WIGGIN AND DANA *A Newsletter from the Insurance Practice Group at Wiggin and Dana LLP*

INSURANCE NEWS

FALL 2017

The past few months have seen catastrophic events impacting our friends and colleagues in Texas, Florida, California, Puerto Rico and the Caribbean. Our thoughts and prayers go out to all who have been impacted by these recent disasters. Wiggin and Dana has made a donation to the American Red Cross Disaster Relief Fund and continues to support the recovery efforts.

American Red Cross

IN THIS ISSUE

We are pleased to share this latest issue of the Wiggin and Dana Insurance Practice Group Newsletter. We circulate this newsletter by e-mail periodically to bring to the attention of our colleagues in the insurance industry reports on recent developments, cases and legislative/regulatory actions of interest, and happenings at Wiggin and Dana. We welcome your comments and questions.

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Insured Contract Coverage – What Does it Mean to "Execute" an Insured Contract?[1]

Contractual liability exclusions are frequently found in commercial general liability policies. These exclusions prevent coverage for "bodily injury" or "property damage" which the insured is obligated to pay not because it has some tort based liability, but because it assumed the relevant risk in a contract or agreement. However, these policies often contain an exception to the contractual liability exclusion where the risk is assumed in an "insured contract." An insured contract is, among other things, a contract or agreement pertaining to the insured's business in which it assumes the tort liability of another for bodily injury or property damage to a third party. While this may sound complicated, it is, in essence, referring to a classic indemnification agreement.

There is a catch, however. For there to be coverage as an insured contract, the "bodily injury" or "property damage" must occur "subsequent to the execution of the [insured] contract." The requirement that an insured contract be executed prior to an injury or property damage makes sense. It prevents parties to an accident from colluding after the fact in order to maximize insurance recovery by shifting liability to the entity with the greatest amount of coverage. However, figuring out when a contract was "executed" is not always easy. This article addresses the jurisdictional split in interpreting the requirement that an injury occur subsequent to the "execution" of the insured contract.

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[1] This article was previously published in the August 16, 2017 issue of the Connecticut Law Tribune.

Insured Contract Coverage CONTINUED

Black's Law Dictionary defines the word "execute" as "**1.** To perform or complete (a contract or duty) . . . **3.** To make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form." Black's Law Dictionary (10th Ed. 2009). Most of the time when people talk about executing a contract they are referring to signing it. Looked at through that lens, it should be easy to determine whether a document was signed prior to the occurrence of bodily injury or property damage.

However, not all contracts or agreements need to be signed in order to be legally enforceable. Section 2-206 of the Uniform Commercial Code states that "Unless otherwise ambiguously indicated by the language or circumstances (a) an offer to make a contract shall be construed as inviting acceptance *in any manner* or by any medium reasonable in the circumstances." *See also* Restatement (Second) Contracts § 53(1) ("An offer can be accepted by the rendering of a performance . . . if the offer invites such an acceptance."). For example, a purchase order may only require the signature of the person or business entity doing the purchasing. Rather than sign the agreement, the seller may just deliver the goods. The same can be seen in many residential home improvement contracts. For instance, a homeowner might sign a contract for a chimney repair but the chimney mason does not. His agreement to the terms is evident in that it is his form (a contract of adhesion) and he performs pursuant to that contract by actually repairing the chimney.

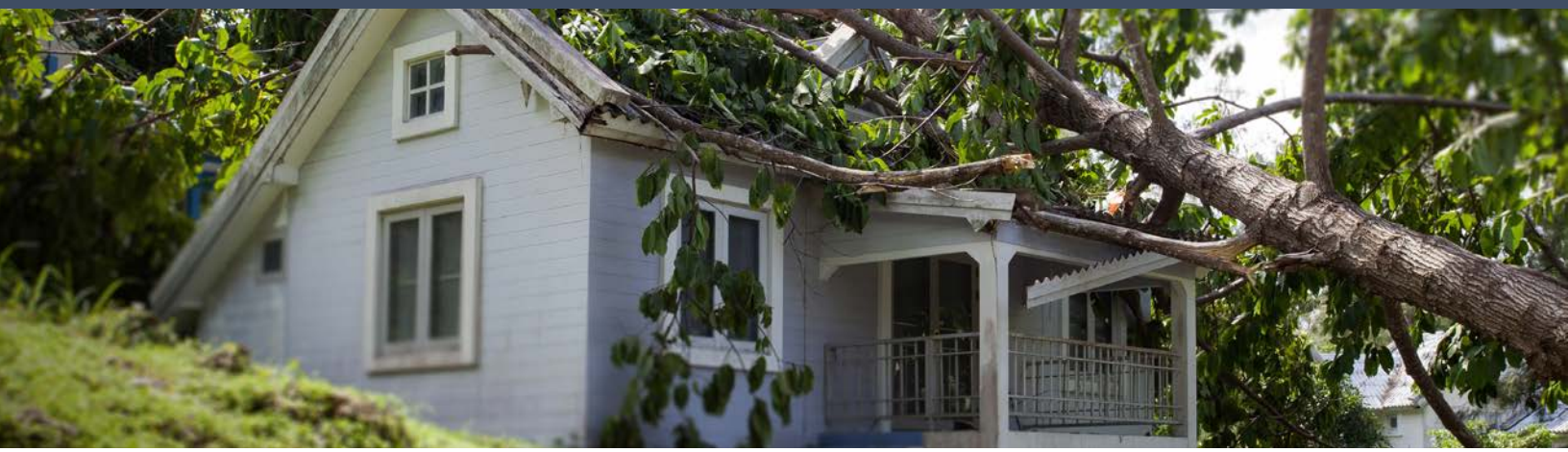
If the word "execute" means signed by both parties, can a contract containing an indemnity provision that only requires a signature from one of the parties ever be "executed" for purposes of Insured Contract coverage? What about an oral agreement where neither party signs the contract? Connecticut courts have not answered these questions. Other courts appear split, with California adopting a narrow reading of the word "execute" while other jurisdictions adopt a broader definition favoring coverage.

In *Am. Guarantee and Liab. Ins. Co. v. Lexington Ins. Co.*, a California District Court concluded that "[i]n the strictest sense, the contract is executed when all parties to the agreement have signed it." No. C 10-03009 RS, 2011 WL 3240511, at *3 (N.D. Cal. Jul. 29, 2011), *rev'd on other grounds* 517 Fed. Appx. 599 (9th Cir. 2013). In that case, a sub-contractor's employee was injured on a job site and sued the general contractor. The Court held that because the subcontract containing the indemnification provision was not signed by both parties prior to the accident, there was no coverage under the insured contract provision. Notably, it was irrelevant to the court when and whether the parties reached an agreement or intended to contract. Instead the court relied on a mechanical analysis of whether the subcontract had been signed by both parties prior to the accident.

The California court's approach appears to be a minority, however, with other courts giving the word "execute" a broader meaning. For example, the Texas Supreme Court held that a contract was "executed" for purposes of the insured contract provision without having been signed by both parties. "There is no language in the policies requiring both parties to sign the insured contract, and there was no evidence raising a fact issue of the parties' intent to require that all parties to the subcontract sign it as a condition precedent to the subcontract's validity." *Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc.*, 323 S.W.3d 151, 158 (Tex. 2010). In *Bernal v. TK Stanley, Inc.*, the court noted that under the policy language at issue stated that an insured contract could either be a written or oral agreement. Because the policy explicitly recognized the possibility of an oral contract the word "execute" necessarily could not be read to require signatures by both parties. No. CIV-12-392-R, 2014 WL 5317907 (W.D. Okla. Oct. 16, 2014).

A more liberal approach to interpreting the word "execute" in an insured contract provision is also in accordance with the general principle that ambiguities in an insurance policy must be construed in favor of coverage. That reasoning relied upon by the court in *Frankenmuth Mut. Ins. Co. v. Anolick* in holding that either the date of acceptance or the start of performance soon thereafter determined the date of "execution" as opposed to the date the parties signed the agreement. No. 218392, 2001 WL 716803 (Mich. App. Ct. Mar. 9, 2001).

When it comes to defining the word "execute," the broader reading is probably the correct one. If insurance companies want to require signatures by both parties in order to create an insured contract they clearly and unambiguously state as much. In the absence of clarifying language, it is likely that courts, including Connecticut's, will continue to apply the broader reading and find that there is coverage so long as the contract is legally binding under state law even if that means that one, or both, parties failed to sign it.



FROM
TheCOURTS

The Connecticut Supreme Court Confirms Narrow Standard for Review of Arbitration Awards

The plaintiff sought to vacate an arbitration award setting the amount of the insured loss to her property resulting from a tree falling on her home during a storm. Plaintiff's appraiser and defendant's appraiser could not agree on the value of the loss and the arbitration clause of the "restorationist policy" at issue was invoked to resolve the dispute. Unlike most homeowner policies, a restorationist policy has no monetary policy limit and it covers the replacement or repair cost of the property without deduction for depreciation. The plaintiff and the defendant picked one appraiser each to act as arbitrator and the two appraisers selected a third to act as a neutral umpire. After each appraiser independently estimated the loss, the umpire analyzed the differences in both estimates and set the loss amount, which fell between the two offered by the parties. The insurer's appraiser accepted the umpire's valuation, which became the panel's decision on the amount of the loss. Plaintiff moved to vacate the award and the insurer sought to dismiss plaintiff's application. After eight days of testimony, the trial court denied the motion to dismiss and granted plaintiff's application to vacate the arbitration award because it violated section 52-418 (a)(3) and (4) of the Connecticut General Statutes for two reasons: (i) the panel's award was insufficient and prejudiced plaintiff's "substantial monetary rights" in violation of 52-418 (a)(3); and (ii) the decision of the appraisal panel evidenced a "manifest disregard of the nature and terms" of the restorationist policy and therefore plaintiff had sustained her burden of proof under 52-148 (a)(4). The insurer appealed the trial court's decision and the case was transferred to the Connecticut Supreme Court for review.

The Supreme Court reversed on the following grounds. First, it found that a challenge to an arbitration award under 52-418(a)(3) is limited to whether a party was "deprived of a full and fair hearing before an arbitration panel." Here, there was no claim that the arbitrators postponed the hearing, refused to hear evidence or otherwise committed a procedural error. In fact, the plaintiff's own appraiser testified that the panel heard all of the evidence "he wanted to present to them." Absent any determination that the panel engaged in misconduct impacting the fairness of the arbitration procedures, "the trial court's disagreement with the appraisal panel's ultimate conclusions [regarding loss amount] cannot justify vacating its award." Second, the trial court vacated the award

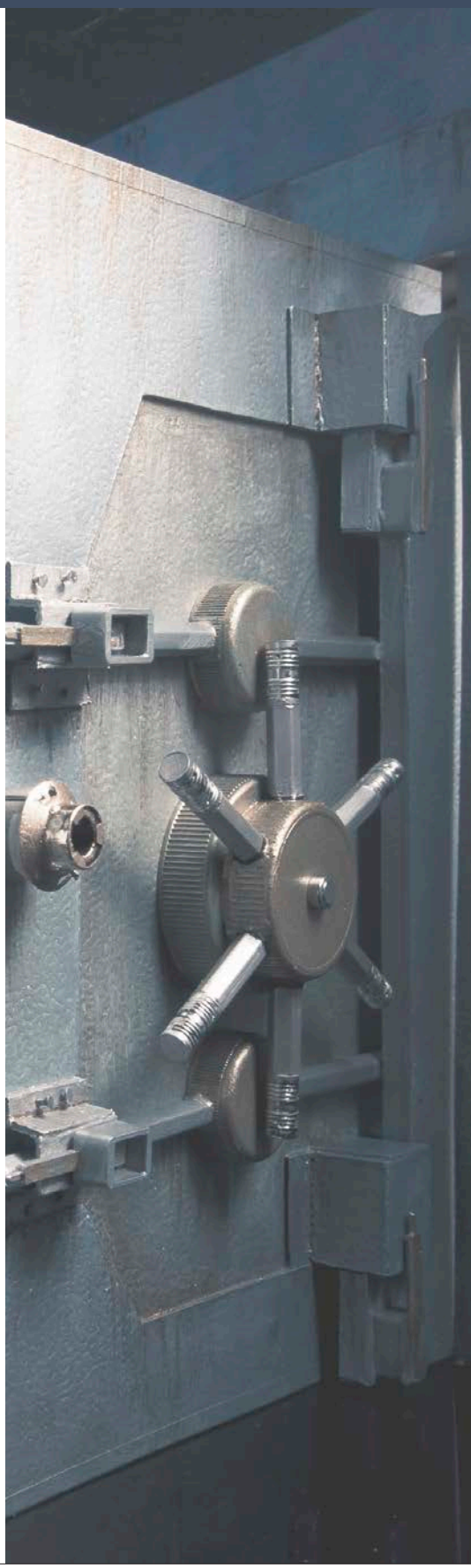
FROM
TheCOURTS CONTINUED

pursuant to section 52-418(a)(4) because the panel "manifestly disregard[ed]" the law when it "calculated depreciation in a restorationist insurance policy that provide[d] for no depreciation." However, the Supreme Court found that the manifest disregard standard for vacating an arbitration award "is narrow" and "should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles." [quoting, Norwalk Police Union v. Norwalk, 324 Conn. 618 (2017).] The elements needed to vacate an arbitration award for manifest disregard of the law were not present here. The meaning of the policy was a matter for the panel and the trial court should not have conducted a *de novo* review of the language which, contrary to the trial court's ruling, "clearly permits withholding depreciation until repairs are made or the damaged property is replaced." Moreover, the Supreme Court found that the panel did not ignore governing law when "it permitted the defendant to withhold depreciation costs until the plaintiff had incurred a debt for the repair or replacement of the property." The case was remanded for judgment to enter denying plaintiff's application to vacate the arbitration award. **Sally Kellogg v. Middlesex Assurance Company (Conn. Supreme Court, August 2017).**

Eleventh Circuit Affirms No Coverage Due to Professional Services Exclusion for Bank

A bankruptcy trustee had sued a bank and its executives to recover losses caused by a Ponzi scheme using the insured bank's accounts. The bank and executives tendered the claim to National Union Fire Insurance Co. of Pittsburgh, PA ("National Union"), which disclaimed coverage. After the insureds settled the trustee's underlying claim, they assigned their rights under the National Union policies to the trustee. The trustee, in turn, sued National Union to recover under the policies. National Union's policy provided that it "shall not be liable to make any payment for loss in connection with any claim made against any insured alleging, arising out of, based upon, or attributable to . . . any insured's performance or failure to perform professional services for others." The trial court granted summary judgment to National Union because some of the executives had provided banking services to the company responsible for the Ponzi scheme. The trustee appealed.

The Eleventh Circuit Court of Appeals affirmed the trial court decision. On appeal the issue was whether the term "any insured" should apply severally to bar coverage only as to the claims against the executives involved working directly with the company responsible for the Ponzi scheme. The appellate court disagreed and ruled that the phrase "any insured" was unambiguous and expressed the contractual intent to apply to joint obligations. As a result, the court held, National Union properly denied coverage to all insureds. **Stettin v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 2017 WL 2858768 (11th Cir. July 5, 2017)**.



FROM
TheCOURTS CONTINUED

California Court of Appeals Affirms No Coverage Due to Professional Services Exclusion for Pipeline Construction Inspectors

Kinder Morgan hired two construction inspectors on a temporary basis from a staffing company, Comforce. After an explosion at a pipeline construction site as a result of an excavator striking and rupturing an unmarked petroleum pipeline, Kinder Morgan was sued. Kinder Morgan sought coverage from its own primary and excess insurers and from Comforce's primary and excess insurer, ACE. ACE denied coverage. After resolving the underlying claims, Kinder Morgan's excess insurer sued ACE alleging that Kinder Morgan was an additional insured under the ACE policies and seeking to recoup defense and indemnity payments it made on behalf of Kinder Morgan. ACE had determination that it owed no coverage to Kinder Morgan because the underlying claims alleged performance or non-performance of services of a professional nature – services that were excluded under the ACE policy.

The trial court determined that the two inspectors were required to ensure compliance with engineering specifications and safety standards, know the practices and regulations for pipeline construction, and understand and interpret construction drawings, maps and blueprints. Applying those job duties to the policy, which stated the policy did not apply "to any liability arising out of the providing or failing to provide any services of a professional nature" ("professional nature" was not defined in the policy), the trial court ruled in favor of ACE. Kinder Morgan's insurers appealed.

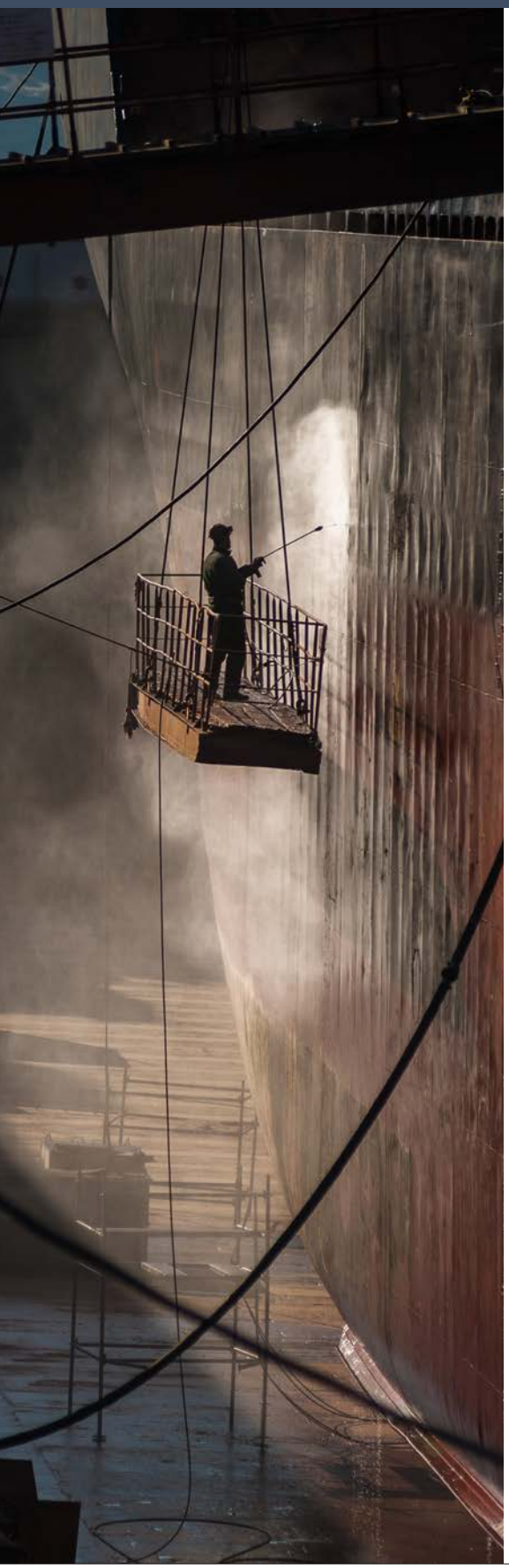
The appellate court recognized that the absence of a definition can weigh in favor of finding ambiguity, but it found that California law had established a generally accepted meaning for "services of a professional nature." Professional services are those "arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual rather than physical or manual." Here, the court held that inspectors were required to have specialized knowledge and "the gravamen of the [underlying] actions is that Comforce and Kinder Morgan failed to mark the pipeline, the very thing they were required to perform at the site." **Energy Ins. Mutual Ltd. v Ace Am. Ins. Co. No 140656 (Cal. App. First Dist. July 11, 2017).**

Texas Supreme Court Holds that Liability Issues Between Claimants and Insured Must Be Litigated in "Fully Adversarial" Proceeding to Be Binding on Underwriters

In this case, a number of homeowners had sued a builder for construction defects and, after the builder's insurers declined to defend the builder, the builder entered into an agreement with the homeowners admitting liability in exchange for the homeowners' agreement not to seek to collect any judgment from the builder's personal assets. The homeowners' claims then went to trial, not surprisingly resulting in a judgment against the builder. After trial, the builder assigned its rights against its insurer to the homeowners, who sought to collect the judgment in full from the insurer. While the lower courts found that the claims against the builder were covered, the Texas Supreme Court found that the "sweetheart deal" between the insured builder and the homeowner claimants was not binding on the builder's insurer, even though the insurer had (wrongfully, it turns out) declined to defend the builder. The Court held that a "fully adversarial" trial between the claimant and the insured is necessary for a judgment to be binding on an insurer. **Great American Insurance Co. v. Hamel No. 14-10076 (Tex. June 16, 2017).**

Louisiana Federal Court Finds Shipyard Not Entitled to Coverage as Additional Insured Under Contractors' Policies in Connection with Toxic Tort Claims Against Shipyard and Contractors

This case arose as a result of claims brought by a number of homeowners in Louisiana state court against a Louisiana shipyard, alleging bodily injuries as a result of sandblasting work at the shipyard. After the plaintiffs sued the shipyard, the shipyard brought third party claims against the contractors who had performed the sandblasting operations. The shipyard sought defense and indemnity from the contractors' insurers, alleging that it was entitled to coverage under the contractors' insurance



FROM
TheCOURTS CONTINUED

policies as an additional insured. The Court held that the shipyard was not entitled to such coverage, because there was no binding contract between the shipyard and the contractors requiring the contractors to name the shipyard as an additional insured in their insurance policies.

The decision provides another reminder that the terms of the underlying contract must often be viewed side by side with the insurance policy when determining the extent of coverage for additional insureds. **Hanover Insurance Co. v. Superior Labor Services Inc. No. 11-2375 (E.D. La., July 12, 2017).**

Pennsylvania Supreme Court Addresses Prerequisites for Finding of Bad Faith on the Part of Insurers

On September 28th, the Pennsylvania Supreme Court held that it is not necessary to demonstrate malice on the part of an insurer to support a claim of bad faith under the Pennsylvania statutes. Instead, the court found that self-interest or ill will on the part of an insurer may simply be considered as a factor in determining whether the insurer acted in bad faith (and thus as a factor in determining what level of punitive damages are warranted).

The case involved a claim by a cancer patient against her health insurer. While the insurer had initially covered the cost of the plaintiff's treatments, when her cancer recurred, the insurer declined her claim based on the plaintiff's failure to apply for a premium waiver for the period between her initial diagnosis and her disability leave.

After the plaintiff sued the health insurer, the trial court found that while the claim had been wrongfully declined, a lack of showing of any malice on the part of the insurer precluded a finding of bad faith and therefore punitive damages. The intermediate appellate court disagreed, holding that the prerequisites for a claim of bad faith in Pennsylvania are (1) lack of a reasonable basis to deny benefits under the policy, and (2) knowing or reckless disregard of such lack of basis on the part of the insurer. While the insurer had argued that malice on the part of the insurer was also required, the court declined to accept that argument, finding instead that the existence of malice is merely a factor to be considered in determining the amount of any punitive damage award. The Pennsylvania Supreme Court affirmed after reviewing the evolution of bad faith law in Pennsylvania, sending the case back to the trial court for a new determination of whether the insurer acted in bad faith.

While the Supreme Court justices were concerned that requiring a showing of malice would essentially require a plaintiff to find a "smoking gun" demonstrating intentionally wrongful conduct on the part of the insurer, a demonstration that an insurer knowingly or recklessly disregarded a lack of a reasonable basis to decline coverage in order to support a claim of bad faith. **Rancosky v. Washington National Insurance Co. No. 28 WAP 2016 (Penn. Sept. 28, 2017).**

FROM
TheREGULATORS

Connecticut Insurance Dept. Property & Casualty (PC) Bulletins Bulletin PC-86: Public Act No. 17-114 (the "Act") increases the minimum amount of automobile insurance a person must maintain to register a private passenger motor vehicle. For more information, please visit the CID website: http://www.ct.gov/cid/cwp/view.asp?a=1255&Q=254266

Connecticut Insurance Dept. Notice 6/28/2017 – Notice of Reminder to Property & Casualty Companies Writing Professional Liability Business in Connecticut For more information, please visit the CID website: http://www.ct.gov/cid/cwp/view.asp?a=1270&Q=255210

Earlier this year, the AIA released its latest versions of eleven forms, with an additional 18 revised versions to follow this fall. One of AIA's flagship forms is the *A201 General Conditions of the Contract for Construction*—roughly 35 pages of general conditions to many of the agreements between the owner and contractor. While most of the modifications to the *A201 General Conditions* are relatively minor, the AIA made material changes to the insurance provisions. In lieu of placing the insurance requirements in Article 11 of the *A201 General Conditions*, the AIA added an *Insurance and Bond Exhibit* (the *"Exhibit"*). The addition of the *Exhibit* is intended, in part, to provide the parties with flexibility in developing insurance requirements, and to allow the parties to easily convey insurance obligations to their insurance agents. Importantly, however, the AIA also made substantive updates in the *Exhibit*.

Previous editions of the AIA forms required contractors to name the owner, architect, and architect's consultants as additional insureds on their liability insurance policies. However, the *Exhibit* now expressly requires the contractor to name these parties as additional insureds with coverage not less than the coverage on specific insurance endorsements (i.e., ISO endorsements CG 20 10 07 04, CG 20 37 07 04, or CG 20 32 07 04). If the contractor's insurance policy does not include the coverage provided in these endorsements, or if the policy includes additional exclusions to these standard endorsements—as many do—there is a danger of the contractor becoming liable to the owner, architect, and/or architect's consultants for any gaps in coverage.

About Wiggin and Dana's Insurance Practice Group

The Wiggin and Dana Insurance Practice Group provides insurers, reinsurers, brokers, other professionals and industry trade groups with effective and efficient representation. Our group members regularly advise clients in connection with coverage issues, defense and monitoring of complex claims, regulatory proceedings, policy wordings, internal business practices, and state and federal investigations. We represent clients in arbitrations and mediations as well as in the courts. We have broad experience in many substantive areas, including property, commercial general liability, inland and ocean marine, reinsurance, E&O, D&O and other professional liability, environmental, energy and aviation. A more detailed description of the Insurance Practice Group, and biographies of our attorneys, appear at www.wiggin.com.

About Wiggin and Dana LLP

Wiggin and Dana is a full service firm with more than 145 attorneys serving clients domestically and abroad from offices in Connecticut, New York, Philidelphia, Washington, DC and Palm Beach. For more information on the firm, visit our website at www.wiggin.com.

AttorneyNOTES

Michael Menapace, partner in Wiggin and Dana's Insurance Practice Group, was recognized as a "Super Lawyer – Connecticut Insurance Coverage," in the most recent *Connecticut Super Lawyers Magazine*. Michael presented a session on cybersecurity and breach response for the small and medium-size business at the February 2017 StaffLeader workshop, and in March he presented a session on cybersecurity and third-party service providers at the Insurance Technology Association conference. As a member of the ARIAS-U.S. Task Force on Data Security in Arbitration, Michael presented workshops at the ARIAS-U.S. Spring 2017 Conference. He also authored an article for the *ARIAS-U.S. Quarterly* newsletter called, "Ensuring Email Security." This September, he also spoke at the 2017 Cyber and Privacy Forum. Michael is the President-Elect of the Hartford County Bar Association—the oldest bar association in the United States. He is also serves as Vice Chair of the American Bar Association Tort Trial & Insurance Practice Section, Cybersecurity and Data Privacy Committee.

Joe Grasso, co-chair of Wiggin and Dana's Insurance Practice Group, attended the U.S. Marine Law Association spring meetings in New York during the week of May 1, (he currently serves on the Board of Directors); and the Annual Meeting for Inland Marine Underwriters Association in Braselton, Georgia on May 21-23. In September, he attended the annual Comte Marine International Conference in Genoa, the annual International Union of Marine Insurance conference in Tokyo, and the annual International Marine Claims Conference in Dublin. Joe Grasso was again recognized as a leading lawyer in 2017 in *Who's Who Legal – Transport.*

Tim Diemand, co-chair of Wiggin and Dana's Insurance Practice Group, was recently recognized by Benchmark Litigation 2018 as a Litigation Star, and the firm received Benchmark's highest ranking. Clients interviewed by Benchmark were quoted as saying that, "Wiggin and Dana provides general high-quality practical-minded legal work with good turnaround." Quoting peers, Benchmark notes that, "if you really look at the work that Wiggin and Dana is involved in and compare it to that of their local peers, you'll notice a marked difference." Tim also was recently honored by the *Connecticut Law Tribune* as a 2017 Distinguished Leader. The Connecticut Law Tribune award is meant to "[recognize] lawyers who achieved impressive results and demonstrated clear leadership skills that helped them achieve those results." Tim is being recognized for his record of achievement representing clients, his continuing bar activities and his pro bono service.

Michael Thompson, partner in Wiggin and Dana's Insurance Practice Group, served on a panel at the ARIAS-U.S. Spring 2017 Conference discussing the most significant cases in the insurance/reinsurance industry during the past three years. Michael's case summary on Granite State Insurance Co. v. Clearwater Insurance Co. can be found in the latest ARIAS-U.S. Quarterly newsletter. In September, he also attended the International Association of Claim Professionals 2017 Annual Conference in Bermuda. Michael and Joe will be giving a presentation in London called "US Bad Faith Update" for the IUA conference on November 9th, 2017.