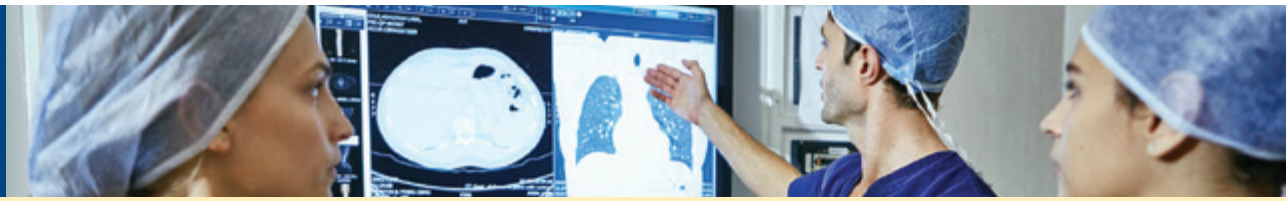
dri™ The Voice of the Defense Bar



Life, Health and Disability News

The newsletter of the
Life, Health and Disability Commitee

9/19/2019

Volume 30, Issue 3

Committee Leadership

Chair
Byrne J. Decker
Ogletree, Deakins, Nash, Smoak & Stewart, P.C
Portland, ME

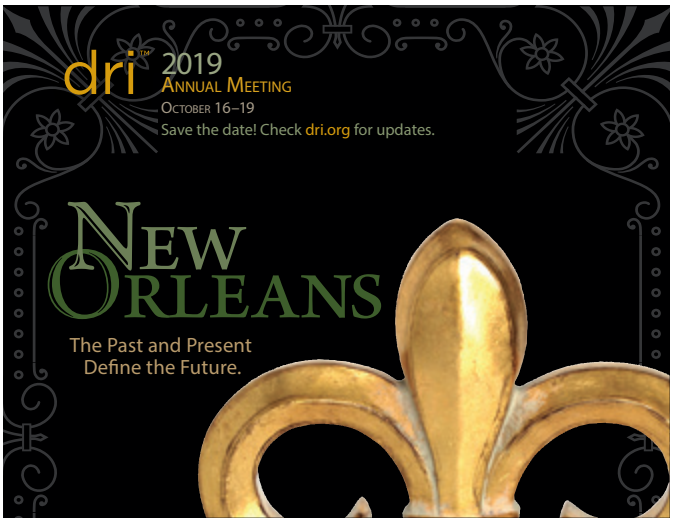
Vice Chair
Scott M. Trager
Funk & Bolton PA
Baltimore, MD

Newsletter Chair
Eileen E. Buholtz
Connors Corcoran & Buholtz PLLC
Rochester, NY

Newsletter Editor
Moheeb H. Murray
BSP Law
Troy, MI

Newsletter Vice Editor
Stephen A. Roach
Roach Ioannidis & Megaloudis, LLC
Boston, MA

Click here to view entire Leadership



In This Issue

Leadership Notes

Message from the Chair

By Byrne J. Decker

Greetings LHD Committee Members!

It's hard to believe that summer is almost over, but our Committee rolls on through all the seasons!

It was great to see so many of you at our annual Seminar last April in Chicago. Pat Begos and his team raised the bar once again with three days of non-stop LHD activities. One of many highlights was the widely popular Diversity and Inclusion Luncheon, which once again featured a standing room only crowd who took advantage of the opportunity to listen to an informative and engaging speaker, Thom Gossom, Jr. This year's Hands-On Community Service Project, benefitting the Chicago chapter of Cradles to Crayons, took place onsite for the first time and was also hugely successful. Another new and very popular offering this year was a fourth breakout track designed for newer LHD practitioners.

As usual, planning for our 2020 Seminar began moments after the 2019 Seminar concluded. Pat passed the Program Chair torch to Sarah Delaney who, with Vice Chairs Jamie Moore and Elizabeth Doolin, and a host of volunteers from Committee leadership, have already made great strides preparing for 2020. Next year, we're excited to bring our Seminar to the Big Easy, at the Sheraton New Orleans from April 29 through May 1, 2020. This just happens to coincide with the New Orleans Jazz Fest, and we are very excited about taking the LHD show on the road to NOLA!

As in years past, many great ideas for the Seminar, and our Committee vision in general, were exchanged at our annual Fly-In meeting, which took place in July in Chicago. The Hinshaw & Culbertson firm graciously hosted our meeting and we continued to make significant planning strides, sandwiched around two fantastic dinners and a night of comedy at The Second City! The Fly-In continues to be one of my favorite Committee events; summer in Chicago, good food, good friends, enhancing relationships, and hard work as we strive to continue to serve the interests of LHD practitioners. Who could ask for more?

Next up on the agenda is the DRI Annual Meeting, also in New Orleans, at the New Orleans Marriott, October 16–19, 2019. Like the Fly-In, the Annual Meeting offers great opportunities to connect with LHD stalwarts. Our Committee will once again conduct a business meeting, as well as a timely CLE session on mediation strategies, featuring Adrienne Publicover, JoAnn Dalrymple, and New Orleans' own Virginia Roddy, on Wednesday afternoon, October 16. And as usual, DRI has outdone itself with three chock full days, including outstanding and informative speakers (such as Keynote presenters David Mann, James T. Kane, Ruby Bridges, and Kevin D. Mitnick), and more networking opportunities than one can even imagine!

While I hope you all enjoy the rest of the summer, if you plan to attend one meaningful conference this fall, I urge you to make it to the Annual Meeting. You'll be glad you did!

Byrne J. Decker is the managing shareholder in the Portland, Maine office of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. Mr. Decker has a nation-wide practice that specializes in the defense of employee benefits/ERISA litigation. He has defended benefits cases in federal courts in every federal judicial circuit. Mr. Decker is the chair of the DRI Life, Health and Disability Committee.

Message from the Editor

By Moheeb H. Murray

For this edition of LHD News, we are excited to provide you with excellent articles discussing topics related to keyperson life insurance. Keyperson insurance is common and often critical for a business's viability if a principal or other leader should die unexpectedly, making it an important topic. And while this particular form of insurance is not always top-of-mind for life insurance practitioners, our authors' contributions for this addition show that keyperson policies can involve interesting and complex issues from both factual and legal viewpoints. We hope that you'll enjoy reading these articles, and we sincerely thank the authors for their hard work.

The November edition of the newsletter will be open for articles relating to any non-ERISA life, health, and disability topics. If you have a topic or a case about which you'd like to write, please contact me murray@bsplaw.com or Stephen Roach roach@rimlawyers.com. The newsletter is a great way to share your knowledge and insights with others in the LHD community.

Moheeb H. Murray leads the insurance coverage practice team at BSP Law in Troy, Michigan. He represents leading national insurers in life, disability, ERISA, and other insurance-coverage matters at all stages of litigation. He also focuses his practice on complex-commercial and construction litigation.

Feature Articles

Shifting the Risks of Employer's Economic Loss Resulting from Employee Injury: Keyperson Insurance in New Mexico

By Little V. West

What's a New Mexico business to do if one of its key employees is absent from work due to a non-work-related injury? A pair of cases, one from the United States Court of Appeals for the Tenth Circuit, and another recently issued by the New Mexico Court of Appeals underscore and illustrate, for both New Mexico insurers and employers why keyperson insurance is important for New Mexico employers. These cases clarify the limits of other kinds of insurance and tort claims in the employment context.

In 1991, the Tenth Circuit Court of Appeals was called upon to decide if New Mexico law permits an employer to recover under an uninsured-motorist policy for economic damages the employer incurred when the corporation's president was physically injured in an accident by an uninsured motorist. Cont'l Cas. Co. v. P.D.C., Inc., 931 F.2d 1429, 1430 (10th Cir. 1991). The language of the insurance policy at issue provided that the insurer would pay for:

> all sums the insured is legally entitled to recover as damages from the owner or driver of an uninsured motor vehicle. The damages must result from bodily injury sustained by the insured, or property damage, caused by an accident.

Id. (emphasis from the original quoted policy document).

Reviewing the district court's order of summary judgment in favor of the insurance company, which sought declaratory judgment based on the policy, the Tenth Circuit observed that "[i]t is difficult to equate the corporation's alleged loss of profits with a claim for bodily injury." Id. The court noted that it was "clear and undisputed that . . . the injured president/employee . . . was fully and amply compensated for his injuries through the limits of the tortfeasor's insurance policy and through a sizable arbitration award under the uninsured motorist provisions of defendant corporation's policy."

In forecasting how the New Mexico Courts would treat this issue as a matter of New Mexico state law, the Tenth Circuit relied on a California Supreme Court case finding an employer's claim for economic losses against a party injuring its employee against public policy, and noted that

court's holding that the employer "was peculiarly able to calculate the risk of services of a key employee and to protect itself against such a loss by securing key employee insurance." Id. at 1430-31 (citing I.J. Weinrot & Son, Inc. v. Jackson, 40 Cal. 3d 327, 708 P.2d 682, 690, 220 Cal. Rptr. 103 (1985)). Relying on this case, the Tenth Circuit found the employer's argument that its claim was similar to a "key man type policy" or "key man insurance situation" to be unpersuasive, since the "corporation was peculiarly able to calculate the risk of services of a key employee and to protect itself against such a loss by securing key employee insurance." Id. at 1431 (internal quotations omitted).

In addition, the Tenth Circuit held that the employer's claim could only prevail if the common-law principle of per quod servitium amisit applied. Id. Per quod servitium amisit, Latin for "whereby the services of the servant were lost," is a common-law claim permitting an employer to maintain a separate claim in its own right against a party injuring its employee. However, the Tenth Circuit held that such a principle "would not be wise" and that "the trial court correctly decided that New Mexico would stand with a majority of jurisdictions who have refused to do so in similar situations." Id.

The Tenth Circuit's decision in Continental Casualty stood as the only persuasive precedent on this point of New Mexico law for nearly 25 years, until the New Mexico Court of Appeals specifically assessed the per quod servitium amisit cause of action at common law under New Mexico law. Nat'l Roofing, Inc. v. Alstate Steel, Inc. is the only time the doctrine has been addressed in a New Mexico state court opinion. In that case, the New Mexico Court of Appeals rejected a claim by an employer against tortfeasors injuring its employees for economic loss due to physical injuries to its employees. Nat'l Roofing, Inc. v. Alstate Steel, Inc., 2016-NMCA-020, ¶ 2, 366 P.3d 276, 277. The Court recognized that quod servitium amisit has fallen out of favor in a society that now recognizes that "servants" are not personal property. Id. at ¶ 10, 366 P.3d at 280. Examining the duty element as a matter of public policy, the Court of Appeals held that in the absence of physical injury or property damage to the *employer*, there is no duty from a tortfeasor to an employer relating to injury to the employer's employees. Id. at ¶¶ 11–17, 366 P.3d at 280–82. As such, the Court explained, a tortfeasor incurs no liability, unless there are facts to suggest another type of cognizable third-party claim (*e.g.*, interference with contract, loss of consortium, or subrogation).

The New Mexico Court of Appeals' opinion in National Roofing ratified the Tenth Circuit's forecast on how New Mexico courts would rule on the common law principle of per quod servitium amisit as a matter of New Mexico state law.

The lesson for insurers and employers is clear: to shift the risks of economic loss resulting from injury, incapacity, or disability of a key employee, New Mexico employers should obtain key person insurance. Employers cannot shift the losses stemming from a key employees' loss of services to either third-party tortfeasors or to insurers by means of tort claims or other kinds of insurance policies. Consequently, these cases provide clarity for New Mexico insurers and employers as they consider whether and how to limit or mitigate risks associated with economic losses arising from the injury, incapacity, or disability of a key employee.

Little V. West is an attorney at Holland & Hart's Santa Fe office. He counsels employers in new and established businesses on development and implementation of best practices to comply with labor and employment laws and regulations and defends employers in employment litigation. He also represents insurers in ERISA litigation. He can be reached at LVWest@hollandhart.com or 505-988-4421.

Jay-Z's Record Label, Roc Nation, Entangled in Battle Over $12.5 Million "Key Person" Policy Insuring Long-Time Manager of Maroon 5

By Elliot A. Hallak, Joseph D. Picciotti, and Zana M. Beck



Jay-Z's record label, Roc Nation, LLC ("Roc Nation"), has filed a lawsuit against insurance company, Houston Casualty Company ("HCC"), for failing to pay on a $12.5 million insurance policy insuring the life of Jordan Feldstein ("Feldstein"). Feldstein is the older brother of actor/director/producer, Jonah Hill, and was a long-time friend of Maroon 5 frontman, Adam Levine. According to the First Amended Complaint, on September 14, 2016, Roc Nation entered into a Purchase Agreement with talent management company, Career Artist Management LLC ("CAM"), whose founder and CEO was Feldstein. Roc Nation purchased CAM to secure CAM's high-profile music industry clients, including the wildly successful Maroon 5, Robin Thicke, and others. Feldstein died on December 22, 2017, at the age of 40.

At the time Roc Nation purchased CAM, Roc Nation completed a "Key Person Failure to Survive Application Form" and purchased two successive one-year insurance policies insuring Feldstein's life. Roc Nation contends HCC represented them to be standard key person policies. While the policies bear different numbers and there is a three-month gap between the end of the 2016 policy and the inception of the 2017 policy (and Adam Levine was added to the 2017 policy as an insured life), ROC Nation and HCC apparently agree that the 2017 policy was intended to be a renewal of the original policy issued in September 2016 (the 2016 and 2017 policies are collectively referred to as the "Policies"). In its three-count First Amended Complaint asserting causes of action for breach of contract, breach of the implied covenant of fair dealing, and declaratory judgment, Roc Nation claims it expected to receive the full $12.5 million limit of liability upon Feldstein's death and that it would have made many tens of millions of dollars in profits had Feldstein lived and performed the duties associated with his employment. However, Roc Nation contends that when the policies were issued, Roc Nation was not given the key person insurance it expected, but instead was provided with an entirely different policy identified as "Critical Asset Protection Insurance." Roc Nation also contends that the Policies are "shoddily drafted" pointing to a number of differences in the wording of the 2016 and 2017 versions of the Policies, and claims that HCC is attempting to take advantage of the ambiguities in its own documents to avoid or delay payment under them for an undefined period of time with such delay potentially lasting for many years.

In the statement of facts section of its Counterclaim, HCC maintains that both parties understood and intended that the Policies would solely insure the purchase price Roc Nation paid for Feldstein's share of CAM, after subtracting all revenue and other value generated as the result of and/or during the time services were performed by Feldstein. These terms of payout are identified in the Policies as the "Direct Ascertained Net Loss." In support, HCC points to the reduction in the limit of liability from $14.5 million in the 2016 version of the Policies to $12.5 million in the 2017 version, which HCC claims reflects Roc Nation's recoupment of over $2 million in revenue generated by Feldstein in 2016 (thereby decreasing the total payout available under the Policies as such income was already realized by Roc Nation and so it could not recover that amount in the event the Policies were triggered). HCC also points to the claim for benefits submitted by Roc Nation on April 6, 2018, wherein Roc Nation purportedly asserted that its "Direct Ascertained Net Loss" was $10.7 million, which is less than the $12.5 million limit of liability under the Policies.

Many of the details are sketchy as Roc Nation and HCC have entered into a non-disclosure agreement relative to the exchange of information and documents in connection with Roc Nation's claim. Roc Nation asserts that in an effort to stall payment, HCC has sent repeated requests seeking overbroad and irrelevant information under the guise of investigating the claim. In August 2018, HCC agreed to (and did) make a partial payment of $1.1 million, with HCC purportedly stating that it "would not represent a full and final value of the claim, but a value of what has been confirmed for this portion of the claim thus far." However, the following month, HCC issued a forty-six (46) page denial letter, denying any further payment on the claim. Unfortunately, due to the NDA, none of these documents have been filed in the lawsuit.

For its part, HCC has denied the majority of the allegations of the First Amended Complaint, asserted twenty-six

affirmative defenses, and has filed a counterclaim seeking declaratory judgment that Roc Nation has failed to cooperate with HCC's investigation of the claim, that HCC has no further liability under the Policies and seeking repayment from Roc Nation of the $1.1 million already paid by HCC last year.

This action was recently filed on January 18, 2019 and remains in its procedural infancy. Much of the fight to date has centered around whether Roc Nation's cause of action for breach of the implied covenant of good faith and fair dealing and claims for extra-contractual damages, including consequential damages, punitive damages, and attorneys' fees and costs, can survive. These issues are before the court in a pending motion to dismiss, which HCC filed in addition to its answer and counterclaims. HCC's motion to dismiss is fully briefed as of June 17, 2019, and is pending.

Aside from the noteworthy celebrities, this case presents several novel issues that may shape New York life insurance law. Some of the issues which are likely to be elucidated in this case include: (i) what exactly is "Critical Asset Protection Insurance"; (ii) can an insurer postpone payment on a life insurance policy based on an accounting and/or determination of future revenues attributable to the deceased; (iii) what is a reasonable amount of time to investigate and make payment on or deny a death claim; (iv) will ROC Nation's claim for extra-contractual damages survive; and (v) to what extent will HCC's partial payment under the policy preclude it from seeking to void the policy, including based upon any misrepresentation regarding Feldstein's health in the Policies' applications.

The Pending Motion to Dismiss

In its Motion to Dismiss, HCC is quick to point out that "most courts faced with a complaint brought under New York law and alleging both breach of contract and breach of a covenant of good faith and fair dealing have dismissed the latter claim as duplicative." Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc., 361 F. Supp. 2d 283, 298 (S.D.N.Y. 2005). However, the main significance of HCC's pending motion to dismiss is whether Roc Nation's bad-faith allegations will survive the pleading stage and whether Roc Nation can maintain claims for consequential damages, punitive damages, and attorneys' fees, which are generally not recoverable under New York law.

In 2008, New York's Court of Appeals held for the first time that, in certain instances, an insured can seek foreseeable consequential damages resulting insurer's breach of contract. Bi-Economy Market Inc., v. Harleysville Insur. Co. of New York, 10 N.Y.3d 187, 192-95 (2008) involved an alleged failure to pay on a business-interruption policy following a fire. Following an alternate-dispute-resolution award, the insured brought a civil action seeking to recover consequential damages for the demise of its business due to the insurer's non-payment. In permitting the insured's claim for consequential damages, the Court of Appeals held: "Certainly, many business policyholders, such as Bi-Economy, lack the resources to continue business operations without insurance proceeds. Accordingly, limiting an insured's damages to the amount of the policy, *i.e.*, money which should have been paid by the insurer in the first place, plus interest, does not place the insured in the position it would have been in had the contract been performed." Id. at 195. In rejecting the insurer's argument that such damages were excluded by the policy, the Court added: "Nor do we read the contractual exclusions for certain consequential "losses" as demonstrating that the parties contemplated, and rejected, the recoverability of consequential "damages" in the event of a contract breach." Id. at 196. In a short decision issued the same day involving an insurance policy claim for property damage, the New York's Court of Appeals reiterated: "consequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted in an insurance contract context, so long as the damages were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting." Panasia Estates, Inc. v. Hudson Ins. Co., 10 N.Y.3d 200, 2003 (2008). HCC argues that Roc Nation has not adequately pled any consequential damages (as opposed to a straightforward agreement to pay the contractual amount), and that the policy itself excludes consequential damages by stating: "In no event shall the insurer be liable to pay more than the Limit of Indemnity."

With regard to Roc Nation's claim for attorneys' fees, HCC points to a 2016 decision from New York's Appellate Division, Fourth Judicial Department that confirmed, notwithstanding Bi-Economy and Panasia, the "general rule that attorneys' fees and other litigation expenses are 'incidents of litigation'" and that it is "well established that an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy." See Zelasko Constr., Inc. v. Merchants Mut. Ins. Co., 142 A.D.3d 1328, 1329 (4th Dep't 2016)(citations and internal quotations omitted)(involving claims on commercial auto policy). New York's Court of Appeals has previously held that even where the carrier loses a dispute over coverage, "[i]t would require more than an arguable difference of opinion between carrier

and insured over coverage to impose an extra-contractual liability for legal expenses in a controversy of this kind. It would require a showing of such bad faith in denying coverage that no reasonable carrier would, under the given facts, be expected to assert it." Sukup v. State, 19 N.Y.2d 519, 522 (1967) (denying insured's claim for legal expenses in connection with worker's compensation claim). "Several courts since Sukup have acknowledged a cause of action for extra-contractual damages for a bad faith denial of coverage, but have generally found that the plaintiff was unable to meet the high standard to prevail on such a claim." Utica Mutual Ins. Co. v. Fireman's Fund Ins. Co., 238 F. Supp. 3d 314, 329-330 (N.D.N.Y. 2017) (citations omitted) (granting partial summary judgment dismissing bad faith damages claim in action involving reinsurance on asbestos bodily injury claims).

Under New York law, "punitive damages for breach of contract are available only if necessary to vindicate a public right." Zarour v. Pac. Indem. Co., 113 F. Supp. 3d 711, 718 (S.D.N.Y. 2015) (citations and internal quotations omitted)(granting summary judgment to insurer dismissing insured's claims for consequential and punitive damages and for breach of the implied covenant of good faith and fair dealing in property damage claim following Superstorm Sandy). "In order to state a claim for punitive damages, plaintiffs' allegations must establish the following: (1) defendant's conduct must be actionable as an independent tort"; (2) the tortious conduct must be of an 'egregious nature'; (3) the egregious conduct must be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally." Id. (internal quotations omitted). HCC asserts that Roc Nation has not pled any independent tort, nor has it adequately pled any claim that HCC violated New York's deceptive acts or practices statute (New York General Business Law §349), which allegations are embedded within Roc Nation's breach-of-implied-covenant-of-good-faith-and-fair-dealing claim.

In opposing HCC's motion to dismiss, Roc Nation alleges that HCC misrepresented to Roc Nation and to the general public the nature and scope of "key person" insurance offered by HCC, that HCC mishandled Roc Nation's claim for benefits following the untimely death of Mr. Feldstein, including HCC's improper use of prohibited post-claim underwriting practices, which was all part of an alleged pattern and practice by HCC of denying payment on claims. Roc Nation maintains that these allegations are not predicated on an express term of the policy, but rather are based upon a common practice of intentionally mishandling and delaying payment of claims to Roc Nation and the general public. In its opposition to the motion to dismiss, Roc Nation extensively discusses Utica Mutual, stating that: "The present case is strikingly similar to the facts presented in the Utica Mutual case." Utica Mutual did hold that as the causes of action for breach of contract (Count I) and breach of the duty of utmost good faith and fair dealing (Count II) "are predicated on different wrongful conduct and seek different relief, they may stand as separate causes of action." Utica Mutual, 238 F. Supp. 3d at 325. However, in the same opinion, the Utica Mutual court granted summary judgment dismissing the bad faith damages claim in Count II explaining: "even drawing all inferences in favor of Utica, there are no material facts in dispute that would preclude summary judgment. Utica cannot sustain its burden in opposition to summary judgment because it cannot show that FFIC had no arguable basis to challenge its claim nor can it prove that no reasonable carrier would, under the given facts, challenge the claim." Id. at 332. Roc Nation also cites to several New York state court cases where claims for extra-contractual damages and punitive damages based upon allegations of bad faith have survived a motion to dismiss. See *e.g.* 25 Bay Terrace Associates, L.P. v. Public Service Mut. Ins. Co., 144 A.D.3d 665, 667–68 (2d Dep't 2016) (denying motion to dismiss claims for punitive damages and attorneys' fees based upon alleged failure to pay majority of property damages claim following Hurricane Irene); Grinshpun v. Travelers Cas. Co. of Connecticut, 23 Misc.3d 1111(A) (Sup. Ct. Kings Co. 2009) (permitting claim for attorneys' fees against insurer to proceed beyond motion to dismiss for alleged failure to pay Plaintiffs' supplemental underinsured motorists coverage following automobile accident).

Issues Likely to Shape the Litigation

Irrespective of how the Court adjudicates the motion to dismiss, there are a number of issues which will ultimately shape the course of this litigation. A critical issue to be determined is what exactly is "Critical Asset Protection Insurance" and how does it differ from a "standard" key person policy. In the same vein, how is "Direct Ascertained Net Loss" calculated. Roc Nation contends that it was advised that it was purchasing a standard key person policy and that it would receive the face value of the policy upon proof of Feldstein's death. Roc Nation also points to a number of differences between the 2016 and 2017 versions of the Policies allegedly resulting in ambiguity. HCC asserts that Roc Nation was well aware of the terms of the Policies, which only insured Roc Nation's purchase of CAM, less amounts recovered as the result of and/or

during the time services were performed by Feldstein. It remains to be seen to what extent parol evidence and other tools will be used in interpreting the terms of the insurance policies, the parties' intent, and the competing versions of the understanding of the parties. Notably, the general rule that any ambiguity is to be resolved liberally in favor of the insured "is applicable only where the ambiguity persists after all other aids to construction are used" and "does not foreclose the use of parol evidence initially to resolve such ambiguity." Union Ins. Soc. of Canton, Limited v. William Gluckin & Co., 353 F.2d 946, 951 (1965).

Another issue likely to be scrutinized is to what extent life insurance policies can be structured so that the benefit cannot be ascertained or payable until long after the death of the decedent. Roc Nation asserts that HCC is relying on a strained interpretation of the "Direct Ascertained Net Loss" so as to require future financial disclosures and accountings from Roc Nation, for purposes of avoiding payment on the policy until years in the future. The manner in which the "Direct Ascertained Net Loss" is calculated and when the policy benefit is payable is likely to be among the most significant issues in this case.

The time within which an insurer is permitted to investigate and make payment on or deny a death claim is also an important issue. Due to the NDA, many of the facts relative to the investigation of Roc Nation's claim are not public. However, Roc Nation alleges that HCC has submitted serial requests for information and documents in order to delay payment of the claim and engage in "post-claims underwriting" to delay and avoid payment under the Policies. However, HCC has countered that Roc Nation has failed to cooperate with its investigation, including by failing to assist in securing standard HIPAA-complaint authorizations to secure Feldstein's medical records, particularly as Feldstein died within the two-year contestability period following the issuance of the policy.

Finally, without regard to any of the reservations identified, HCC's payment on a portion of the benefit purportedly "confirmed" and HCC's acknowledgement that it does "not represent a full and final value of the claim" may be problematic to HCC's denial of the remainder of the claim or possible assertion that the entire policy is void based upon misrepresentations or omissions regarding Feldstein's health in the policy applications. Whether a partial payment on an insurance claim constitutes an admission that the policy is payable or will preclude the insurer from taking the position that the Policies are void based upon disclosures regarding the insured's medical history in the applications is likely to be an important issue.

As this case is just getting underway, it remains to be seen how these and other issues will shape the litigation. On July 16, 2019, the Civil Case Management Plan and Scheduling Order was entered by the Court. Fact discovery is scheduled to be completed by January 31, 2020. Stay tuned for further developments and subsequent comments.

The lawsuit is styled: Roc Nation, LLC v. HCC International Insurance Company, Case No.: 1:19-cv-00554-PAE, pending in the United States District Court, Southern District of New York.

Elliot Hallak is a litigation partner in Harris Beach, PLLC's Albany, New York office. Elliot is a member of the firm's Management Committee and co-leader of the firm's Commercial Class Actions and Regional Financial Institutions teams. Elliot focuses his practice on a wide range of business and commercial litigation, including class action defense, business disputes and torts, financial institution litigation, insurance defense, and life insurance litigation.

Joseph Picciotti is a partner in the Harris Beach, PLLC's Rochester, New York office. Joe is the leader of the firm's Insurance Coverage Practice Group, where he has extensive litigation experience and also counsels clients on insurance coverage matters, among other things, including coverage relating to business and environmental matters.

Zana Beck is a summer associate in Harris Beach, PLLC's Albany, New York office. Zana recently completed her first year of studies at Albany Law School. Zana received a Dual Bachelor of Science in Accounting and Economics, summa cum laude, and a Master of Science, summa cum laude, in Taxation, from the University at Albany, State University of New York.

In re Estate of Yudin, 2014 IL App (4th) 130171-U

By Adam T. Ernette and Edna S. Kersting


In a lawsuit between the representatives of two estates, the Illinois Appellate Court, 4th District, determined whether a key employee policy was an asset of the company, and subsequently the former owner's estate even after the company had been voluntarily dissolved.[1] In 1991, Julian H. Yudin ("Yudin"), owner and sole shareholder of J.H. Yudin, Inc., took out an insurance policy on one of its employees – office manager Alma Pate ("Pate").[2] The policy, to which Pate consented, insured her life for $100,000, and listed J.H. Yudin, Inc. as the policy's owner and sole beneficiary.[3] A short time after Prudential Insurance Company issued the policy on Pate, J.H. Yudin, Inc. voluntarily dissolved.[4] The beneficiary of the life insurance policy did not change, and all premiums were paid by either J.H. Yudin, Inc.; Yudin, personally; or J.H. Yudin & Associates.[5]

Pate continued working for J.H. Yudin, Inc. until she too stopped working altogether on July 15, 2011.[6] [7] Two months later, Pate died on September 14, 2011.[8]

A dispute arose over the proceeds of the life insurance policy when Michael Merlie ("Merlie"), successor executor of Yudin's estate and successor trustee under the Yudin trust, filed a complaint for declaratory judgment, naming both Gary Kyger ("Kyger")—as executor of Pate's estate—and Prudential as defendants.[9] After a joint motion by the parties, Prudential deposited the life insurance proceeds ($112,560.86) with the clerk of court in an interest-bearing account, was dismissed from the lawsuit, and was discharged from further liability.[10]

In late-2012, Kyger and Merlie filed counter summary judgment motions, seeking a declaration of entitlement to the life insurance proceeds.[11] The trial court granted summary judgment in Merlie's favor, granting the proceeds to Yudin's estate.[12]

On appeal, Kyger argued that there was no evidence to suggest that any entity beside J.H. Yudin, Inc. had an interest in the life insurance policy and that it was dubious to characterize a key man insurance policy as an "asset".[13] Citing section 12.30 of the Illinois Business Corporation Act of 1983 (805 ILCS 5/12.30), the court held that while an Illinois corporation retains legal title to its assets, shareholders "have an interest in the assets of a dissolved corporation".[14] Instead of providing any relevant legal authority in support of his argument, Kyger merely cited the statutory section setting forth the general effect of dissolution on a corporation and otherwise left the argument undeveloped.[15]

Kyger's secondary argument was that the trial court erred because neither Yudin, nor any of the associated entities, had an insurable interest in Pate's life at any time other than when the policy was first issued.[16] In other words, because Yudin no longer held an insurable interest in Pate's life at the time Pate died—because J.H. Yudin, Inc. has dissolved—neither Yudin, nor Yudin's entities were entitled to the life insurance proceeds. However, under Illinois law, the question of whether an insurable interest exists "must be determined as of the date upon which the insurance was taken out."[17] As a result, J.H. Yudin, Inc.'s voluntary dissolution had no effect on its interest in the life insurance policy, and the policy was not void or against public policy because the corporation's interest ceased at a later date, because J.H. Yudin, Inc. had an insurable interest at the time the policy was taken out.[18]

1 See In re Yudin, No. 4-13-0171, 2014 IL App (4th) 130171-U.
2 Id. ¶ 4.
3 Id.
4 Id.
5 Id. ¶ 5.
6 Id.
7 Yudin died on May 21, 2011.
8 Yudin, 2014 IL App (4th) 130171-U, ¶ 5.
9 Id. ¶ 7.
10 *Id.* ¶ 8.
11 *Id.* ¶ 9.
12 Id.
13 Id. ¶ 13
14 Yudin, 2014 IL App (4th) 130171-U, ¶ 13 (citing In re Liouma, 167 B.R. 522, 525 (1994)); see also Shute v. Chambers, 142 Ill. App. 3d 948, 952 (1st Dist. 1986) ("Whatever assets a dissolved corporation has belongs to the stockholders subject to the rights of creditors" and "[e]ven without the purported assignment, the remaining assets of the dissolved corporation, including contractual rights secured by a notes, would pass to the shareholders by operation of law.").
15 Yudin, 2014 IL App (4th) 130171-U, ¶ 17.
16 Id. ¶18.
17 Id. ¶19 (citing Wagner v. National Engraving Co., 307 Ill. App. 509, 513 (1st Dist. 1940)).
18 Yudin, 2014 IL App (4th) 130171-U, ¶¶ 20, 24; see also Wagner, 307 Ill. App. at 513.

On appeal, both parties relied heavily on section 224.1 of the Illinois Insurance Code (215 ILCS 5/224.1) ("Insurance Code"), which states in relevant part: "An insurable interest must exist at the time the contract of life or disability insurance becomes effective, but need not exist at the time the loss occurs."[19] While the court stated the controlling law is the law in effect at the time an insurance policy was issued, it applied section 224.1 despite it having been enacted after Pate's life insurance policy was issued. Consequently, because Pate was a manager for J.H. Yudin, Inc. at the time the life insurance policy was issued, the trial court correctly concluded that Yudin's estate was entitled to the life insurance policy's proceeds.

The court's ruling, and section 224.1 of the Insurance Code, are consistent with the majority of jurisdictions who acknowledge that an insurable interest (*i.e.*, "lawful and substantial economic interest") in the continued life, health, and bodily safety of another need only exist at the time of the policy's inception and not at the time of the insured's death.[20]

Adam T. Ernette is an associate at Wilson Elser Moskowitz Edelman & Dicker LLP's Chicago office where he focuses on commercial ligation and is a member of the life, health, disability & ERISA practice group. He is admitted to practice in Illinois and the Northern District of Illinois and the Northern District of Indiana.

Edna Kersting, a partner of Wilson Elser in Chicago, is considered an authority in life, health, disability and ERISA law, an area in which she has concentrated throughout her legal career. Her experience extends to matters involving bad faith and punitive damages, fiduciary duty, class action claims, and a range of other insurance and coverage issues. Edna is a co-chair of the firm's Life, Health, Disability & ERISA Practice.

[19] Id. ¶ 21 (quoting 215 ILCS 5/224.1); see also 215 ILCS 5/224.1 (employer has insurable interest in certain categories of employees).

[20] *See, e.g.,* Hilliard v. Jacobs, 874 N.E.2d 1060, 1064–65 (Ind. Ct. App. 2007); *In re* Estate of D'Agostino, 139 P.3d 1125, 1128 (Wash. Ct. App. 2006); Herman v. Provident Mut. Life Ins. Co. of Philadelphia, 886 F.2d 529, 533-34 (2d Cir. 1989) (applying N.Y. law); Trent v. Parker, 591 S.W.2d 769, 770–71 (Tenn. Ct. App. 1979); Robert E. Keeton & Alan J. Widiss, Insurance Law § 3.3(b)(1) 151 (1988) (stating the general rule that a life insurance contract is enforceable, regardless of whether this insurable interest exists at the time of death).