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How the Defense Can Leverage Plaintiff Tax Strategies

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Defendants negotiating a settlement can often control plaintiffs' ability to use tax strategies. Without risk, that control can significantly improve defendants' negotiating leverage. This article explores the basis and risks of this "Defense Strategy." It offers a win-win scenario: defendants pay less and plaintiffs keep more.

In writing this article, we're mindful that the Defense Strategy could be perceived, and used, in ways harmful to plaintiffs. However, we're far more concerned that plaintiffs regularly pay more tax than they should. Unfortunately, plaintiffs often overlook tax savings that can only be obtained by taking certain actions before settlement. When plaintiffs do consider tax savings, defendants often and unnecessarily obstruct the required actions and settlement language. Instead of obstructing, the defense can safely leverage its cooperation to pay less.

Better yet, when the defense recog-

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Letter from the President

Andrew R. Jones, Esq. | *Furman Kornfeld & Brennan, LLP*

Hello Everyone. I hope you are all doing well. Welcome to my Second Presidential Message.

Below is an update as to what PLDF had done since Nashville, in pursuit of our goals for this year. As a reminder, my personal main goals for this year are to make PLDF an even more vibrant, useful, inclusive, and supportive professional organization (and it's already pretty great).

1. Foundation/Connection

We are off to a strong start in terms of bolstering monthly calls and creating more contacts during the year. There has been greater attendance at

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The ***Professional Liability Defense Quarterly*** is the official publication of the Professional Liability Defense Federation (PLDF). It is published quarterly as a service to its members.

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nizes an opportunity to reduce plaintiff's taxes, it can use this knowledge to "bridge the gap" between settlement offers. In short, the Defense Strategy secures leverage for the defense to pay less by facilitating tax strategies that allow the plaintiff to keep more.

We believe this Defense Strategy encourages all parties to compliantly facilitate the reduction of plaintiff taxes. We doubt that tax-aware plaintiffs will keep less because of it. Two of us routinely advise plaintiffs, and on their behalf, successfully negotiate better tax outcomes. More importantly, we're confident that tax-unaware plaintiffs will keep more. This article describes a practical incentive for defendants to help plaintiffs save —one that defendants often ignore to their own detriment.

Defense Control Over Plaintiff Taxation

When plaintiff taxes are ignored before settlement, plaintiffs pay more tax. By default, lawsuit recoveries are fully taxable at ordinary income tax rates. Better treatment is often available through exclusions, deductions, and deferral. Such treatment can more than double a plaintiff's after-tax value.

Better taxation typically results from the memorialization of case facts that, without further tax language, can establish eligibility for better tax treatment. Memorializing the facts in the settlement agreement is necessary. Memorializing the tax treatment is not. For example, in an emotional distress case, the taxable portion of a recovery might dramatically decrease when the parties memorialize the amount compensating for the plaintiff's medical expenses. In a physical injury case, doing the same might dramatically increase the plaintiff's ability to deduct future medical expenses. In both cases defense cooperation is necessary to effect the tax savings. We discuss other ways to reduce plaintiff taxes later in the article.

Many conservative tax strategies can result in significant savings for plaintiffs. Often, defendants control plaintiffs' ability to use those strategies. If used well, that control can significantly add to defendants' leverage. We discuss how defendants can wield that leverage later in the article. Defendants are the gatekeepers to plaintiffs' tax savings in four distinct ways.

First, the IRS and courts have regularly said that plaintiffs' taxation "hinges on the payor's dominant reason for making the payment." *Green v. Commissioner*, 507 F.3d 857, 868 (5th Cir. 2007). To determine the "dominant reason," courts "first look to the language of the [settlement] agreement." *Id.* Thus, a defendant's intent and consent to language at settlement are critical and a source of leverage.

Second, a largely tax-free recovery can become wholly taxable if the defendant will not allocate (i.e., insists on general release language). The U.S. Tax Court wrote, "In those cases where a settlement agreement fails to allocate the proceeds…and the taxpayer otherwise fails to establish the specific portion of the settlement amount [that is received tax-free], the entire amount has been held to be taxable." *Forste v. Comm'r*, T.C. Memo 2003-103.

Third, a defendant's decision to report some of the recovery as taxable to the plaintiff, and how much, greatly affects the plaintiff. The IRS' Information Matching Program aims to detect differences in reporting. Thus, a plaintiff cannot report less taxable proceeds than the defendant without significant risk of audit and challenge. As you'd expect, the IRS has used defendants' reporting as evidence of plaintiffs underreporting. *See e.g.*, *Connoly v. Comm'r*, T.C. Memo 2007-98.

Every settlement is a negotiation and involves many factors that will dictate the best path. Both sides hold cards and play them based on full context. The point is that the defense has, and often ignores, a powerful card.

Fourth, a defendant's consent to language at settlement provides significant protection to the plaintiff if the IRS chooses to audit and challenge the plaintiff's tax reporting of the settlement proceeds. In general, a taxpayer bears the burden of proof upon an IRS challenge. However, with a showing of "credible evidence," that burden shifts to the IRS. IRC § 7491. In general, express language in a settlement agreement constitutes sufficient credible evidence. *See Forste v. Commissioner*, T.C. Memo 2003-103. Thus, the plaintiff's need for the defendant's consent gives the defendant substantial leverage.

Plaintiffs can reduce, but not escape defendants' influence on tax treatment through the use of a qualified settlement fund ("QSF"). QSFs are typically used in mass torts and multi-claimant cases, and allow a defendant to obtain a full release in exchange for a tax deductible payment to the QSF. Using a QSF puts the QSF administrator, rather than the defendant, in charge of deciding to issue plaintiffs IRS Form 1099-MISC. IRS Reg. § 468B-2(l). However, plaintiff taxation is still driven by the defense. IRS regulations state that a plaintiff's tax treatment of amounts received from a QSF is determined "as if the [payment] were made directly by the [defendant]." IRS Reg. § 468B-4. And as discussed above, such treatment hinges on the defendant's intent, best evidenced in a settlement agreement signed by the defendant.

Thus, even if a QSF is used, plaintiffs seeking to minimize taxes are largely dependent on defendants. This gives defendants significant leverage in negotiations if they can agree to certain language, or even suggest strategies, without assuming risk. As we discuss below, they can.

Negotiating for Savings

We devote little discussion in this article to implementing the strategy. Why? Every settlement is a negotiation and involves many factors that will dictate the best path. Both sides hold cards and play them based on full context. The point is that the defense has, and often ignores, a powerful card.

The defense can offer unexpected value that neither party typically considers, allowing the defense to pay less while the plaintiff keeps more. Defense counsel has many opportunities to bring up potential tax savings. They might identify this value early on to benefit the plaintiff, demonstrating good faith, and avoiding last minute haggling. Or, they can wait until the parties are nearing their final offers, then suggest tax savings as a way to "close the gap." Or, they can tentatively agree on the settlement amount, then propose changes that reduce plaintiff's taxes and the defense's payment.

Avoiding Defendant Liability

The most common concern raised in discussing the Defense Strategy is liability: (1) defendant's liability to the plaintiff in giving tax advice, (2) defendant's liability for IRS penalties, and (3) defendant's liability for under-withholding. Only the third of these materially exposes the defendant, and only in employment cases.

The first potential liability is the easiest to resolve. By stating clearly that the plaintiff has not received and will not rely on the defendant for tax advice, the defendant can avoid risk. Stronger language is always an option.

The second potential liability is more technical. The defendant is required to report the taxable portion of the recovery on IRS Form 1099-MISC. Failure to do so exposes the defendant to a $250 penalty. IRC § 6721(a)(1). A greater penalty applies if the failure was "knowing or willful." Treas. Reg. § 301.6721-1(f)(2). In that case, the penalty is 10% of the reportable amount. *Id.*

We have never heard of the IRS asserting either penalty against a defendant in a non-wage case. This is likely because the amount reportable by the defendant is largely dictated by the defendant's own reason for making the payment (see discussion above). In addition, defendants are relieved of the obligation to issue IRS 1099-MISC when they don't have enough information to determine the taxable portion. IRS Rev. Rul. 80-22. For example, a defendant won't likely know the taxable portion of reimbursements it pays to the plaintiff for medical expenses—to know that, the defendant must know which of those expenses the plaintiff previously deducted. IRC § 104(a), (a)(2).

We recommend that defendants avoid taking aggressive positions in identifying the amount reportable on IRS 1099-MISC. However, defendants clearly have significant discretion.

The third potential liability risks real exposure. However, if handled correctly, there is still considerable safety. The defendant will owe the defendant's and the plaintiff's share of employment

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taxes if the IRS proves that the defendant failed to withhold on the appropriate amount of wages at settlement. IRC § 3102(b); § 3403. Additional penalties and interest may be imposed, especially upon a finding negligence or fraud. IRC § 6601; § 6662; § 6663. For this reason, defendants should carefully consider what portion of a recovery to treat as wages. Fortunately, there are many cases considering the proper allocation of wages and non-wages at settlement. Thus, effecting the Defense Strategy through the allocation of wages can often be used without risking defendant exposure.

Defendants sometimes demand language in the settlement agreement that can substantially undermine the plaintiff's desired tax position. Such language generally provides the defendant little or no protection, though it's best to consider on a case-by-case basis.

Many Ways to Save

As you'd expect, strategies to save plaintiff taxes are as varied as the cases that plaintiffs bring. Articles and treatises have been written on the many opportunities to consider. Fortunately, most strategies are conservative and primarily focus on (1) identifying a tax benefit available based on case facts and (2) memorializing those facts in the settlement agreement. Of course, memorializing requires defense consent, which creates defense leverage, which enables the Defense Strategy. Following are several examples:

Physical Injury—Maximizing Medical Deductions

In general, lawsuit proceeds paid on account of personal physical injuries are received tax-free. IRC § 104(a)(2). Thus, a plaintiff is unlikely to owe tax unless her settlement compensates for punitive damages, interest, or abiding by a non-disclosure agreement—all taxable.

But, allocating a reasonable portion of settlement proceeds to future medical expenses may save the plaintiff significant future taxes. Without doing so, she may be unable to deduct medical expenses related to the case until she has spent the full amount of the recovery on medical expenses. See IRS Rev. Rul. 75-232. In a paraplegic case, for example, this could increase the plaintiff's taxes by millions of dollars.

Notably, this tax strategy merely requires the defense to agree that a particular portion of the settlement proceeds compensate for medicals. No reference to taxation is needed. Beyond that, it's up to the plaintiff to determine deductibility of future medical expenses. Thus, effecting the Defense Strategy in this context is straightforward.

Emotional Distress—Avoid Tax on Legal Fees

Like proceeds from many other claims, a recovery for emotional distress is generally taxable. In taxable cases, the plaintiff is taxed on the amount she keeps and also on the amount she pays to her lawyer. *E.g.*, *Commissioner v. Banks*, 543 U.S. 426 (2005). That is, unless she can deduct her legal fees. Unfortunately, as of 2018, plaintiffs generally can't deduct their legal fees except in employment and classic civil rights cases. IRC § 67(g), 62(a)(20). Because the rule causes plaintiffs and counsel to pay tax on the same amount, some call it a "Double Tax."

To avoid the Double Tax, some plaintiffs transfer their claim to a litigation trust similar to a charitable remainder trust. The trust pursues and recovers on the claim, pays plaintiff counsel their legal fee, and distributes the remainder to the plaintiff. For a plaintiff paying tax at a 40% rate, and a contingency fee of 40%, such a trust can reduce taxes on a $1,000,000 settlement by $160,000.

Notably, this tax strategy merely requires the defense to (1) settle with the plaintiff in addition to the trust and (2) make payment to the trust, rather than the plaintiff. Here, the biggest step in the Defense Strategy might be informing the plaintiff of the opportunity.

Claims Affecting Family Members—Reduce Income and Estate Taxes

Claims of all sorts affect a plaintiff's family, and that fact offers tax planning opportunities. When a former plaintiff receives nursing care from a family member, and pays for it, those payments are taxed and compensation for services. However, if that family member receives settlement proceeds as a co-claimant, he or she can likely avoid substantial taxation.

When an already-settled plaintiff dies and passes on cash or future payments from the settlement, their estate pays estate tax on amounts above the threshold (e.g., $12 million in 2022), and possibly generation skipping tax. However, those amounts avoid taxation if the would-be beneficiaries instead receive such amount as co-claimants in the settlement.

Whether family members and other beneficiaries can receive settlement proceeds as co-claimants is highly fact spe-

cific. And, in some states, statutes and common law may obstruct their claims for emotional distress, loss of consortium, or loss of society. However, if a claim could conceivably succeed, the defense is justified in paying to extinguish it. Thus, by considering possible co-claimants, settling parties can reduce both income and estate tax. Here again, the Defense Strategy doesn't require much—the defense can suggest treating and paying the family member as a co-claimant.

Capital Claims—More Income at a Lower Rate

Settlement proceeds from capital-related claims are taxed based on their reason for payment and the "origin of the claim." A plaintiff pays less if she can treat the proceeds as a combination of (1) a recovery of cost and (2) capital gain rather than (3) lost profits.

For example, let's say that a business sues an investment banker for breach of contract after multiple delays by the banker resulted in the plaintiff raising less capital and generating less profit because of a slower economy. The plaintiffs will pay less tax if the settlement agreement reasonably allocates more of the recovery to diminution in value and less to lost profits. Diminution in value will be taxed as capital gain, and only in excess of basis.

Notably, this strategy often merely requires the defense to agree that it intends particular portions of the settlement proceeds to compensate for diminution in value versus lost profits. Thus, again, the Defense Strategy primarily involves the defense offering to agree to reasonable language in the settlement agreement.

There are many more tax strategies available. They can focus on securing more tax-free treatment, a lower tax rate, larger deductions, or tax deferral. Plaintiffs can obtain tax advantages through structured settlements (i.e., payments over time), which take a variety of forms. Typically, in a structured settlement, the defendant is permanently released from liability in exchange for facilitating the plaintiff's indirect investment in annuities or market-based products. The defense plays a pivotal role in nearly every strategy—that is, without the defense's consent, the plaintiff can't secure the desired tax savings. The Defense Strategy leverages the plaintiff's need for the defense's consent in order for the defense to pay less.

Demands That Undermine the Defense Strategy

Defendants sometimes demand language in the settlement agreement that can substantially undermine the plaintiff's desired tax position. Such language generally provides the defendant little or no protection, though it's best to consider on a case-by-case basis. Often, there's value to share between the parties if they take time to understand the issues. This isn't necessary to effect the Defense Strategy, but very good to know since it can reduce plaintiff tax savings.

Defendants sometimes insist on "disavowing" language in the settlement agreement that states why proceeds are being paid. Since tax treatment of proceeds hinges on the defendant's reason for making payment, disavowals undermine the value of the settlement language. *E.g., Metzger v. Comm'r*, 88 T.C. 834 (1987). Defendants need not make a tax representation, but it's critical to plaintiffs that they state their intention. This shouldn't pose a risk.

Defendants sometimes insist on "tax indemnification" language in the settlement agreement, binding the plaintiff to financially insure the defendant from liability, penalties, and legal costs. Unfortunately, the IRS and courts have used such indemnifications as evidence that the defendant didn't truly believe the language in the settlement agreement. *E.g.*,, *Vincent v. Comm'r*, T.C. Memo 2005-95. In most cases, there is no risk to the defendant in agreeing to language that helps the plaintiff. In those cases, demanding a tax indemnification defeats the purpose and loses potential value for both sides. The defendant can effect the Defense Strategy while insisting on a "tax indemnification"—but doing so reduces the value to plaintiffs.

Defendants sometimes insist that plaintiffs unilaterally draft settlement language relating to the purpose of payment. Again, the IRS and courts have found that such facts indicate that the defendant didn't truly believe the language in the settlement agreement. *E.g., Goode v. Comm'r*, TC Memo 2006-48. Defendants can help support plaintiff tax positions by participating, even in a small way, in the drafting of language that explains why payment is being made.

Conclusion

Tax is technical and many avoid thinking about it even when significant savings are available. This article focused on the first step: recognizing defendants' leverage. Defendants heavily influence, even control, plaintiffs' ability to pay less tax, avoid IRS audit, and avoid and defeat IRS challenge. In our experience, defendants regularly ignore this influence. We believe that a defendant who considers this influence, and looks to exercise it, can pay less while becoming the plaintiff's greatest source of tax savings.

Once defendants recognize their leverage, the next step is to recognize opportunities for plaintiff savings. With that, defendants can choose whether and when to unblock, or even suggest steps to secure those savings. There are many

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tax strategies for plaintiffs—and many ways defendants control plaintiffs' ability to use those strategies. Put differently, there are many ways defendants can pay less while plaintiffs keep more. ■

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* The authors are grateful for reviews by **Patrick Hindert** and **John Darer**, two prolific commentators in settlement planning, and **Joe Di Gangi**, President of the Society of Settlement Planners.

Statute of Limitations in Legal Malpractice Claims – Continuous Relationship versus Continuous Representation

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One of the most effective defenses to professional malpractice cases is the expiration of the statute of limitations. Plaintiffs often try to get around this defense by claiming continuous representation. The recent Second Department case *Goodman v. Weiss, Zarett, Brofman, Sonnenklar & Levy, P.C.,* 2021 N.Y. Slip Op. 05957 (November 3, 2021) demonstrates that simply having a continuous relationship with an attorney does not toll the statute of limitations, the continuous representation doctrine is "limited to the course of representation concerning a specific legal matter."

Background

In New York, an action to recover damages for legal malpractice must be commenced within three years from the accrual of the claim, which is measured from the commission of the alleged malpractice, not from when the malpractice is discovered. *See Shumsky v. Eisenstein*, 96 N.Y.2d 164 (2001); *see also, e.g., Ackerman v. Price Waterhouse,* 84 N.Y. 2d 535, 541 (1994); *Glamm v. Allen*, 57 N.Y.2d 87, 95 (1982). To invoke tolling of the statute of limitations pursuant to the "continuous representation" doctrine, a plaintiff is required to establish, by sufficient evidentiary facts, "an ongoing, continuous, developing and dependent relationship between the attorney" or a "mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim." *See Matter of Merker*, 18 A.D.332, 332-333 (1st Dept 2005); *Hasty Hills Stables, Inc. v. Dorfman, Lynch, Knoebel & Conway*, 52 A.D.3d 566 (2d Dept. 2008). The concern is whether there has been continuous representation concerning a specific legal matter, not merely a continuing relationship between the client and lawyer. *See Shumsky, supra.*

Goodman v. Weiss, Zarett, Brofman, Sonnenklar & Levy, P.C.

The recent Second Department case *Goodman* stands for the proposition that continuous representation tolls the running of the statute of limitations only so long as the professional defendant continues to represent the plaintiffs in connection with the particular transaction which is the subject of the action, not merely during the continuation of a general professional relationship.

In *Goodman,* the plaintiff entered into a retainer agreement in December 2010 with defendant to represent plaintiff in negotiating an employment contract for services to be performed at St. Luke's Roosevelt Hospital Center and Beth Israel Medical Center. In January 2011, plaintiff entered into a five-year employment contract with the hospitals, which included a termination clause. The termination clause provided for termination "for cause", defined as the failure to satisfactorily perform any material obligations, unless remedied within 30 days of written notice.

Generally, absent unique circumstances, if a law firm represents a client on an initial transaction and then later represents the client in litigation related to that transaction, these are considered two wholly separate matters for the purposes of continuous representation. Therefore, courts take a narrow view of the subject matter of the representation for the purposes of establishing continuous representation.

On November 15, 2013, the hospitals served plaintiff with written notice advising employment would be terminated in three days unless he cured various alleged breaches of his employment contract. Plaintiff contacted defendant regarding the notice of potential termination and defendant drafted a response to the notice. Plaintiff was terminated December 19, 2013.

In June 2014, plaintiff, represented by defendant law firm, commenced an action against the hospitals for damages for breach of the employment contract. In August 2014, plaintiff substituted other counsel for defendant. The plaintiff settled his action in 2016, and then commenced an action against defendant in July 2017. Of import, the malpractice alleged that defendant failed to properly negotiate plaintiff's employment contract by permitting the overbroad "failure to satisfactorily perform" language to be included without modification and plaintiff was therefore forced to accept a de minimis settlement.

Defendant moved for dismissal for, among others, statute of limitations grounds, which was granted. Plaintiff moved to reargue the dismissal which was granted, but upon reargument, adhered to the prior determination. On appeal, the Second Department agreed the legal malpractice cause of action was time barred under CPLR 214(6) and continuous representation did not toll the statute of limitations. The Appellate Division noted there was no evidence that the defendant provided legal services to plaintiff between January 2011 and November 2013. Additionally, when plaintiff did engage defendant again, it was for a distinct service related to a different subject matter. Therefore, continuous representation was inapplicable.

Analysis

The *Goodman* holding is helpful because it supports the argument that even if subsequent representation is tangentially related to the initial retainer, the courts will parse out the terms of the relationship and are able to differentiate between related, but independent, subject matter.

We note that a party cannot create a relationship based on its own beliefs or actions and the continuation of a general professional relationship is insufficient to toll the statute of limitations. In *Davis v. Cohen & Gresser, LLP*, 160 AD3d 484 (1st Dept. 2018), the court concluded that the attorney-client relationship was severed upon the death of the decedent. See *id*. Thereafter, defendant did not represent the estate with regard to the action wherein the claimed malpractice occurred, but in other litigation. Thus, the Court held, "the record evidence demonstrates the lack of a mutual understanding that defendant would continue to represent the estate in the Devine action, even if there was a continuation of a general professional relationship." *Id*. Generally, absent unique circumstances, if a law firm represents a client on an initial transaction and then later represents the client in litigation related to that transaction, these are considered two wholly separate matters for the purposes of continuous representation. *See Pandozy v. Robert J. Gumenick, P.C.,* 2008 U.S. Dist. LEXIS 41440 (S.D.N.Y. May 23, 2008) (finding no continuous representation where defendant represented plaintiff for the sale of his apartment and then subsequently regarding litigation related to specific performance of the contract). Therefore, courts take a narrow view of the subject matter of the representation for the purposes of establishing continuous representation.

Comparison with Other Jurisdictions

New York is not the only state to have considered the merits and limitations of the continuous representation rule. For example, courts in both Pennsylvania and Michigan have also recently examined the doctrine and have come to much different conclusions.

On the one hand, the Pennsylvania Supreme Court completely rejected the doctrine a little over a year ago in *Clark v. Stover*, 242 A.3d 1253 (Pa. 2020). Although the court noted that the doctrine had been adopted by many other states, it held that adopting it in Pennsylvania was the prerogative of the legislature, not the courts, and also hinted that the rule was anyway unnecessary due to other tolling doctrines for unknown injuries (i.e., the discovery rule) or fraud (i.e., fraudulent concealment). The court also held

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that it could discern no reason to treat attorneys differently than other professionals who are not subject to a similar rule, which can allow claims to be brought years after the standard limitations period has passed.

Michigan law, on the other hand, functions similarly to the Second Department's interpretation in *Goodman*. Michigan's statute of limitations, MCL 600.5838, imposes a two-year statute of limitations for legal-malpractice claims. The Michigan Supreme Court interpreted MCL 600.5838 in *Gebhardt v. O'Rourke*, 444 Mich. 535, 510 N.W.2d 900 (S. Ct. Mich. 1994) to begin running the statute of limitations "from the time the attorney stops representing [the plaintiff] *regarding the matter in question*…" 510 N.W.2d 900 (emphasis added). And in *Maddox v. Burlingame*, 205 Mich. App. 416, 517 N.W.2d 816 (Mich. Ct. App. 1994), the Michigan Court of Appeals held that, because the attorney-client relationship is contractual in nature, the relationship ends "upon completion of a specific legal service that the lawyer was retained to perform." 205 Mich. App. 450, 517 N.W.2d 818. See also *Chapman v. Sullivan*, 161 Mich. App. 558, 562, 411 N.W.2d 754 (holding that the statute of limitations begins running when the attorney stops representing the client for the matter from which the alleged malpractice arose).

The Michigan Court of Appeals has differentiated between continuing representation and remedial representation related to prior representation. For example, in *Braspenick v. Johnson Law PLC*, unpublished per curiam opinion of the Court of Appeals, issued April 19, 2018 (Docket No. 338556), the plaintiff hired the defendant law firm to represent her in a medical-malpractice action. After the jury returned a verdict of no cause, the law firm sent the plaintiff a letter stating that it would take no further action with regard to an appeal for her case. But the court granted case evaluation sanctions (a Michigan-specific ADR process) and taxable costs against the plaintiff, and the law firm filed a motion for relief from judgment. The court ultimately held that the legal-malpractice claim accrued when the law firm sent the letter to the plaintiff, stating that it would take no further action. The court held that the filing of the motion for relief from judgment did not extend the accrual date, was it was a remedial effort concerning past representation, rather than a continuation of the representation. In sum, Michigan's caselaw is generally consistent with the analysis in *Goodman*.

Conclusion

Thus, to successfully invoke the continuous representation toll of the statute of limitations in New York, a plaintiff is required to establish "an ongoing, continuous, developing and dependent relationship between the attorney" or a "mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim." If the facts indicate that the attorney-client relationship was related one specific subject, a subsequent representation tangentially related to the initial representation will generally break continuity. ■

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This article was prepared by **Mehreen Hayat** and **Andrew Jones** of the New York City-based law firm of *Furman Kornfeld & Brennan LLP*. Mehreen and Andrew are part of a team of 36 lawyers and paralegals devoted to the defense of attorneys and other professionals in malpractice and disciplinary matters, as well as the defense of construction and personal-injury accidents. For more information about the above topic or authors, please visit: **www.fkblaw.com**. We trust that the article was useful and thought-provoking; however, please note that it is intended as a general guide and opinion only, not a complete analysis of the issues addressed, and readers should always seek specific legal guidance on particular matters.

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Real News About Fake Construction Insurance

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Fake news, fake emails, now even a plethora of fake phone calls. Let's add another one to that list—fake insurance. It's not that the entire policy is fake. Indeed, most fake insurance policies are written by real insurance companies and provide some aspects of real coverage, and buyers of fake insurance policies are charged real premiums. The problem is that a wide swath of the insurance industry, mostly comprised of excess/surplus lines carriers providing coverage to smaller to mid-size subcontractors, adds exclusions and limitations that eviscerate the coverage ostensibly being provided. The exclusions and limitations are commonly not understood or even noticed by the insurance agent or broker selling the coverage and, as a result, frequently not divulged or properly explained to the party purchasing the coverage, and rarely (if ever) divulged to a certificate holder.

While legal, these practices by the insurance industry effectively border on widespread deception. Insurance policies frequently don't change in front of your eyes. They are changed behind your back. The manner in which coverage is reduced is often quite subtle, making the limitations and coverage gaps difficult to identify. The revised policy or endorsement may have the identical heading as a standard coverage form, the exact same font, and contain almost the identical language. Sometimes the change is just one word, or the word is simply positioned differently. No warnings are given, no explanations are provided, and the changes can be difficult for even the most seasoned insurance professional to grasp.

Standard vs. Non-Standard Insurance Forms

Most insurance policy and endorsement forms are written by Insurance Services Office ("ISO") for use by the insurance industry on a nation-wide basis. These forms are widely recognized as being the industry standard, and a substantial body of case law has been developed pertaining to them. ISO policy and endorsement forms can be identified by the copyright, either "© Insurance Services Office, Inc. 20__" or "© ISO Properties, Inc., 20__".

Other policy or endorsement forms are "manuscripted", meaning that the forms are drafted by an entity other than ISO, frequently by the insurance company providing the coverage. Such manuscripted forms may state "Includes Copyrighted Material of ISO With Its Permission" or may make no reference to ISO. As the comedian Bill Engvall says, "Here's your sign!"

If the other party's insurance company drafted a nonstandard modification to the insurance policy to be provided, how likely is it that the nonstandard modification will favor your client? While it is not impossible that a non-standard provision or form may benefit your client, the odds are not good. Most non-standard forms have little to no case law applicable to them, and the lack of a solid legal foundation often results in conflicts of interpretation and litigation. Further magnifying this issue, many of the same insurance companies drafting these forms tend to take more aggressive claim settlement positions.

Hence, it is critical that the party depending on the coverage be vigilant. When drafting specifications for the required insurance coverages, specificity is critical. Requiring coverage provided by a specific ISO form number means that the draftsman is expecting to receive exactly that coverage contained in the published ISO form, not coverage that someone feels is reasonably close or "equivalent". Equivalency is in the eye of the beholder, and what the other party's insurance company believes is equivalent is not likely to be equivalent in the eyes of the party requiring the coverage. Requiring specific ISO form numbers forces the other party's insurance agent or broker to raise his or her hand while in contract negotiations, to disclose if the agent or broker cannot deliver a particular scope of coverage but can provide alternative coverage. This disclosure provides an opportunity for the party requiring the coverage to review what alternative coverage is being proposed and make a well-informed business decision about whether to accept the proposed alternative insurance coverage or to seek another contractor or subcontractor that can obtain the required coverage.

Bottom Line: Do not simply list the insurance coverages that are to be provided. Also list exclusions and limitations that are unacceptable and will not be permitted. Then require verification that those impermissible forms are not being used … more about verification later.

Indemnity vs. Insurance— "Insurance offers very limited coverage"

Indemnity

An indemnity is a contractual undertaking by one party ("Indemnitor") to compensate or reimburse another party ("Indemnitee") for damage, loss or injury incurred by the Indemnitee due to the act

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of the Indemnitor and/or another party and/or resulting from the interaction of the Indemnitee or Indemnitor. The Indemnitee is the "upstream party" being relieved of risk. The Indemnitor is the "downstream party" assuming the risk. An indemnity is a voluntary assumption of risk, i.e., the Indemnitor agrees to be liable for the damages, losses or injuries incurred by the Indemnitee to the extent stipulated.

Generally, there are three types of contractual indemnity: (1) limited form; (2) intermediate form; and (3) broad form. Under a limited form of indemnity, the indemnification provided is limited "to the extent" the damage, loss or injury incurred by the Indemnitee is caused by the acts or omissions of the Indemnitor. By way of example, if there is a loss for which the Indemnitor is 80% at fault and for which the Indemnitee is 20% at fault, under a "limited form" of indemnity, the Indemnitor will be liable for only 80% of that loss. Under an intermediate form of indemnity, the Indemnitor is not responsible for the Indemnitee's sole negligence, but is responsible for all damage, loss or injury caused by the Indemnitee, so long as the Indemnitee was at least partly at fault for that same damage, loss of injury. Using the previous example, under an "intermediate form" of indemnity, the Indemnitor would be liable for 100% of the loss, essentially assuming liability for the Indemnitee's 20% of fault. Finally, under a broad form of indemnity, the Indemnitor assumes responsibility for all damage, loss or injury incurred by the Indemnitee, even if in whole by the Indemnitee. Using a different example where the Indemnitor is 0% at fault and the Indemnitor is 100% at fault for some loss, under a "broad form" of indemnity, the Indemnitor still would be liable for 100% of the loss.

For purposes of this article, the Indemnitee is "the insured" (most often, the downstream subcontractor), the entity that paid a big premium for its insurance coverage and is now sharing that insurance coverage with others.

(i) The scope of risk that can be transferred varies by state. Most states have some sort of anti-indemnity law governing this transfer and limiting the scope of risk that can be transferred to a downstream party. For example, Sections 725.06 and 725.08 of the Florida Statutes limit an Indemnitor's ability to assume liability for an Indemnitee's own negligence (i.e., an intermediate or broad form indemnity). Additionally, in Texas, an indemnity contained in a construction contract is limited to the downstream party's own negligence, with one major exception: joint, concurrent and even sole negligence can be transferred onto the downstream party for claims arising out of injury to the contractor's, or a subcontractor's, employee. (In Texas, the anti-indemnity law does not apply to municipal work or certain kinds of residential work; thus, all risk can be transferred with respect to contracts or subcontracts for those types of work.)

(ii) What dollar amount of risk can be transferred? Most indemnities are unlimited in dollar amount.

Impact of Insurance

To reiterate, an indemnity is strictly contractual in nature. Rarely is the word "insurance" encountered in an indemnity provision. That said, portions of the risks being indemnified are insurable under an unmodified ISO commercial general liability policy. That coverage is commonly referred to as "contractual liability insurance" or a "contractual liability clause" and is the funding mechanism for those covered portions of the indemnification agreement.

Contractual liability coverage is not easy to locate in an ISO commercial general liability policy as it is not provided as a coverage provision. Instead, contractual liability coverage is set forth in

(i) a series of six definitions of the phrase "Insured Contract", which phrase is contained in
(ii) an exception to
(iii) an exclusion to
(iv) the coverage provision of "bodily injury" and "property damage" only.

The sixth definition of an "Insured Contract" is the most important for purposes of a construction context as it refers to "that part of any other contract or agreement pertaining to your business … under which you assume the tort liability of another party to pay for the 'bodily injury' or 'property damage' to a third party." [For purposes of this discussion, "tort liability" means "negligence".]

Many construction agreements contain a covenant that "Contractor shall provide contractual liability insurance covering the liabilities assumed in the indemnification agreement". However, this is impossible. Insurance does not and cannot cover "any and all liabilities", fines, penalties or similar requirements. Contractual liability insurance provides coverage only for bodily injury and property damage, subject to the limits of liability and policy terms and conditions, and nothing else. For instance, an ISO commercial general liability form contains virtually no coverage for hazardous materials contamination, but construction contracts almost always contain indemnities for hazardous materials contamination resulting from the construction. The contractual liability clause cannot create coverage for risks not covered by the policy. Therefore, broad indemnities can potentially bankrupt an Indemnitor that is relying solely on coverage provided by the contractual liability provision of standard ISO general commercial liability policy form.

The author's recommended wording: "Contractor shall provide standard contractual liability insurance applying to the indemnification agreement" or "The standard ISO contractual liability language will be provided."

Third Party Over Actions

Coverage Under ISO Commercial General Liability Policy

The most common type of claim arising from on-going construction operations is commonly known as a "third party over action". As an example, subcontractor's employee is injured on the job, makes a workers' compensation claim, but is dissatisfied with the statutory benefits provided. Subcontractor's employee is prohibited from suing his/her employer due to the exclusive remedy rule of the workers' compensation act, so that employee sues the upstream contractor, e.g., a claim that the upstream contractor provided an unsafe workplace. As the lawsuit is against the upstream contractor only, this is by definition an allegation of sole negligence. The upstream was not solely at fault, but is the only party being sued.

Because contractor's agreement with the subcontractor states that subcontractor will defend, indemnify and hold contractor harmless for injuries to subcontractor's employees, contractor forwards the lawsuit to subcontractor to answer and defend. Where is the coverage for this petition potentially provided? Under the subcontractor's general liability coverage.

In a standard ISO policy, subcontractor's general liability insurance states: "This insurance does not apply to (e) Employer's Liability, "bodily injury" to an employee of the insured arising out of an in the course of employment by the insured". One would conclude that the claim is excluded. However, the coverage form goes on to state: "This exclusion does not apply to liability assumed by the insured under an "insured contract".

This exception to the exclusion does not provide subcontractor with coverage for the injury to its employee, but instead provides the subcontractor with coverage for the contractual assumption of this risk.

Three points:

(i) When the policy refers to "employment by the insured", the only entity being excluded is the entity employing that individual. "The insured" applies only to that specific insured, not to any other insured (named or additional) that may be on the policy.
(ii) Coverage is provided due to the exception to the exclusion, referring back to the earlier described "Insured Contract" in general and that sixth definition in particular.
(iii) When this coverage is triggered by a claim, the subcontractor's workers' compensation coverage has already made payment, and now the subcontractor's general liability coverage is making further payment for that same claim.

Manuscripted General Liability Employer's Liability Exclusion

What if the commercial general liability form instead read: "This insurance does not apply to (e) Employer's Liability, 'bodily injury' to an employee of any insured arising out of and in the course of employment by the insured"? Did you catch the change? Just substituting one word—"any" instead of "the"—is subtle, but hardly insignificant. The effect is that coverage for a third party over action is no longer provided to any insured.

Not as subtle but equally devastating: many insurance companies simply delete the exception to the exclusion through an endorsement, again resulting in a loss of coverage for a third party over action for any insured.

In either case, now both the upstream contractor and the downstream subcontractor have real problems and are headed toward litigation.

§A.3.2.2.2.3 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims for bodily injury other than to employees of the insured."

§A.3.2.2.4 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims for indemnity under Section 3.18 of the General Conditions arising out of injury to employees of the insured."

ISO Contractual Exclusions/Limitation

Limitation

There are two ISO exclusions that may affect coverage for the assumption of risk in any indemnity agreement. The first is called an "Amendment of Insured Contract Definition", which modifies that sixth definition of an "Insured Contract", limiting coverage by referring to "that part of any other contract or agreement pertaining to your business … under which you assume the tort liability of another party to pay for the 'bodily injury' or 'property damage' to a third party provided the 'bodily injury' or 'property damage' is caused, in whole or in part, by [the Named Insured] or those acting on [the Named Insured's] behalf."

In effect, contractual liability coverage is now provided only to the extent that the Indemnitor was wholly or partially negligent. Coverage is no longer extended to the Indemnitee for its sole actions, again eliminating coverage for a third party over action lawsuit. This is ISO CG 24 26 04

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13 and should be avoided if the transfer of sole negligence is required.

Deletion

The second ISO endorsement affecting the contractual assumption of liability is called a "Contractual Liability Limitation Endorsement" - limitation is an understatement. This endorsement completely deletes that sixth definition of "Insured Contract", thereby eliminating any and all coverage for the assumption of negligence in a construction agreement.

This is ISO 21 39 10 93 and is, in the author's opinion, the second worst endorsement in the liability industry.

Endorsements like these limit the coverage provided for the contractual assumption of liability in spite of what the construction agreement may require. This may lead to the downstream party being found to be in breach of contract, since no insurance is provided, and no insurance is applicable to a breach of contract.

§A.3.2.2.2.3 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims for bodily injury other than to employees of the insured."

§A.3.2.2.4 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims for indemnity under Section 3.18 of the General Conditions arising out of injury to employees of the insured."

Required by Written Contract

Is the primary triggering mechanism for the provision of coverage a well-written policy, an indemnity, or additional insured status?

Many of the insurance coverages ostensibly provided to upstream parties are provided only where required by written contract. When a loss occurs, one of the first documents that any insurance company adjuster will demand is the signed contract as that document stipulates the agreement of the parties. The contract is, therefore, the primary triggering mechanism. If the contract fails to state a necessary requirement, then the insurance may not be triggered.

As briefly discussed above, simply requiring a coverage without specificity is insufficient and ineffective.

Additional Insured Status

Additional insured endorsements can be provided on a specific basis (i.e., naming the parties to be added as additional insureds) or a "blanket" basis (i.e., stating that additional insured status is extended to all parties required to be named as additional insured in a written contract). Neither basis informs about the kind of operations or the scope of negligence to which the additional insured status applies.

The ISO CG 20 10 is the construction-related endorsement most commonly used to provide additional insured status for ongoing operations. There have been six different editions of this endorsement, each progressively more restrictive.

The last four numbers of an ISO endorsement indicate the edition date. ISO Form CG 20 10 10 01 was promulgated in October, 2001. This endorsement is applicable to liabilities arising out of the insured's on-going operations. "Arising out of" is commonly held to include protection for the additional insured's sole negligence related to those operations.

ISO Form CG 20 10 07 04 drops the "arising out of" wording and instead states that additional insured status is provided only for liabilities caused, in whole or in part, by the acts or omissions of the Named Insured or of those acting on the Named Insured's behalf, again in performance of ongoing operations.

ISO Form CG 20 10 04 13 is the latest ongoing operations endorsement. Like its immediate predecessor, the endorsement excludes coverage for the additional insured's sole negligence but goes on to state that it:

(i) Applies only to the extent permitted by law;
(ii) Will not be broader than that which [the Named Insured is] required by contract to provide; and
(iii) Will not pay more than the amount required by contract.

For legal counsel, these are "whether conditions"—whether or not you properly and adequately drafted the contract. Failure to do so results in a professional liability exposure.

ISO CG 20 37 provides additional insured status with regard to completed operations. This endorsement is subject to the same editions and issues pertinent to those editions.

In summary, there are hundreds of manuscript additional insured endorsements currently in use. These may (1) limit the parties covered, (2) limit the scope of coverage, (3) limit the operations coverage, and/or (4) add new exclusions.

Primary and Noncontributory Status

All general liability policies state that they are primary, unless any other insurance covering the same loss is also primary, in which case the primary policies share in payment of that loss. That is contrary to the desire of an upstream party who wants the downstream contractor's insurance to pay fully until it is exhausted without contribution from the upstream party's insurance. To achieve this goal ISO has issued a General Liability Primary & Noncontributory endorsement CG 20 01 04 13 which states that the Named Insured's coverage "is primary

and will not seek contribution from any other insurance available to an additional insured under [the Named Insured's] policy provided that:

(i) the additional insured is a Named Insured under such other insurance; and
(ii) [the Named Insured has] agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured."

Warning: Note that requiring that the downstream party's insurance be primary is not sufficient. The endorsement requires "primary and would not seek contribution".

Actual Manuscript Additional Insured Endorsement Example

"Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the schedule above, but only for 'bodily injury' or 'property damage' caused by [the Named Insured's] sole negligence or acts or omissions of the additional insured in connection with its general supervision of your work.

"When provided this additional insured status is excess of any and all other coverage available to the additional insured.

"No coverage is provided for damages because of "bodily injury" or "property damage" to employees of any insured."

What's wrong with this endorsement? At a minimum, the endorsement:

(i) fails to include coverage for any of the additional insured's direct joint, concurrent or sole negligence;
(ii) provides coverage on an excess liability basis only (the exact opposite of primary and noncontributory); and
(iii) adds an exclusion for third party over action claims.

If challenged in court, is this endorsement, in fact, the provision of additional insured status? Absolutely, yes. "Additional insured" simply means the party named as an additional insured in an additional insured endorsement. Simply requiring "additional insured status" without definition is meaningless. When that is the requirement, who picks which endorsement that will be provided for the protection of the additional insured? The downstream party's insurance company —truly an example of the fox being in charge of the hen house.

Do not permit endorsements of this type that fail to achieve the desired results, simply because of a lack of specificity. Require specific ISO form numbers. Require a broad listing of the parties to be included as the additional insured. Get a copy of the endorsement(s) being provided and read it (them) carefully.

Waivers of Subrogation

A general liability policy commonly states that when a waiver is required in writing prior to a loss, the policy will honor that requirement. For those that want additional protection, a general liability waiver of subrogation endorsement is readily available, ISO CG 24 04 05 09. This endorsement states:

> "We waive any right of recovery we may have against the person or organization shown in the Schedule above because of payment we make for injury or damage arising out of [the Named Insured's] ongoing operations or 'your work' done under a contract with that person or organization."

What could be simpler? See below.

Actual Manuscript Waiver of Subrogation Endorsement Example

"We waive any right of recovery we may have against the person or organization shown in the Schedule above because of payment we make for injury or damage arising out of your completed operations done under a contract with that person or organization so long as the injury or damage was caused by your sole negligence."

What is wrong with this endorsement? At a minimum, it:

(i) excludes waiving rights for ongoing operations (because of third party over action claims?); and
(ii) excludes waiving rights for any portion of any loss not caused solely by the Named Insured.

But again, is this the provision of a waiver of subrogation? Absolutely, yes. Do not let it happen to your client. These examples barely scratch the surface of the dangers of the everyday use of manuscripted endorsements.

Prohibited Exclusions and Limitations

Additionally, there are a large number of coverage reductions in everyday use by many insurance companies that eviscerate coverage but will never show up on most certificates of insurance. A few (far from all-inclusive) of the more critical such endorsements are:

(a) Amendment of Insured Contract Definition (ISO CG 24 26): As described above, this endorsement excludes coverage for the contractual assumption of another party's sole negligence.

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§A.3.2.2.2.4 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims for indemnity under Section 3.18 of the General Conditions arising out of injury to employee of the insured."

(b) Changes to Employer's Liability (Manuscript Exclusion): As described above, endorsements of this type exclude coverage for third party over actions.

§A.3.2.2.2.3 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims for bodily injury other than to employees of the insured."

§A.3.2.2.2.4 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims for indemnity under Section 3.18 of the General Conditions arising out of injury to employee of the insured."

(c) Classification or Business Description (Manuscript exclusion): This endorsement restricts coverage only to those classifications or descriptions specifically listed and excludes all others. For instance, if the classification or business description states "roofer" and that subcontractor performs any other type of work, no coverage will be provided for liabilities arising out of that other type of work.

§A.3.2.2.2.8 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims related to roofing, if the Work involves roofing."

(d) Continuous or Progressive Injury and Damage Exclusion (Manuscript): This, in the author›s opinion, is the worst endorsement in the liability insurance industry. While different insurance companies use different wording, the most damaging states:

"This insurance does not apply to:

"Any damages arising out of or related to 'bodily injury' or 'property damage' whether such 'bodily injury' or 'property damage' is known or unknown;

"Which first occurred in whole or in part prior to the inception date of this policy); or

"Which are, or are alleged to be, in the process of occurring as of the inception date of the policy; or

"Which were caused, or are alleged to have been caused, by the same condition(s) or defective construction which first existed prior to the inception of this policy."

A variety of questions and issues arise. Known to whom? This is not limited to known by the insured.

Alleged by whom? The insurance company adjuster, perhaps?

By a condition that existed prior to policy inception? A possibly unknown condition that had not caused any injury or damage previously? There may be, depending on state law, an argument that property damage may be covered under other policies, but what about bodily injury?

Assume that the policy incepted two months ago and a serious injury arose today from a condition that had unknowingly existed for the past few years. No coverage would be provided under the current policy incorporating this endorsement, and because most general liability policies cover only claims that arise during that policy period, no coverage is available under any prior policy. And of course, when this policy is renewed with the same wording, the issue compounds. This effectively becomes a claims-made coverage with no prior acts coverage and no extended reporting period.

Assume that the policy incepted two months ago and a serious injury arose today from a condition that had unknowingly existed for the past few years. No coverage would be provided under the current policy incorporating this endorsement, and because most general liability policies cover only claims that arise during that policy period, no coverage is available under any prior policy.

§A.3.2.2.2.3 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims for bodily injury other than to employees of the insured."

§A.3.2.2.2.6 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims or loss due to physical damage under a prior injury endorsement or similar exclusionary language."

(e) Contractual Liability Limitation (ISO CG 21 39): As described above, this endorsement excludes coverage for the contractual assumption of another party's negligence.

§A.3.2.2.2.4 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims for indemnity under Section 3.18 of the General Conditions arising out of injury to employee of the insured."

(f) Damage to Work Performed by Subcontractors on Your Behalf (ISO CG 22 94 or CG 22 95): General liability policies exclude damage to a contractor's own work (exclusion l.), but grant an

exception to that exclusion stating: "This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."

Because of this exception most construction defect claims get paid. These endorsements delete the exception, thereby deleting most construction defect coverage.

§A.3.2.2.2.2 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims for property damage to the Contractor's Work arising out of the products-completed operations hazard where the damaged Work or the Work out of which the damage arises was performed by a Subcontractor."

(g) Explosion, Collapse and Underground Property Damage Hazard (CG 21 42 or CG 21 43): An unmodified general liability policy no longer includes such exclusionary wording. This endorsement adds the exclusion.

(h) Habitational or Residential Exclusion (Manuscript): Every insurance company defines habitational or residential differently. It may be limited (e.g., to condominiums only) or quite broad (e.g., condos, apartments, spec homes, custom homes, tract homes, nursing homes, hospitals, jails, dorms, barracks – anything with a bed). If this is potentially important to the work, require a copy.

§A.3.2.2.2.7 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims related to residential, multi-family, or other habitational projects, if the Work is to be performed on such a project."

(i) Insured vs. Insured Exclusion (Manuscript): An Insured vs. Insured exclusion applies to both Named Insureds and Additional Insureds, and excludes coverage if an Additional Insured brings suit against a Named Insured when both are covered by the same policy. Note that a Named Insured vs. Named Insured exclusion is permissible, as that excludes coverage only among companies in the same economic family.

§A.3.2.2.2.1 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims by one insured against another insured, if the exclusion or restriction is based solely on the fact that the claimant is an insured, and there would otherwise be coverage for the claim."

(j) Limitation of Coverage to Designated Premises, Project or Operations (ISO CG 21 44): This endorsement restricts coverage only to those premises, projects or operations specifically listed and excludes all others.

§A.3.2.2.2.8 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims related to roofing, if the Work involves roofing."

(k) Prior Work (Manuscript Exclusion): This is effectively another quasi claims-made coverage in occurrence clothing. This endorsement excludes allegations arising from work that has been completed prior to the inception of current coverage. The result is that coverage is provided only with regard to work in progress at the time of policy inception or begun during that policy period.

§A.3.2.2.2.5 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims related to earth subsidence or movement, where the Work involves such hazards."

(l) Punitive, Exemplary or Multiplied Damages (Manuscript Exclusion): Punitive and exemplary damages require a high bar, but multiplied damages (in Texas, the Deceptive Trade Practices Act) are a much easier target and are included in essentially every pleading. If this exclusion cannot be eliminated in its entirety, strive to have it state that coverage shall be provided where permitted by law.

(m) Subsidence (Manuscript Exclusion): This endorsement excludes damage resulting from improper soil compaction, collapse of underground drains and similar exposures.

§A.3.2.2.2.10 of the 2017 AIA Insurance Exhibit prohibits any exclusion or restriction of coverage for "claims or loss excluded under a prior work endorsement or other similar exclusionary language."

(n) Work Height (Manuscript Exclusion): Some general liability insurance companies exclude coverage for work performed above a stated height. This may be stated in number of feet or stories.

Additional exclusions or restrictions of coverage prohibited by the 2017 AIA Insurance Exhibit are:

§A.3.2.2.2.9, pertaining to "claims related to exterior insulation finish systems (EIFS), synthetic stucco or similar exterior coatings or surfaces, if the Work involves such coatings or surfaces". It should be noted that insurance coverage for the installation of EIFS and related products is not readily available.

§A.3.2.2.2.11, pertaining to "claims related to explosion, collapse, and underground hazards, where the Work involves such hazards". The standard, unmodified ISO general liability policy no longer includes an XCU exclusion, but care should be taken to prevent it being endorsed onto a policy.

Builders Risk

Builders risk exposures are complicated and cannot be properly addressed in just a few sentences. Originally, the intent of builders risk insurance was to provide coverage to all parties involved in the construction so that any insurable issues could be transferred to an insurance

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company, thereby making the progress of the project smooth and uninterrupted by dispute. Today, however, we find that the description of builders risk coverage to be provided by an Owner or Contractor is increasingly onerous on a subcontractor. For example, many contracts will provide the following:

"Owner or Contractor may provide builder's risk insurance. If provided, Subcontractor agrees to waive its rights of subrogation in favor of Owner and Contractor. Subcontractor will be responsible for payment of any deductible. Subcontractor will be responsible for all damage to all property until final acceptance by Owner."

Four brief sentences, to which most people pay very little attention, but generate a potentially bankrupting exposure to the subcontractors performing the Work. This provision generates a number of issues regarding whether or not coverage is provided or how it is provided.

(i) How is the Subcontractor covered? As a Named Insured, as its interest may appear or as an Additional Insured? In many jurisdictions, neither status protects the subcontractor performing the work from subrogation by the builder's risk insurance company except to the extent of the subcontractors own financial interest in the work. If the subcontractor performed $3,000,000 work on a $25,000,000 project and inadvertently burned it down, the builder's risk carrier will likely subrogate for the $22,000,000 difference.

(ii) Require that the waiver of subrogation be mutual.

(iii) How much is the deductible? What if the Owner is a major corporation and has a $100,000 deductible? Limit the size of deductible that can be assessed to the subcontractor.

(iv) For what kind of loss is the deductible charged to a subcontractor? Any and all? Excluding acts of God? Limited to only losses caused by the negligence of the subcontractor?

(v) At what point is the work deemed covered? The above wording requires that the subcontractor be responsible for the property being installed and the labor to perform that installation while the property is off-site for storage, in transit to the job site, at the job site prior to installation, and even at the job after installation until final acceptance by Owner.

Contracts utilizing this wording fail to provide much builder's risk protection to the subcontractor.

Certificates of Insurance

It is widely recognized that certificates are replete with disclaimers and are not enforceable against the insurance companies list thereon. However, certificates of insurance can be an exceedingly valuable tool if properly utilized.

(i) First, require the proper form. An ACORD 25 Certificate of Liability Insurance is designed for liability insurance only. Do not permit any type of property insurance to be included. An ACORD 28 Evidence of Commercial Property Insurance should be used instead.

(ii) Detailed certificate requirements should be included in any contract. State clearly what must be provided and what exclusions or limitations are prohibited. The intent of this specificity is to get the other side's insurance agent to raise his or her hand now, while in negotiation, and state what coverage is not being provided and what alternatives may be available.

(iii) Require a copy of the Additional Insured endorsements provided.

(iv) Require a copy of the Schedule of Forms and Endorsements page(s) on at least the general liability coverage. This form lists all of the endorsements added to the standard policy. Are any of the prohibited endorsements included?

(v) There may be endorsements that you don't recognize. That's not unusual, as insurance companies make this stuff up (see manuscript endorsements, above). Demand a copy and review it carefully.

Armed with this information, you and your client will be able to make a better informed business decision about engaging the services of a contractor. Please remember, there are only two times where you will learn about such deficiencies – in negotiation or in litigation. Negotiation is far easier and less expensive.

Importance of Proper Drafting—Team Effort

It is critical for developers, contractors and subcontractors to understand both what insurance requirements they are obligated to satisfy contractually and what insurance requirements they should contractually require of the other party. In order to do so properly, it is important for each party to work closely with their respective insurance consultants and attorneys, utilizing a team approach with each member understanding their individual roles. It is the responsibility of the insurance consultant to identify the relative risks against which the client needs to be protected and making a recommendation as to how best to manage that risk. The client will then determine from a business perspective how best to manage that risk (e.g., through a combination of risk finance and risk retention). Finally, the attorney will assist the client in drafting the contract to properly incorporate the insurance requirements. Additionally, developers, contractors and subcontractors should continuously work closely with their insurance consultants and attorneys in order to confirm whether or not their current insurance satisfies those requirements and to ensure contracts are properly drafted to reflect the intended coverage. In most cases, parties should obtain and review copies of other parties' insurance policies (as opposed to simply requesting a certificate of insurance), as well as any other project-specific policies that may have been obtained, such as a

builders risk insurance policy or a wrap-up. It should go without saying that this should be done prior to executing the respective contracts. Finding out one of the parties failed to properly obtain insurance, especially if that insurance was thoughtfully required through the process described above, at the time of a potential claim, can be disastrous for everyone. ■

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Getting Help When Nothing is Wrong

Andrew P. Carroll | *Clark Hill PLC*

It is well-documented that lawyers traditionally feel that admitting they need help through regular therapy is seen as a sign of weakness. That they cannot "handle" the difficulties of their lives or jobs, and therefore must be weak. As we shift from that frame of thinking, another change in perspective should be considered: Should one see a mental health professional even when nothing is "wrong?"

I have personally dealt with various stress and anxiety induced issues, culminating in insomnia during my college years. Although at that age I assumed a little Ambien would do the trick, I was instead referred to therapy to try resolving the issues without immediately jumping to a prescribed solution. For the rest of college, I would regularly meet with a therapist to discuss both mechanisms for helping me sleep at night and life in general. By the time I graduated, my insomnia had greatly decreased and, after making additional changes, has been completely resolved for over a decade.

However, I later sought out regular mental health appointments again after a friend experienced a foreseeable episode if not viewed from the maximize-your-billables perspective of an attorney. I thought to myself, if only he had been seeing a professional *before* it reached a critical stage, perhaps it all could have been avoided. So I made my first appointment with a mental health professional despite being unsure of what one does in sessions when there isn't anything in particular to "cure"?

The answer is that you say whatever you want, and there need not be a target of your therapy. We all have friends and family we share our trials and tribulations with, but a mental health professional is specifically trained to handle both acute events and assess overarching patterns. They are strangers, yes, but in the most intimate way possible. Consider your own clients, who after many years of litigation, become someone who vents to you, discloses potentially embarrassing information about the case, and eventually has to trust you to convince 12 jurors that he did not err in exercising his professional skill. While you are only his attorney, there is a great deal of value in being able to speak openly and honestly—without the fear of judgment from a colleague, family member or even friend.

Regular therapy provides a similar reservoir for problems, big or small, and a truly judgment-free professional who can listen, advise, and be whatever you

— *Continued on next page*

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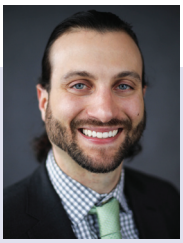
wish the therapist to be. Some people go once per week, others less than once per month. But with various in-person and virtual options now available, regular mental health therapy is as accessible as it has ever been. Therapists can be helpful whether you are going through a tough time or the happiest of times. In fact, both can be informative in assessing your well-being. So even if nothing is "wrong," consider seeking out a professional, because regularly assessing your mental health is the best way to keep things "right." ■



About the **AUTHOR**

Andrew P. Carroll is a Senior Attorney with *Clark Hill PLC* in Philadelphia. Mr. Carroll is a litigator with a diverse and complementary practice who represents professionals, mortgage lenders and servicers, and construction clients in both civil and disciplinary proceedings. He focuses his professional liability practice on representing attorneys and law firms in a variety of civil and disciplinary proceedings, including claims of legal malpractice, abuse of process, breach of fiduciary duty, violations of debt collection laws, wrongful use of civil proceedings and actions brought by state disciplinary boards. Andrew also represents attorneys in litigation relating to partnership dissolutions, third-party litigation funding and fee splitting disputes. He may be reached at apcarroll@clarkhill.com.

Welcome New Members

We are thrilled to welcome the following new members to the Association:

Adnan Arain | *Arthur J. Gallagher* | Oak Brook, IL

Patrice Asimakis | *LegalEase Solutions LLC* | Ann Arbor, MI

Jeremy Babener | *Structured Consulting, and law firm Lane Powell* | Portland, OR

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Lara Jo Taibi | *Argo Group* | New York, NY

Kyle Virgin | *Freeman Mathis & Gary, LLP* | Lexington, KY

Michael D. Wiese | *Smith Haughey Rice & Roegge* | Grand Rapids, MI

Kurt Zitzer | *Meagher + Geer, P.L.L.P.* | Scottsdale, AZ

Committee calls, some Committees have conducted joint calls, particularly with the Young Lawyers Committee, which has been productive and rewarding. We had an in-person meetup in NYC in December (pics available via the PLDF LinkedIn Group page (https://www.linkedin.com/groups/2558882/). Looking ahead, we are planning a short mid-year (virtual) "meeting" alongside several online presentations that are in the works. And the LinkedIn Group is now over 1.1K with new members joining every day. These increased contacts make membership more rewarding and reinforce a central focus: connecting people who work in the industry, as well as sharing ideas and knowledge.

2. Inclusion (DEI)

PLDF's diversity, equity, and inclusion efforts have started robustly. The Board's changes to the Diversity Statement are being implemented (https://www.pldf.org/page/MissionandDiversity). We are actively encouraging more diverse members to join and participate.

Our newly appointed Diversity Officer, Michelle Arbitrio, Esq. has fast become an invaluable resource and is actively forming a Diversity Committee/Action Group to further pursue strategies that incorporate and promote DEI. Please contact Michelle directly if you would like to become more involved in these initiatives, at: marbitrio@wshblaw.com

3. Support/Wellness

We are already more actively promoting attorney wellness and offering enhanced pandemic support resources to our members. See for example the new Attorney Wellness Tab on the PLDF website (https://www.pldf.org/general/custom.asp?page=AttorneyWellness). That page contains a link to a 50-state survey examining currently available attorney mental health and COVID-19 resources, nationwide. We will publish this survey shortly to increase awareness and reduce barriers to support. We will also have a segment at the upcoming annual meeting which focuses directly on attorney support and wellness. These resources help us, which in turn allows us to better help our clients.

4. Looking Forward/Substantive Contributions

We look forward to the September 14-16, 2022 Annual Conference in Chicago. The Planning Committee has already begun the work of crafting a great lineup of presentations.

Also look out for upcoming opportunities to publish in the *PLD Quarterly* and post to PLDF's Member LinkedIn Group at your convenience. More details of each can be found on www.pldf.org.

I look forward to seeing some of you on the next Committee Call (I try to make all of them), at the upcoming mid-year virtual meeting, and in Chicago in September. Until the next time, be well. ■

About the **AUTHOR**

Andrew R. Jones is a Partner in the New York City law firm of *Furman Kornfeld & Brennan LLP*. Mr. Jones' practice focusses on professional liability and includes the direct defense of lawyers, insurance brokers and other professionals, as well as giving advice to domestic and international insurers, including insurance program management. Mr. Jones has tried cases in Federal and State Courts and handled international and domestic arbitrations. He has lectured extensively on various professional liability defense matters. Mr. Jones is admitted as an attorney in New York, and is a Solicitor admitted to practice in England & Wales. He may be reached at ajones@fkblaw.com.

Association News

Taibi and Sawhney Appointed

We are pleased to announce that **Lara J. Taibi** of *Argo Group* in New York and **Sareena Sawhney** of *Withum* in New York have been appointed to serve in committee leadership. Ms. Taibi will become the Vice Chair of the A&E, Construction and Real Estate Design Professionals and Ms. Sawhney will become Vice Chair of the D&O/Trustee E&O Committee. ■

Lara J. Taibi
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Sareena Sawhney
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PLDF Young Professional Membership

Understanding and responding to the needs of the next generation of attorneys is of paramount importance to us. In an effort to help our young attorneys advance their careers and develop important connections in the professional liability community, PLDF is proud to announce that effective immediately membership for young attorneys (those in practice 5 years or less) is now 50% off our regular dues.

If one of your professional liability colleagues is looking for an organization where they can advance their career and network with professional liability counsel and claims professionals, please encourage them to take a look at PLDF and Join Today! ■

SAVE THE DATE!

Please make plans to join us September 14-16 for the 2022 PLDF Annual Meeting in Chicago. We are excited to offer lively discussions of developments in professional negligence claims and fantastic networking! Learn more at www.PLDF.org.

JOIN US IN THE WINDY CITY!

We cannot wait to get back together with you and have already begun planning for our Annual Meeting. Please mark September 14-15 on your calendar and make plans to join us in Chicago.

The Annual Meeting will feature exceptional education programs, great tours, a wonderful group dinner, and a fantastic opportunity to mix and mingle with old (and new!) friends and colleagues from across the country. We can't wait to see you there!

ANNUAL MEETING SPONSORSHIP

We are excited to once again offer an opportunity for your firm to participate in this special event. With your firm by our side, we're sure to have a successful event. Please review the Annual Meeting Sponsorship Opportunities available here: https://www.pldf.org/page/AnnualMeetingFirmSponsorship and contact our staff to secure your sponsorship.

EXHIBIT OPPORTUNITY

We will also offer opportunities for vendors to participate in the Annual Meeting in Chicago. Please feel free to share this link to our Exhibitor Opportunities: https://www.pldf.org/page/AnnualMeetingVendorSponsorship with the vendors you work with.

Professional Liability Defense Federation

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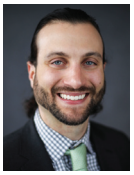

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