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## NEWSLETTER

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### CARRIER ESTOPPED FROM DENYING COVERAGE DUE TO UNREASONABLE DELAY

by Francis P. Cuisinier

This is an insurance coverage case involving the duty to defend under an additional insured endorsement in a CGL policy issued in connection with a construction subcontract. Fernando Berrera was injured on a construction site while employed by Pinto Construction Company, a subcontractor. Pinto was insured by Country Mutual Insurance Company. Berrera's complaint for personal injury named the general contractor, Mota Construction Company, and another subcontractor, GM Sloan Mosaic Tile Company, as defendants. Sloan was insured by Westfield Insurance Company. Westfield's policy had an additional insured endorsement, limiting its

liability to that "which may be imputed to the additional insured by virtue of the conduct of the named insured".

The complaint in the underlying bodily injury action alleged that Mota, as the general contractor, retained control over the work and safety of the project and through the manner in which it scheduled and coordinated the work controlled the means and manner of work of the subcontractors during the construction process. The complaint contained similar negligence allegations against Mota and Sloan alleging a failure to inspect, supervise, clean and provide proper lighting as well as permitting dangerous conditions to exist. Mota initially tendered its defense to Westfield, Sloan's carrier. Westfield denied the tender on the grounds that the additional insured endorsement only provides coverage for vicarious liability, whereas the complaint against Mota alleged direct negligence resulting from its failure to supervise the project. Mota then tendered its defense to Country Mutual, which proceeded to defend the case under its additional insured endorsement. Prior to trial, Mota and Country Mutual filed a declaratory judgment action. Westfield proceeded to file a counterclaim for declaratory judgment. Cross motions for summary judgment were filed. The trial court granted summary judgment for Westfield. The appellate court, First District, reversed.

The appellate court held that Westfield's duty to defend was triggered by allegations that potentially fell within the coverage of



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the additional insured endorsement. The court noted that the complaint against the general contractor was not based solely upon the theory of negligent supervision. The allegations that Mota retained control over the manner and method of the work gave rise to the possibility of vicarious liability.

The appellate court also held that Westfield was estopped from denying coverage because of its unreasonable delay in filing a declaratory judgment action. In this instance, 16 months elapsed from the date in which Westfield had actual notice of the underlying case until it filed its counterclaim for declaratory judgment. The court recognized that there is a split in authority on the issue of when a declaratory judgment action is timely filed. One group of cases has required only that the declaratory judgment action be filed before the underlying suit is resolved. A second group of cases has looked to whether the trial or settlement was eminent at the time the insurer sought declaratory relief. Finally, a third group of cases has focused on whether the insurer filed its action within a reasonable time of being notified of the underlying suit. State Automobile Mutual Insurance Co. v. Kingsport Development, LLC, 364 Ill.App.3d 946, 846 N.E.2d 974 (2d Dist. 2006). The court agreed with the decision in Kingsport that the reasonable time test is the best approach in determining whether an insurer's declaratory judgment action was timely.

*Mota Construction Company v. Westfield Insurance Company*, (1st Dist. 2009).

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## INTENTIONAL OR CRIMINAL ACTS EXCLUSION UPHELD

by Francis P. Cuisinier

Greer is a coverage case involving the construction and application of the intentional or criminal acts exclusion of a homeowner's insurance policy. The case arises out of the tragic death of a minor who was killed in an automobile accident. The minor had been at a party at the insureds' residence where he had become intoxicated. The owners of the residence were found guilty on a criminal charge of serving alcohol to a minor in violation of 235 ILCS 5/6-16 (West 2006) (declaring that "No person after purchasing or otherwise obtaining alcoholic liquor, shall sell, give, or deliver such alcoholic liquor to another person under the age of 21 years.")

The decedent's parents filed a wrongful death action alleging that Allstate's insureds were liable for damages because they supplied alcoholic beverages to the decedent, causing him to be intoxicated and impaired, which caused him to die while driving a motor vehicle. Allstate filed a declaratory judgment action arguing that the allegations of the wrongful death complaint fell squarely within one of their policy exclusions which read "We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. . . This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime."

The appellate court affirmed the trial court's order granting summary judgment in Allstate's favor. The court held that a comparison of the allegations of the underlying complaint to the provisions of the insurance policy showed that Allstate did not have a duty to defend, finding that the allegations described criminal conduct under the Illinois Criminal Code. The decedent's parents argued that the exclusion did not apply absent evidence of intent, noting that the allegations of the complaint could be construed as either negligent or intentional conduct. The court rejected the argument on the grounds that the exclusion expressly contains a criminal act exclusion under which coverage would be barred irrespective of its intentional act exclusion.

*Allstate Insurance Company v. Greer*, 396 Ill.App.3d 1037, 921 N.E.2d 793 (3d Dist. 2009)

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#### ERISA STANDARD OF REVIEW BOLSTERED IN FAVOR OF PLAN ADMINISTRATOR

by Paul A. Farahvar

In April, the U. S. Supreme Court confirmed the deference owed to plan administrators of ERISA benefit plans where the plan documents gave discretionary authority to the plan administrator.

In Conkright v. Frommert, 130 S.Ct. 1640 (2010), the United States Supreme Court faced the issue of when discretion must be given under ERISA when the defendant, Xerox Corporation's pension plan and the

plan administrator mistakenly interpreted the time value of money to plaintiffs, former employees of Xerox, who received lump sum distributions of their benefits when they were rehired. In interpreting the plan, the plan administrators applied their interpretation of the plan to calculate benefits. The Second Circuit Court of Appeals disagreed with the interpretation and later, the plan administrator changed its interpretation to account for the time value of money using an interest rate fixed as opposed to the method first used. The Second Circuit again disagreed with the plan administrator's interpretation, failing to give it any deference, and the defendants appealed.

The Supreme Court ruled that the plan administrator's second interpretation of the Plan-accounting for the time value of money- is subject to a deferential standard of review under ERISA. Citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948 (1989) and the plan's own terms, the Supreme Court ruled that the plan administrator would normally be entitled to deference when interpreting its own plan. By making an exception to this deference, the Second Circuit Court of Appeals, violated ERISA. The Supreme Court found no basis in prior cases or otherwise for this exception, rejecting this novel "one-strike-and-you're-out" approach. As such, it overturned the Second Circuits' decision and remanded the case.

This ruling strengthens the language of a plan and the deference given to a plan administrator under ERISA. This decision

stresses the importance of clear language in plan documents and summary plan descriptions which is shown to be even more beneficial to a plan administrator or an insurance carrier who provides benefits to an employer under ERISA. By giving clear discretionary authority to a plan administrator, it can be assumed that Courts will now give even more broad deference to their interpretations of the plan, so long as that interpretation is made in good faith.

*Conkright v. Frommert*, 130 S.Ct. 1640 (2010)

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### **\*RECENT WINS\***

PAUL A. FARAHVAR recently obtained summary judgment in the matter of John v. OneSource, et al. Plaintiff claimed injury as a result of falling ice outside a high rise building in the Chicago loop. Our office represented the maintenance company. Plaintiff was represented by Clifford Law Offices. Mr. Farahvar argued that the maintenance company was entitled to summary judgment on the basis that the maintenance company was not responsible for clearing ice from the structure of the building.

PAUL A. FARAHVAR also recently obtained summary judgment in the matter of Killian v. Concert Health Plan. Plaintiff's decedent sued the decedent's health insurance carrier and employer claiming he was entitled to payments of medical bills which fell outside of the insurance coverage. Plaintiff disputed

the carrier's decision not to pay the medical bills of a health care provider who was not within the carrier's network of providers. Our office represented the health insurance carrier. The Court granted summary judgment holding that the carrier's decision was neither arbitrary nor capricious.

VICTORIA R. BENSON obtained a transfer of a pending matter from Cook County to Kane County pursuant to a Motion to Transfer based upon *forum non conveniens*.

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### **UPCOMING EVENTS**

Current Trends in Cook County Litigation: July 15, 2010. Pat Cuisinier will be a guest speaker at this Council on Litigation Management event. To RSVP for the event, please go to [www.litmgmt.org/rsvp/IL10](http://www.litmgmt.org/rsvp/IL10).

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If you would like a full copy of any opinion discussed in our newsletter, please contact Victoria R. Benson ([vbenson@cfblaw.net](mailto:vbenson@cfblaw.net)).