

Claims Notes: September 2024

CALIFORNIA

Insurer Not Bound by Employees' Opinions that Suit Raised Potential for Coverage

Litigation arose over whether a suit for misrepresentation and breach of contract arising out of an easement triggered a Commercial General Liability (CGL) insurer's duty to defend. Internal confidential communications reflected that, on several occasions, the claims professionals expressed the opinion that the suit potentially triggered the duty to defend. The policyholder contended these admissions proved the insurer owed a duty to defend.

The California Court of Appeals disagreed, reasoning that whether the insurer had a duty to defend is a legal question for the court. It found no duty to defend because no occurrence was alleged. The court further explained that "If [claims professionals'] opinions were deemed to be binding upon [the insurer], free discussion among insurance company employees would be seriously impeded. An employee would be reluctant to express an opinion that the company had a duty to defend for fear that the opinion would be discoverable and would be used against the company if it decided not to defend." *Decision.*

MASSACHUSETTS

Faulty Work is Not Property Damage under a CGL Policy

A jury found a custom home builder responsible for numerous construction defects. The builder's CGL insurer intervened, seeking a declaration it had no duty to indemnify the builder. The Massachusetts Appeals Court ruled that construction defects without resultant damages are not property damage within the meaning of a CGL policy. The court declined to determine whether there had been an occurrence. *Decision.*

INDIANA

Unlicensed Drivers Cannot Possess Reasonable Belief of Permission

Howard injured the claimant while driving Smith's auto with her permission. Howard did not have a valid driver's license. The auto liability policy excluded coverage where the driver does not have a reasonable belief of entitlement to drive the auto. The insurer denied coverage on this basis, explaining that "[a]lthough you were given permission to use [the auto], ... you did not have a valid driver's license...." The insurer filed a declaratory judgment action against the claimant. The claimant's summary judgment motion included Smith's affidavit stating that she permitted Howard to drive her auto. In Indiana, an unlicensed driver cannot possess a reasonable belief of entitlement when they cannot legally drive on public highways. As such, the appellate court affirmed summary judgment to the insurer. *Decision.*

UTAH

Liquor Liability Policy: Assault & Battery Exclusion Defeated Duty to Defend Dramshop Claim

A nightclub overserved a patron who punched the claimant in the parking lot. The claimant sued the nightclub for dramshop violations. The nightclub tendered to its liquor liability insurer, which denied a duty to defend based on an absolute assault and battery exclusion. The claimant and insured executed a consent judgment and assigned all rights in the policy to the claimant. The claimant



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sued the insurer, contending that it wrongfully denied a defense and that the assault and battery exclusion either did not apply or was ambiguous.

The Tenth Circuit Court of Appeals disagreed, ruling that it was obvious that the claimant's injuries arose from an assault and battery. The claimant alleged her assailant followed her out to her car and "struck [her] in the face." As such, the liquor liability insurer did not breach its duty to defend and did not owe coverage for the consent judgment. *Decision*.

NEW YORK

No Refund Owed on Structured Payments in Universal Life Insurance Dispute

Unlike term or whole life insurance, universal life insurance allows policyholders to make flexible payments into an interest-bearing account. The insurer deducts monthly fees and insurance costs, with the remaining funds growing tax-free. New York law requires life insurers to refund any excess *premium actually paid* upon a policyholder's death.

A dispute arose when an insurer refused to refund the remaining structured premium, claiming it was fully earned. The policyholder's trust sued, arguing that this violated New York law. The Second Circuit asked New York's high court if such payments are premium actually paid under New York law. The New York Court of Appeals concluded that this is not the case because a policyholder can withdraw money from the account. Instead, the insurer's monthly deductions cover the insurance and keep the policy active. As such, the life insurer could keep the remaining premium as fully earned. *Decision*.
