

# Professional Services Exclusion, Prejudgment Interest, Control of Defense, Stop-Gap Endorsement Coverage Update

November 1, 2017

**Florida, Oregon, Massachusetts, West Virginia Coverage Cases**

*The e-POST*

## **Professional Services Exclusion – Eleventh Circuit (Florida Law)**

***Witkin Design Grp., Inc. v. Travelers Prop. Cas. Co. of Am.***

--- Fed. Appx. ---, 2017 WL4708164 (11th Cir. Oct. 19, 2017)

The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's ruling that the professional services exclusion in a commercial general liability policy issued by Travelers Property Casualty Company of America (Travelers) applied to preclude insurance coverage (defense and indemnity) to Witkin Design Group, Inc. (Witkin) for a lawsuit alleging that it negligently designed a traffic intersection that caused the death of an 11-year-old child. The professional services exclusion stated that there was no insurance coverage for any "[b]odily injury or property damage arising out of the rendering of or failure to render any professional services." "Professional services" was defined as "any service requiring specialized skill or training." The appellate court found that this exclusionary language plainly applied to preclude coverage because "[t]he professional service[s] exclusion applies to any service requiring specialized skill or training, such as the services" at issue in the underlying lawsuit. The appellate court concluded that the "conduct of Witkin in designing and constructing the intersection" was architecture and construction services that required "specialized skill or training" and thus they fell "squarely within the professional services exclusion[]."

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## **Prejudgment Interest – Ninth Circuit (Oregon Law)**

***Kollman v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.***

--- Fed. Appx. ---, 2017 WL 4708352 (9th Cir. Oct. 19, 2017)

The U.S. Court of Appeals for Ninth Circuit ruled that an insured was entitled to prejudgment interest under Oregon Revised Statute § 82.010(1)(a), which provides that the rate of interest is nine percent per annum and is payable on "[a]ll moneys after they become due." Under Oregon law, "a party can receive prejudgment interest only when the 'exact pecuniary amount was either ascertained, or

ascertainable by simple computation, or by reference to generally recognized standards such as market price,' and where 'the time from which interest ... must run ... can be ascertained.'" The appellate court determined that both the amount due to the insured and the interest start date were ascertainable. The amount due, according to the appellate court, was ascertainable because it was calculated by "simple computation." The appellate court also determined that the interest start date was ascertainable because it was the date the insurer "became obligated to make payments under the terms of its policy, " which arose following a September 2004 state court judgment. Ultimately, the appellate court remanded the case to the district court to calculate the amount of interest owed.

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### **Control of Defense – Massachusetts**

#### ***OneBeacon Am. Ins. Co. v. Celanese Corp.***

--- N.E.3d ---, 2017 WL 4583266 (Mass. App. Ct. Oct. 16, 2017)

The Massachusetts Appeals Court held that an insurer was entitled to control the defense of its insured because there was no conflict of interest in such a defense. Celanese Corporation (Celanese) was subject to numerous legal actions involving claims of bodily injury from asbestos and chemicals allegedly contained in Celanese's products. Celanese tendered these claims to its insurer OneBeacon American Insurance Company (OneBeacon). OneBeacon agreed to defend Celanese against the asbestos and chemical actions without a reservation of rights if OneBeacon could assume full control of Celanese's defense of the lawsuits. Celanese refused to cede control of its defense, asserting that a conflict of interest existed between Celanese and OneBeacon regarding the appropriate way to conduct the defense of the underlying claims. Celanese argued that it placed a high priority on its reputation and, therefore, wanted to publicly defend and rebut any claims, while OneBeacon's focus was on reducing the volume and costs of pending cases. The appellate court rejected Celanese's argument, finding that Celanese and OneBeacon entered into a contractual agreement that required Celanese to pay a certain amount of money to insure against a particular risk, and protecting Celanese's reputation was not something that OneBeacon was required to insure or defend. Ultimately, the appellate court concluded that "[s]ince Celanese has not demonstrated that a sufficient conflict of interest exists, it unjustifiably refused OneBeacon's offer to defend without a reservation of rights."

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### **Stop-Gap Endorsement – West Virginia**

#### ***First Mercury Ins. Co., Inc. v. Russell***

--- S.E.2d ---, 2017WL 4766729 (W. Va. Oct. 19, 2017)

The West Virginia Supreme Court of Appeals held that a stop-gap endorsement was ambiguous such that the insured was entitled to coverage with respect to an underlying deliberate intent lawsuit. The

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insured's employee suffered a workplace injury and subsequently brought a statutory deliberate intent action against the insured, asserting that the insured acted with deliberate intention in requiring the employee to perform his job duties without adequate safety measures. In analyzing whether there was coverage under the commercial general liability policy, the appellate court first noted that stop-gap coverage is generally applicable when employee claims are not compensable under the workers' compensation scheme. The appellate court further found that the heading of the endorsement denoting "Stop Gap" coverage "plainly indicates the policy provides ... coverage for a deliberate intent action," which was inconsistent with the language in the endorsement limiting coverage only to "bodily injury by accident" or "bodily injury by disease." The appellate court further found that an exclusion in the stop-gap endorsement, which precluded coverage for statutory deliberate intent actions, was also ambiguous. The appellate court ruled that "[b]y purporting to exclude deliberate intent actions from the Stop Gap endorsement, the ... policy largely nullifies the purpose of the coverage, which is to fill the gap in the commercial general liability policy and provide protection for employees' bodily injury claims." The appellate court ultimately found that "[s]uch ambiguous policy language must be construed against the insurance company and in favor of the insured so as to support the purpose of indemnity."

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