IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 20-0238

ALPS PROPERTY & CASUALTY INSURANCE COMPANY, d/b/a Attorneys Liability Protection Society, A Risk Retention Group,

Plaintiff/Appellee,

v.

KELLER, REYNOLDS, DRAKE, JOHNSON & GILLESPIE, P.C., RICHARD GILLESPIE, BRYAN SANDROCK, GG&ME, LLC, a Montana Limited Liability Company, and DRAES, INC., a Montana Close Corporation, CHARLES JOSEPH SEIFERT and THOMAS Q. JOHNSON,

Defendants/Appellants.

AMICUS CURIAE BRIEF OF AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION

On Appeal from the First Judicial District Court,
Lewis & Clark County, Montana
Cause No. ADV-2016-463
Honorable Mike Menahan

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I. INTRODUCTION, SUMMARY OF ARGUMENT & INTEREST OF AMICUS CURIAE

American Property Casualty Insurance Association ("APCIA") respectfully submits this amicus curiae brief to provide background on several basic concepts of insurance, including risk pooling, known losses, and the distinction between claims-made and occurrence-based policies. APCIA also analyzes the potential consequences if this Court expands the common law innocent insured doctrine to re-write a claims-made insurance policy and provide coverage for known losses.

II. FACTUAL BACKGROUND

In this amicus brief, APCIA focuses on insurance concepts rather than the specific facts before this Court.

III. ARGUMENT

A. Risk Pooling and the Known Loss Doctrine

Fundamentally, a legal malpractice insurance policy allows an insured law firm to shift certain risks to an insurance carrier. 1 New Appleman Insurance Law Practice Guide 1.03 (2020); *Clougherty Packing Co. v. Commissioner*, 811 F.2d 1297, 1300 (9th Cir. 1987) ("historically and commonly insurance involves risk-shifting and risk-distributing") (quoting *Helvering v. Le Gierse*, 312 U.S. 531, 539 (1941)).

An insurance carrier agrees to accept certain defined risks from the law firm, and pools that risk with the risks from other law firms. Through risk pooling, the insurance carrier averages the risks and the losses from multiple law firms. After multiple risks are pooled, the law of large numbers makes the average risks and the average losses more predictable and stable. By knowing the average risks and losses, the insurance carrier can actuarially determine the appropriate premiums that cover the average costs of the risks. 1 New Appleman Insurance Law Practice Guide 1.05 (2020); *Sears, Roebuck & Co. v. Comm'r*, 972 F.2d 858, 863 (7th Cir. 1992) ("as the size of the pool increases the law of large numbers takes over, and the ratio of actual to expected loss converges on one. The absolute size of the expected variance increases, but the ratio decreases."); *Clougherty*, 811 F.2d at 1300 ("By assuming numerous relatively small, independent risks that occur randomly over time, the insurer smoothes out losses to match more closely its receipt of premiums.").

The concept of risk pooling only works, however, if the loss is fortuitous rather than inevitable. 1 New Appleman Insurance Law Practice Guide 1.05, 1.06 (2020). No insurance carrier would agree to insure a house that was already on fire. Similarly, an insurance carrier would not issue a claims-made legal malpractice policy that provided coverage for a claim that the insured

already knew was made or was likely to be made. *See* 1 New Appleman Insurance Law Practice Guide 1.06 (2020) (noting that the "fundamental principle of insurance is that it responds to risk, not certainty"); *Capitol Specialty Ins. Corp. v. Big Sky Diagnostic Imaging, LLC*, No. CV 17-54-BLG-SPW-TJC, 2019 U.S. Dist. LEXIS 45234, at **26-27 (D. Mont. Jan. 30, 2019) ("Known loss exclusions 'embody the concept that one may not obtain insurance for a loss already in progress, or for a loss that the insured either knows of, planned, intended, or is aware is substantially certain to occur.'" (quoting 43 Am. Jur. 2d *Insurance* § 469 (WestNext through Aug. 2013)); *Upper Deck Co. v. Endurance Am. Specialty Ins. Co.*, No. 10cv1032 JM(WMC), 2011 U.S. Dist. LEXIS 148668, at *18 (S.D. Cal. Dec. 15, 2011) ("Insurance typically is designed to protect contingent or unknown risks of harm, not to protect against harm that is certain or expected." (quoting *Chu v. Canadian Indem. Co.*, 274 Cal. Rptr. 20, 25 (Ct. App. 1990)). For this reason, all insurance policies preclude coverage for known losses and losses that the insured expects will occur.

Indeed, the common law known loss doctrine provides that it would be against public policy for an insurance company to provide coverage for known losses. *Burch v. Commonwealth Cty. Mut. Ins. Co.*, 450 S.W.2d 838, 840-41

(Tex. 1970) ("[I]t is contrary to public policy for an insurance company, the business of which is affected with a public interest, knowingly to assume the burden of a loss that occurred prior to making the contract. This is the basis of the statements found in some opinions that an agent has no authority to issue a policy to cover a known loss."); *see also Buckeye Ranch, Inc. v. Northfield Ins. Co.*, 839 N.E.2d 94, 104 (Ohio Ct. Com. Pl. 2005) (the "known loss doctrine", or "fortuity" doctrine is premised upon the idea that "one cannot buy insurance coverage for a loss already known to be in progress, or for a loss that the insured planned, intended, or is aware is substantially certain to occur." (citing 43 Am. Jur. 2d *Insurance* § 479 (2004)); Scott C. Turner, *Insurance Coverage of Construction Disputes* § 3:18 (2011) ("The principle of public policy that insurance should only cover fortuitous losses is universally recognized."); 7 Lee R. Russ and Thomas F. Segalla, *Couch on Insurance*, § 102:8 (3d ed. 2011) ("losses which exist at the time of the insuring agreement, or which are so probable or imminent that there is insufficient 'risk' being transferred between the insured and insurer, are not proper subjects of insurance").

The United States District Court for the District of Montana has enforced the policy language arising out of the known loss doctrine. The Court adopted the two-prong "subjective-objective" test to determine whether an exclusion

based on prior knowledge applies. *See Capitol Specialty Ins.*, 2019 U.S. Dist. LEXIS 45234, at *27 ("Under this approach, the court first 'asks the subjective question of whether the insured knew of certain facts and then asks the objective question of whether such facts could reasonably have been expected to give rise to a claim.'" (quoting *Am. Special Risk Mgmt. Corp. v. Cahow*, 192 P.3d 614, 625 (Kan. 2008)).

As discussed below, coverage only exists under the legal malpractice policy that is in effect on the date an insured becomes aware of the potential claim. Known claims that are reported to the insurance carrier in a later policy year are not covered pursuant to the grant of coverage in a claims-made policy and the exclusion for known claims. This is consistent with the well-recognized principle that insurance never provides coverage for known losses.

B. Claims-Made Legal Malpractice Policies

Nearly all legal malpractice policies are written on a claims-made-and-reported basis. Nevertheless, it is important to understand the difference between an "occurrence-based" and a "claims-made" policy. An occurrence-based policy provides coverage for any incident that occurred while the policy was in force, regardless of when the claim is actually made. 1 New Appleman Insurance Law Practice Guide 1.12 (2020). Many toxic tort claims have

triggered occurrence-based policies dating back decades, because of allegations that the occurrence happened decades before, during the policy period. *See, e.g., R.T. Vanderbilt Co. v. Hartford Accid. & Indem. Co.*, 156 A.3d 539 (2017) (discussing insurance coverage for long latency toxic torts such as asbestos).

Claims-made and reported policies, in contrast, only provide coverage for a new claim that is first made against the insured and first reported to the insurance carrier during the policy period. As addressed above, losses and known claims are never covered under any type of insurance policy. If a new claim is not made or is not reported during that policy period, no coverage exists under that policy, even if the error or omission occurred during that policy period. 20-130 Appleman on Insurance Law & Practice Archive § 130.3 (2nd 2011); *Banjosa Hosp., LLC v. Hiscox, Inc.*, No. CV 17-152-BLG-TJC, 2018 U.S. Dist. LEXIS 165537, at *9 (D. Mont. Sept. 26, 2018) ("coverage under a claims-made policy is 'determined by claims made within the policy period, regardless of when the events that caused the claim to materialize first occurred' . . . 'notice is the event that actually triggers coverage.'" (internal citation omitted)).

Because insurance is never available under a future policy for a known claim, some insureds have attempted to expand the reporting period to report a

previously known claim under an already expired policy in order to trigger coverage under the expired policy. Numerous courts have rejected such attempts to re-write the unambiguous policy terms to expand the reporting period and provide such coverage under an expired policy. *See, e.g., Burns v. Int'l Ins. Co.*, 929 F.2d 1422, 1425 (9th Cir. 1991) (declining to expand the reporting period by applying the notice-prejudice rule, because that would be "to rewrite the policy, extending the policy's coverage at no cost to the insured"). Some courts have recognized that the premium rates reflected the clearly defined window within which a claim could be made, and requiring occurrence-based coverage would result in exorbitant rates. *See Brander v. Nabors*, 443 F. Supp. 764, 773-74 (N.D. Miss. 1978) ("Obviously, it is not against the public interest that professional practitioners, for example, doctors, lawyers, engineers, and architects, be able to obtain insurance on a reasonably structured 'claims made' basis, rather than being left in the position of being able to obtain insurance only on an 'occurrence' basis at what may perhaps be exorbitant rates that few could afford."). Other courts have upheld claims-made policies on public policy grounds or by simply enforcing them. *See Zuckerman v. Nat'l Union Fire Ins. Co.*, 495 A.2d 395, 400 (1985) (collecting cases in which claims made policies have been upheld).

A claim may be based on an unknown error or omission that occurred prior to the inception date of the policy. In those circumstances, the retroactive date or loss inclusion date in the policy would determine whether coverage would exist under the policy. If a law firm changes legal malpractice carriers, and the new policy will not provide retroactive coverage, the law firm can purchase an extended reporting period endorsement from its previous insurance carrier. This extended reporting period endorsement will extend the reporting period under the previous policy and provide coverage for unknown losses arising out of errors and omissions occurring prior to the retroactive date or loss inclusion date of the new policy. A retiring attorney can similarly purchase an extended reporting period endorsement to provide coverage after retirement for unknown claims that may later arise. 4 New Appleman on Insurance Law Library Edition § 25.01 (2020); *Zuckerman*, 495 A.2d at 397 (noting the policy provision allowing for the purchase of an extended reporting period).

Some legal malpractice policies were initially written as occurrence-based policies. However, insurance carriers were not able to accurately predict the risk associated with these occurrence-based policies, because often an injury would not occur until years after the negligent act or omission. This left the insurance carriers with an unpredictable "tail" of liability coverage. 4 New

Appleman on Insurance Law Library Edition § 25.01 (2020). *Zuckerman*, 495 A.2d at 399 (noting that occurrence policy premiums were "grossly inadequate to cover the inflationary increase in the cost of settling claims asserted years later" and that "new theories of recovery in tort law and increased consumer awareness have contributed to an increase in the number of claims that undermines the actuarial basis for premiums on occurrence policies issued years earlier"). By switching to a claims-made and reported form, the insurance carriers were able to more accurately price the risk and ensure the premiums they charged reflected that risk. *See, e.g., Sigma Fin. Corp. v. Am. Int'l Specialty Lines Ins. Co.*, 200 F. Supp. 2d 710, 716-17 (E.D. Mich. 2002) ("because notice during the policy period is a prerequisite for coverage, a claims made policy benefits the insurer by allowing it to 'close its books' on a policy at its expiration date, restricting its liability to a finite period of time, thus permitting 'a level of predictability unattainable under standard occurrence policies'" (internal citations omitted)). This allowed the insurance carriers to lower the premium costs to reflect the risk of a one-year policy, as opposed to the unlimited exposure of the occurrence-based policies. *Zuckerman*, 495 A.2d at 399, 406 (finding that claims made policies allow the underwriter "to calculate risks and premiums with greater exactitude since the insurer's

exposure ends at a fixed point," and that expanding the notice period bargained for in a claims-made policy would "significantly affect both the actuarial basis upon which premiums have been calculated and, consequently, the cost of 'claims made' insurance"); *FDIC v. St. Paul Fire & Marine Ins. Co.*, 993 F.2d 155, 158 (8th Cir. 1993) (A claims made policy also "allows the insurer to more accurately fix its reserves for future liabilities and compute premiums with greater certainty." (citing *City of Harrisburg v. Int'l. Surplus Lines Ins. Co.*, 596 F. Supp. 954, 960 (M.D. Pa. 1984))).

C. Known Losses and Reasonable Expectations

A typical malpractice insurance policy application will ask whether any applicant is aware of any facts, events, or circumstances that may lead to a claim, or has any reason to believe that a claim may be made. 4 New Appleman on Insurance Law Library Edition § 25.02 (2020). Such application questions underline the significance of accurate information, and the application itself typically warns of the consequences of the time-limited coverage. Answering these application questions annually should provide each insured attorney with a reminder to timely report any potential claims under their current policy before the policy period ends and their opportunity to obtain coverage for the claim is lost. *See, e.g., Banjosa Hosp., LLC*, 2018 U.S. Dist.

LEXIS 165537, at *17 (analyzing a claims-made policy and finding that "[b]ecause the Claim was untimely, no coverage exists under the Policy").

These application questions also inform an insured's reasonable expectations regarding what coverage will be provided under the next year's claims-made policy. *See, e.g., Fisher v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 208, ¶ 20, 371 Mont. 147, 305 P.3d 861 ("[T]he reasonable expectations doctrine is inapplicable where the terms of the policy at issue clearly demonstrate an intent to exclude coverage." (internal citations omitted)). Indeed, many applications include an explicit warning that the failure to timely disclose a claim may result in the loss of coverage for the claim. *See, e.g.,* App. Appellants' Keller, Reynolds, Drake, Johnson & Gillespie, P.C. & Charles J. Seifert & Thomas Q. Johnson, Aug. 17, 2020, App. 11 at 6: Notice Appl., Nov. 26, 2015 ("[T]he failure to reveal timely facts or circumstances which may give rise to a claim against current or prior insureds, may result in the absence of coverage for any matter which should have been reported or may result in the failure of coverage altogether."; *see also ALPS Prop. & Cas. Ins. Co. v. McLean & McLean, PLLP*, 2018 MT 190, ¶ 56, 392 Mont. 236, 425 P.3d 651 (Dissent) (noting that such warnings shape an insured's reasonable expectations of coverage).

The warnings in the application for insurance simply buttress the sound public policy of requiring accurate reporting of claims to insurers. "[T]he public policy of the State of Montana is set by the Montana legislature through its enactment of statutes . . . ." *Duck Inn, Inc. v. Mont. State Univ.-N.*, 285 Mont. 519, 523, 949 P.2d 1179, 1182 (1997). Montana's legislature has codified the importance of providing accurate information to insurers by criminalizing the submission of a "materially false" application for insurance, or "false, incomplete, or misleading insurance documents to any person." Mont. Code Ann. § 33-1-1504(1)(b), (d). These types of application questions allow the insurance carrier to accurately price the risk the insured poses based on the frequency and type of any past errors or omissions. *Ahmann v. Minn. Mut. Life Ins. Co.*, 29 M.F.R. 457, 463 (May 7, 2002) (rescinding life insurance contract where insurer provided testimony that misrepresentations changed acceptance of risk and decision to issue policy); *Century Sur. Co. v. Robin Singh Educ. Servs., Inc.*, No. CV-06-8066 CAS (Ex), 2008 U.S. Dist. LEXIS 129940, at *30 (C.D. Cal. Apr. 14, 2008) (insurance carrier asserted that it would not have issued the policies if the insured had accurately disclosed facts in the application).

Legal malpractice policies generally preclude all coverage for a claim if any insured had knowledge of the potential claim on the inception date of the policy. 4 New Appleman on Insurance Law Library Edition § 25.02 (2020); *Sapp v. Paul Revere Life Ins. Co.*, No. 93-56290, 1994 U.S. App. LEXIS 15219, at *7 (9th Cir. June 13, 1994) ("It is axiomatic that insurance does not cover known losses. Insurance covers the risk of loss."). Therefore, regardless of whether an attorney discloses a known circumstance in the application, no coverage will exist under the policy for a future claim based on that known circumstance existing before coverage is placed. As addressed above, coverage for an inevitable loss would undermine the concept of risk pooling and could not even be considered insurance. Instead, the policy in place on the date an insured becomes aware of the potential claim is the policy under which the claim should be made.

D. Consequences of Expanding the Minority Interpretation of the Innocent Insured Doctrine to Provide Coverage for Known Losses

In this case, the insured law firm asserts that the common law innocent insured doctrine should prevent an insurance carrier from precluding coverage for known losses. *See* Opening Br. Appellants Keller, Reynolds, Drake, Johnson & Gillespie, P.C. & Charles J. Seifert & Thomas Q. Johnson 24-26, Aug. 17, 2020. A minority of courts have relied on the innocent insured

doctrine to prevent a carrier from rescinding a policy entirely. This protects innocent firm members from losing all insurance coverage for all claims, including unrelated claims. In its expanded interpretation, the insured law firm in the present case before the Court seeks not only to *preserve* insurance coverage for unrelated claims, but also to *create* insurance coverage for a claim that was known prior to the inception date of the policy.

This argument parallels the unsuccessful argument that the claims reporting period should be extended to allow late claims to trigger coverage. *See* § B, *supra* (citing *Brander*, 443 F. Supp. at 773-74; *Zuckerman*, 495 A.2d at 400). Just as courts have rejected the idea that the reporting period should be extended longer into the future than the parties bargained for, so too should this Court reject the idea that the policy period should extend back further into the past than the parties bargained for.

The public policy rationale behind preventing rescission of an entire policy is to protect innocent insureds against other, unrelated claims. This rationale does not logically apply to prevent an insurance carrier from precluding coverage for a known loss. Such an expansion would not protect any "innocent" insureds and it would undermine the known loss doctrine and the very concept of insurance.

1. A Liable Partner is Not an Innocent Insured

An innocent partner faces no liability for an act or omission of another attorney under the current limited liability structures permitted in Montana. Liability exists only if the partner knew about the act or omission, or the partner was overseeing the attorney who made the act or omission, and therefore should have known about the act or omission. *See* Mont. Code Ann. § 35-10-307(3) (A partner is liable for the partner's "own negligence, wrongful act, or misconduct . . . or that of any person under the partner's direct supervision and control."); Mont. Code Ann. § 35-8-1306 (An individual in a professional limited liability company "is liable for any negligent or wrongful act or omission in which the individual personally participates" but "is not liable for the conduct of other members or employees unless the member or employee is at fault in appointing, supervising, or cooperating with them."). Under these circumstances, the liable partner could not be properly identified as being "innocent."

Based on the limited liability under Montana law, it makes sense for a malpractice policy to preclude coverage for a claim that one attorney knew about and failed to report, because the partners either have no liability for that claim, or are not innocent because they also knew about it or should have

known about it. This Court adopted this approach in *McLean*, where it prevented ALPS from rescinding the policy and eliminating all coverage for Michael McLean, but found that no coverage existed under the policy for the claims which David McLean knew about prior to the policy period. *McLean*, ¶ 42 ("ALPS was within its rights to prevent recovery under the Policy"); *see also First Am. Title Ins. Co. v. Lawson*, 827 A.2d 230, 240-41 (N.J. 2003) (preventing rescission of the innocent partner's coverage because loss of the policy would expose the innocent partner "to uninsured liability in a manner inconsistent with his expectations under the UPL [Uniform Partnership Law]"); *see also Ill. State Bar Ass'n Mut. Ins. Co. v. Law Office of Tuzzolino & Terpinas*, 27 N.E.3d 67, 72 (Ill. 2015) (The innocent insured doctrine "allows an insured who is innocent of wrongdoing to recover despite the wrongdoing of other insureds.").

2. Requiring Coverage for Known Losses Would Undermine the Known Loss Doctrine

In addition to not protecting any "innocent" partners, expanding the innocent insured doctrine to provide coverage for known losses would undermine the concept of risk pooling. As discussed above, an insurance carrier's ability to price risk is based on uncertainty and the law of large numbers. *See generally*, *supra* § A.

As addressed above, underwriters were unable to accurately price occurrence-based malpractice policies, because of the long tail of coverage. *See supra* § B (citing 4 New Appleman on Insurance Law Library Edition § 25.01 (2020); *Zuckerman*, 495 A.2d at 399). If an insurance carrier is obligated to provide coverage for a known loss, that similarly would make it impossible to accurately price policy premiums. Instead of taking on risk of a future loss, the insurance carrier would be taking on the certainty of a future loss.

Indeed, an agreement to accept a known loss could not even be considered insurance, since insurance is based on risk, not certainty. *See generally*, *supra* § A; *Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co.*, 124 F.3d 508, 516 (3d Cir. 1997) ("The known loss doctrine is a common law concept that derives from the fundamental requirement of fortuity in insurance law. Essentially, the doctrine provides that one may not obtain insurance for a loss that either has already taken place or is in progress."). No basis exists to force an insurance carrier to provide coverage for known losses.

Further, no need exists to require an insurance carrier to provide coverage for a known loss. A law firm's prior malpractice policy already provides adequate insurance coverage for errors and omissions that occurred in the prior year. All potentially liable partners each must report any potential claims

during the policy period and they will possess coverage for all claims for which they could face liability. The contract revision suggested by the insured law firm, to include coverage for known claims, would raise premiums for all law firms and challenge the very meaning of insurance, without providing coverage that a law firm does not already possess under its prior malpractice policies.

IV. CONCLUSION

Just as courts have refused to expand the coverage granted by a claims-made policy to allow late claims to trigger coverage, APCIA respectfully requests that this Court deny the attempt to expand the claims-made policy to include known losses. An insured law firm is already adequately protected against such losses, provided they maintain legal malpractice insurance and timely report any potential claims. No reason exists to force an insurance company to go beyond the sale of insurance, and begin writing policies that cover known losses.

DATED this 19th day of October, 2020.

/s/ Bradley J. Luck
Attorneys for Amicus American Property Casualty Insurance Association

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2016 is 3,895 words, excluding Certificate of Service and Certificate of Compliance.

/s/ Bradley J. Luck

CERTIFICATE OF SERVICE

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Dated: 10-19-2020