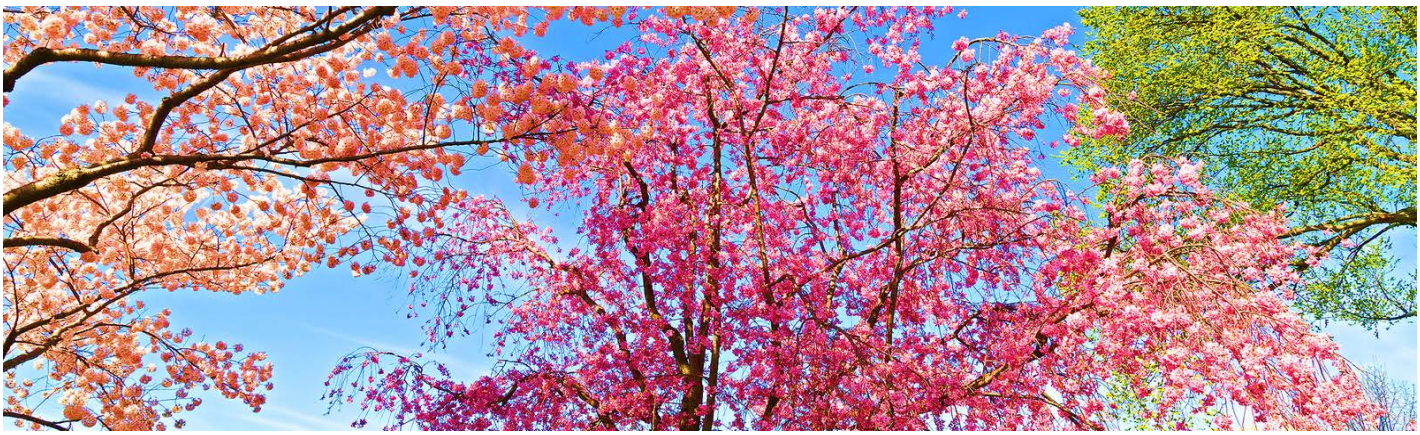
CARR MALONEY PC

LEGALLY SPEAKING

VOLUME XXXIV: APRIL 2017



4TH CIRCUIT COURT OF APPEALS INSURANCE COVERAGE UPDATE

On December 6th, a three-judge panel of the 4th Circuit Court of Appeals unanimously overturned a District Court's award of summary judgment in favor of a hospital's insurer. The insurer had denied coverage in a malpractice action to a nurse working at the hospital through an agreement with an independent staffing agency.
[CLICK HERE TO READ MORE]

FEDERAL COURT IN MARYLAND FINDS NO COVERAGE FOR FAULTY TOWERS' WINDOW CLEAN UP

On December 20, 2016, the United States District Court for the District of Maryland, applying Maryland law, enforced a Faulty Workmanship Exclusion in an insurance policy and granted summary judgment in favor of the insurer. In James McHugh Construction Co. v. Travelers Property Casualty Co. of America, Judge Paula Xinis, held that the Faulty Workmanship Exclusion was not ambiguous and that the Ensuing Loss exception to the exclusion did not apply. [CLICK HERE TO READ MORE]

4TH CIRCUIT EXPANDS DEFINITION OF 'JOINT EMPLOYERS'

For 30 years, the test to determine whether two or more businesses can be considered joint employers for a single group of employees was straight-forward: it rested on whether a business had "direct and immediate" control over the terms and conditions of an individual's employment. In August 2015, the test was broadened by Browning-Ferris, when the National Labor Relations Board changed the joint employer liability standard to include businesses that had "indirect control" over an individual's employment. [CLICK HERE TO READ MORE]

CLICK HERE TO READ MORE NEWS, ANNOUNCEMENTS AND DEVELOPMENTS

Carr Maloney PC is a litigation firm providing comprehensive legal services throughout the mid-Atlantic region. Businesses and individuals use the firm as a single resource to meet all of their legal needs. Recognizing that each client's legal issue comes with its own specific complexities, we simplify the complex. Copyright © 2017 Carr Maloney PC, All rights reserved.

CARR MALONEY PC

4TH CIRCUIT COURT OF APPEALS INSURANCE COVERAGE UPDATE

By J. Peter Glaws, IV, Esq.

On December 6th, a three-judge panel of the 4th Circuit Court of Appeals unanimously overturned a District Court's award of summary judgment in favor of a hospital's insurer. The insurer had denied coverage in a malpractice action to a nurse working at the hospital through an agreement with an independent staffing agency. The case is Interstate Fire and Casualty Company v. Dimensions Assurance Ltd., No. 15-1801 (4th Cir. Dec. 6, 2016).

As noted, the case arises out of an underlying malpractice claim. In that case, a former patient sued the hospital, several doctors, and several nurses. One of the defendant nurses had been placed at the hospital through a staffing agency that, by contract, placed nurses and other healthcare professionals at the facility. The contract between the agency and the hospital dictated that agency-provided practitioners are employees of the agency, not the hospital. On that basis, the hospital's liability insurer, Dimensions Assurance Ltd., denied coverage to the nurse. At that time, the agency's liability insurer, Interstate Fire and Casualty Company, assumed her defense. Interstate subsequently settled the case against the nurse for $2.5 million and incurred approximately $500,000.00 in legal fees in the process. Interstate then filed an equitable contribution action against Dimensions alleging it had wrongfully denied coverage and, since the Dimensions policy would have been primary, it was liable for the entire settlement and defense costs.

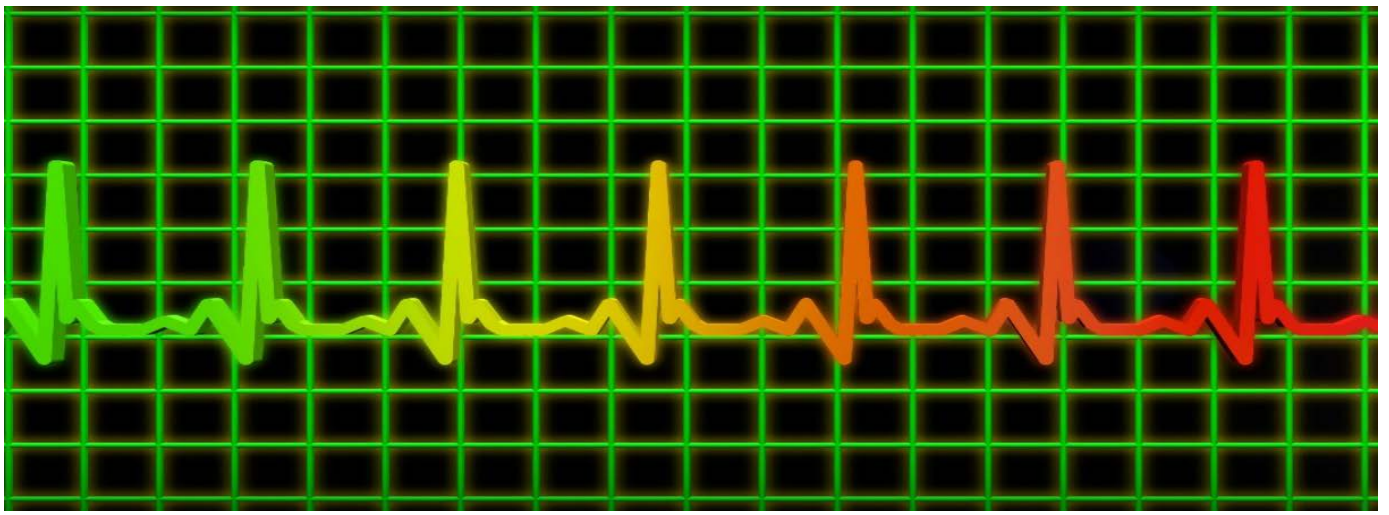
The professional-liability section of the of the Dimensions policy at issue extends coverage to those classified as "protected persons." Among other categories, the policy states that: "present and former employees, students and authorized volunteer workers are protected persons while working or when they did work for you within the scope of their duties." The professional-liability section did not specifically exclude agency-provided practitioners from coverage.

The District Court granted judgement in favor of Dimensions based on its finding that, pursuant to the terms of the contract between the hospital and the agency, agency-provided practitioners were not employees of the hospital. **(continued)**

Carr Maloney Senior Associate Peter Glaws serves as a counselor and litigator for businesses and individuals. Peter concentrates his litigation practice on commercial disputes and professional liability defense, particularly in the defense of accountants and lawyers.

Peter litigates trust and estate disputes, broker and agent liability, and personal injury and property damage claims. As a counselor, Peter advises businesses on general legal matters including contract formation and interpretation, data loss and other cyber liability issues, selected tax issues and subpoena matters.

Peter is a *cum laude* graduate of The Catholic University of America, Columbus School of Law. At Catholic, Peter served as notes-and-comments editor for the Journal of Law, Philosophy, and Culture and was a member of the Willem C. Vis International Arbitration Moot Court Team.



4TH CIRCUIT COURT OF APPEALS INSURANCE COVERAGE UPDATE

(continued from previous page)

The Court of Appeals, however, found that the District Court erred, as a matter of law, by looking to the hospital/ agency contract to define "employee" in the Dimensions policy, a wholly independent contract that did not incorporate the hospital agency contract in any manner.

The Court of Appeals reasoned that word "employee" is not ambiguous. And, under well settled principles of contract interpretation, the District Court should not have looked to extrinsic evidence to define an unambiguous term. Rather, unambiguous language that is not otherwise defined in the contract or insurance policy is given its ordinary legal meaning. In this circumstance, an "employee," as defined under settled Maryland law applicable to the case, is "[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance" (citing Black's Law Dictionary (10th Ed. 2014)). This is also known as the "control test."

The Court of Appeals then applied the undisputed facts of the case to the unambiguous definition of "employee," and determined that the nurse at issue was an employee for purposes of the Dimensions policy. This is because the hospital had complete control of agency-provided practitioners while at the facility. Such control included orienting the agency-provided practitioners, floating agency-provided practitioners to areas they were not originally assigned to, and dismissing any agency-provided practitioners whose performance is unsatisfactory. Thus, the nurse was an "employee" of the hospital and a "protected person" under the terms of the Dimensions policy, within the scope of insurance coverage thereunder.

The Court of Appeals also stated it was telling that the Dimensions policy explicitly excluded agency-provided practitioners from the definition of "employee" under the general-liability portion of the policy. Under those facts, the Court stated that failure to make the same exclusion in the professional-liability section of the policy must be viewed as intentional. The Court noted, however, it need not base its ruling on that reasoning because examining the professional-liability section of the policy in isolation compels the same conclusion.

The take away for this decision is not entirely novel. Rather, it conjures up the old adage about what it means to "assume." There is no room for assumptions in contracts, whether those contracts are insurance agreements or otherwise. If the parties intend to give specific meaning to a word or phrase, it needs to be defined. Otherwise, if and when litigation arises, settled principles that are applicable under Maryland law and across the country will govern. Namely, the objective theory of contract interpretation that gives effect to unambiguous terms of the contract, regardless of what the parties may have believed those terms to mean. It underscores the importance of precision in drafting. Failure to do so can be costly.

J. PETER GLAWS, IV is licensed to practice law in the District of Columbia, Virginia, and the U.S. District Court of the District of Columbia, Maryland, and the Eastern and Western Districts of Virginia.

CARR MALONEY PC

FEDERAL COURT IN MARYLAND FINDS NO COVERAGE FOR FAULTY TOWERS' WINDOW CLEAN UP

By James P. Steele, Esq.

On December 20, 2016, the United States District Court for the District of Maryland, applying Maryland law, enforced a Faulty Workmanship Exclusion in an insurance policy and granted summary judgment in favor of the insurer. In James McHugh Construction Co. v. Travelers Property Casualty Co. of America, Judge Paula Xinis, held that the Faulty Workmanship Exclusion was not ambiguous and that the Ensuing Loss exception to the exclusion did not apply.

McHugh, the general contractor of a project to construct a high-rise apartment building in Chicago, Illinois, hired a subcontractor to clean the building's windows. While doing that work, the subcontractor scratched some of the windows. The project's owner rejected the windows, and McHugh incurred costs to repair and replace them.

Travelers insured the project's owner, and McHugh was an insured under the policy through blanket named insured endorsement. Travelers' denied McHugh's claim, citing the Faulty Workmanship Exclusion.

That provision excluded coverage "for loss or damage caused by or resulting from . . . [o]mission in, or faulty, inadequate or defective . . . [m]aterials, workmanship or maintenance." The exclusion contained an Ensuing Loss exception, by which Travelers would pay where the faulty workmanship results in "loss or damage by a Covered Cause of Loss."

McHugh argued that the Faulty Workmanship Exclusion was ambiguous and the ambiguity should be resolved in its favor. The ambiguity arose from the argument that the policy did not specify whether the phrase "faulty workmanship" applied "to processes, like cleaning windows, or final products such as the windows themselves, or both."

(continued on next page)

Carr Maloney Member Jim Steele counsels insurers on complex coverage matters and litigates insurance coverage disputes. He also defends clients in construction accidents, professional malpractice claims and personal injury matters.

Jim has wide-ranging experience in the state and federal trial and appellate courts of the District of Columbia and Maryland.

He is a longtime member of the DC Defense Lawyers' Association (DCDLA), serving as president from 2010 to 2011, and as a member of the Board of Directors from 2012 to 2015.

For insurance companies, Jim litigates and arbitrates coverage cases involving construction mishaps, professional liability claims, uninsured/underinsured motorist policy provisions, subrogation claims, third-party additional-insured disputes, lead paint exclusions and "other insurance" provisions.

FEDERAL COURT IN MARYLAND FINDS NO COVERAGE FOR FAULTY TOWERS' WINDOW CLEAN UP

(continued from previous page)

McHugh also argued that it was unclear whether "faulty workmanship" applied to clean, debris free glass, which was the contracted for work, or to the collateral damage of glass scratched while being cleaned.

Judge Xinis noted that Maryland, unlike many jurisdictions, does not automatically hold ambiguous contract language against the drafter. Rather, where contract language is ambiguous, Maryland courts will turn to extrinsic evidence to determine the parties' intent. Where there is no extrinsic evidence, or where the extrinsic evidence does not resolve the ambiguity, "only then do Maryland courts construe the policy against the insurer 'as the drafter of the instrument.'" (Citation omitted, emphasis in original.)

However, Judge Xinis disagreed with McHugh that the exclusion was ambiguous. "Whether one uses the term 'workmanship' to describe the quality of work in progress or the quality of the final product, the term is being used to refer to the quality or skill of the work performed in the process of creating the product." The Court noted that many other state and federal jurisdictions have similarly found Faulty Workmanship Exclusions to be clear and unambiguous.

Travelers supported its argument that the workmanship was faulty with an affidavit from an engineer who specialized in building facades who said the work "was not performed in accordance with the glass manufacturer's recommendations and industry standards." McHugh countered that the opinion was really aimed at interpreting the policy language, which is the court's role. Judge Xinis accepted "as true that [the subcontractor's] glass-cleaning process fell below industry standards" in part because McHugh conceded that the work did not conform to those standards or to the subcontract.

McHugh further argued that even if the exclusion applied, the loss was still covered by the Ensuing Loss exception because the subcontractor did not install the windows – it cleaned them and damaged them in the course of that cleaning. Travelers countered that the Ensuing Loss exception applies to independent damage that ensues from faulty workmanship. Judge Xinis agreed with Travelers, citing Selective Way Ins. Co. v. Nat'l Fire Ins. Co. of Hartford, 998 F. Supp. 2d 530 (D. Md. 2013), in which faulty pipe installation resulted in water damage to other property.

Accordingly, Judge Xinis granted Travelers' motion for summary judgment, and denied McHugh's cross-motion. It remains to be seen whether McHugh will appeal the ruling.

JAMES P. STEELE is licensed to practice law in the District of Columbia, Virginia and the U.S. District Court of the District of Columbia, Maryland and the Eastern and Western Districts of Virginia. He helps his clients wade through the obstacles and complexities of issues they face in the course of running their businesses and organizations.


4TH CIRCUIT EXPANDS DEFINITION OF 'JOINT EMPLOYERS'

By Tina M. Maiolo, Esq. and Connie M. Ng, Esq.

For 30 years, the test to determine whether two or more businesses can be considered joint employers for a single group of employees was straight-forward: it rested on whether a business had "direct and immediate" control over the terms and conditions of an individual's employment.

In August 2015, the test was broadened by Browning-Ferris, when the National Labor Relations Board changed the joint employer liability standard to include businesses that had "indirect control" over an individual's employment.

On January 25, 2017, the Fourth Circuit took the joint employer liability standard even further in Salinas v. Commercial Interior, Inc., 848 F.3d 125, 129 (4th Cir. 2017) by broadening the test for joint employer liability under the Fair Labor Standards Act (FLSA) in such an expansive way that it could adversely impact every outsourcing relationship, staffing agency relationship or other contractual relationship for the performance of work.

In Salinas, Defendant Commercial Interiors, Inc. ("Commercial"), a general contractor offering general contracting and interior finishing services, subcontracted with J.I General Contractors ("J.I.") to provide framing and drywall installation. J.I. General Contractors. J.I. General Contractors directly employed the Plaintiffs as drywall installers. The Plaintiffs subsequently brought this suit against J.I. General Contractors and Commercial Interiors, Inc. claiming that they were joint employers who violated FLSA, Maryland Wage and Hour Law, and Maryland Wage Payment and Collection Law for failing to pay them overtime wages.

The district court held that Commercial and J.I. had a contractor-subcontractor business relationship, and that Commercial was not a joint employer with J.I. The Fourth Circuit disagreed and reversed the district court's decision. It held that Commercial and J.I. jointly employed the Plaintiffs and created a new joint employment test for FLSA violations.

When making this decision, the Court examined the legislative history of the FLSA. It noted that Congress purposely adopted definitions of "employ," "employee," and "employer," in the FLSA to bring "a broad swath of workers within the statute's protection." Most significant to the Court was the fact that Congress defined "employee" as "any individual employed by an employer," which was "the broadest definition that has ever been included in any one act."

Based on this legislative history, the Court determined that the joint employment test under the FLSA should be broader than the common law joint employment test as well as the joint employment test under other employment laws.

The Court then set forth the "completely disassociated" joint employment test for FLSA violations, which had only one question: "whether two or more persons or entities are 'not completely disassociated' with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine – formally or informally, directly or indirectly – the essential terms and conditions of the worker's employment."

It then identified six non-exhaustive factors to be considered when answering this question:

(1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;

(2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to – directly or indirectly – hire or fire the worker or modify the terms or conditions of the worker's employment;

(continued)

4TH CIRCUIT EXPANDS DEFINITION OF 'JOINT EMPLOYERS'

(continued from previous page)

3) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;

4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other punitive joint employer;

5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and,

6) Whether, formally or as matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

The Court made it clear that these six factors were not an exhaustive list of relevant considerations and that "the ultimate determination of joint employment must be based upon the circumstances of the whole activity."

The Salinas decision has created serious implications for any employer who has either another company's employees working on site or a contractual relationship with another entity for services. In order protect themselves from liability under the new "joint employer" test, employers in either of these situations should ensure that a strong indemnity provision is included in any contract with any outsourcing entities, staffing agency and/or any parties they may have a contractual relationship for the performance of work with. While currently this broader definition of joint employer is only limited to FLSA violations and statutory interpretation and not applicable to the common law or the Browning-Ferris line of decisions, the Salinas decision demonstrates courts' willingness to cast a wider net to create an employer-employee relationship even when the parties did not intend for an employer-employee relationship.

7th CIRCUIT RELEASES LANDMARK OPINION

On April 4, 2017, the Seventh Circuit issued a landmark opinion in Kimberly Hively v. Ivy Tech Community College of Indiana, No. 15-1720 (7th Cir. Apr. 4, 2017), when it ruled that the protections afforded by Title VII of the Civil Rights Act of 1964 extends to discrimination on the basis of sexual orientation.

In reaching its decision, the Court examined a number of U.S. Supreme Court cases and held that but for Hively's gender, Ivy Tech would have kept her on staff. In reaching its decision, the Seventh Circuit reasoned that "[t]he Supreme Court's decisions [in the past], as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line."

While this ruling is only limited to the Seventh Circuit at this time, it is indicative of the changing legal landscape and courts' willingness to apply Title VII broadly.

CARR MALONEY PC

NEWS AND ANNOUNCEMENTS

TRACY SCOTT ELECTED AS CARR MALONEY'S NEWEST MEMBER

Carr Maloney is pleased to announce that Tracy Scott has been elected a Member of the Firm. Tracy focuses her practice on complex commercial, premises, professional and product liability. She is a seasoned trial attorney who has successfully represented individuals and businesses alike in Federal and State Courts throughout the Washington Metropolitan area. She is licensed to practice law in Maryland and the District of Columbia. Prior to entering private practice, Tracy worked closely with members of the U.S. Congress and Maryland General Assembly as a Budget and Legislative Analyst at the Montgomery County Commission for Women.

KENNETH STALLARD APPEARS ON A.M. BEST TV CONSTRUCTION LAW WEBINAR

Carr Maloney Member Kenneth Stallard was a featured panelist on A.M Best TV's "Hammering on Construction Liability" webinar, during which he discussed some of the emerging issues law firms should be aware of concerning construction risks.

"A construction company needs to know the statutes for new home buyers in the residential context," said Stallard. "About 30 states have passed these types of notice statutes, and the trend is they are rising. These statutes essentially require that new home buyers have to give the builder and/or contractor prior notice before filing a lawsuit."

DENNIS QUINN FEATURED AT ABA'S NATIONAL LEGAL MALPRACTICE CONFERENCE

On Thursday, April 20th, Carr Maloney Member Dennis Quinn is presenting "Data Security Risk Assessments: The Gold of Due Diligence" at the 2017 American Bar Association's National Legal Malpractice Conference in Boston, Massachusetts. As part of this panel discussion, Dennis addresses the ethical aspects of dealing with technology as incorporated in recent amendments to the ABA Model Rules of Professional Conduct. He is an elected representative to the Virginia State Bar Counsel and sits on the Bar's Standing Committee on Legal Ethics. He concentrates his practice on professional liability, commercial litigation, and ethics counseling.

JAN SIMONSEN RECOGNIZED IN SPRING 2017 BEST LAWYERS 'WOMEN OF INFLUENCE' BUSINESS EDITION

Carr Maloney Member Jan Simonsen was featured in the Spring 2017 *Best Lawyers*™ 'Women of Influence' Business Edition for her work in Mass Tort Litigation/Class Actions. Previously named 'Lawyer of the Year' by the DC Defense Lawyers Association, Jan was one of only three attorneys from the District of Columbia to be recognized in this area. Jan is currently serving an appointment by the DC Court of Appeals as a Trustee to the DC Client Security Trust fund through 2018.