TRIGGERING THE DUTY TO DEFEND FOR INARTFUL PLEADINGS (135)

Alan Van Etten, Esq., and Aaron Loeser, Esq.
Deeley King Pang & Van Etten

When does an insurer have a duty—or not—to defend a so-called inartfully pled claim? Where are courts likely to draw the line between the two? What are other considerations that will affect a court's decision regarding duty to defend? Our thoughts on this issue were prompted by Hawai'i Supreme Court's recent attempt to delineate that boundary in ***Hart v. TICOR Title Ins. Co.,*** 272 P.3d 1215 (Haw. 2012).

Hart v. TICOR Title Co.

Hart involved a dispute between property owners Charles Mitchell Hart and Lisa Marie Hart, and their title insurer, TICOR Title Insurance Company, over whether TICOR owed the Harts a duty to defend against an inartfully pled escheat claim that the State of Hawai'i (the "State") asserted against the Harts.

The dispute arose when the Harts filed a petition in land court to consolidate two lots of real property into a single parcel. The State filed an answer, asserting or reserving numerous claims, including claims for mineral rights, rights of native tenants, and, significantly, "any interests in the property that may have escheated to the State." (Footnote 1) The State's answer included a request for a ruling that "the State has reserved any interests in the property that may have escheated to the State."(Footnote 2)

The applicable insuring agreement provided:

> TICOR ... insures ... against loss or damage ... sustained or incurred by the insured by reason of ... Any defect in or lien or encumbrance on the title[.]... [TICOR] will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.(Footnote 3)

The relevant conditions and stipulations provided that:

> [TICOR] ... shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy.(Footnote 4)

The Harts tendered defense of the State's claims to TICOR. TICOR denied coverage for the State's various claims of mineral rights, rights of native tenants, etc., based on policy exclusions that the Harts did not dispute. TICOR conceded that a claim of escheat is not excluded from coverage but argued that the State was not making a claim of escheat but merely reserving its right to do so in the future. TICOR denied the Harts' tender of defense.

The Harts, providing their own defense, filed a motion for summary judgment to resolve all of the State's claims or reservations, including the escheat claim, to which the State responded, "[T]he State is not pursuing any claim of escheat to the State."(Footnote 5)

The land court granted the Harts' motion as to the escheat claim. This summary judgment effectively ended the land court action, and the land court ordered the requested consolidation of the lots shortly thereafter.

The Harts then requested reimbursement from TICOR for their legal fees, stating that "the State asserted an escheat claim covered under the Policy, and though it was a 'false claim, defense against the escheat claim was inseparably part of the defense of all claims, and TICOR was obligated to see the defense through to conclusion by court ruling.'"(Footnote 6) TICOR repeated its denial of the Harts' defense claim.

The Harts brought an action for declaratory judgment against TICOR in state court and filed a motion for summary judgment, which the trial court denied. The court found that "the State's escheat defense was a routine reservation of a possible defense and did not trigger coverage" and that "'the language raising the escheat defense did not create a realistic or reasonable potential for coverage' under the Policy."(Footnote 7)

The Harts appealed to the Hawai'i Intermediate Court of Appeals ("ICA"), which affirmed the district court's judgment, noting that the State had not followed the statutory requirements that an escheat claim must be filed in the first circuit court and state the factual basis for escheat.

On appeal, the Hawai'i Supreme Court reversed, holding that TICOR owed the Harts a duty to defend the State's escheat claim, in land court, from the filing of the State's answer to the date that the land court granted the Harts' motion for summary judgment as to the covered escheat claim. In reaching that holding, the supreme court addressed the trial court and ICA's positions that the State's "claim" was merely a standard reservation of a possible right as follows:

> [T]hrough the reservation, the State alleged it had existing rights and interest in the property that may "have escheated" and that those rights and interest would be noted against the Harts' Land Court-registered title. The State's escheat reservation was an independent and affirmative claim to an interest in the Harts' property, just like every other "reservation" made in the State's pleadings. For example, the State reserved "the rights of native tenants in the property," and "an easement for the free flowage of waters through, over, under, and across the property." The State prevailed on some of those claimed interests and lost on others. Those reservations plainly sought to assert "claims."(Footnote 8)

The Hawai'i Supreme Court did not address the ICA's conclusion that "the State failed to assert any facts supporting a claim of escheat[.]"(Footnote 9)

The court hedged its decision with the following oft-recited rule in duty to defend cases:

> We do not condone any attempt to create an insurer's duty to defend by "artful pleading" of a claim or defense which has no legitimate basis in the facts alleged or issues raised in the pleadings. In [***Dairy Road Partners v. Island Ins. Co., Ltd.,*** 992 P.2d 93 (Haw. 2000)], this court expressly intended to ensure that plaintiffs could not, through artful pleading, bootstrap the availability of insurance coverage under an insured defendant's policy by purporting to state a claim for negligence based on facts that, in reality, reflected manifestly intentional, rather than negligent, conduct. Stated differently, when the facts alleged in the underlying complaint unambiguously exclude the possibility of coverage, conclusory assertions contained in the complaint regarding the legal significance of those facts (such as that the facts as alleged demonstrate "negligent" rather than "intentional" conduct) are insufficient to trigger the insurer's duty to defend.(Footnote 10)

This article explores this "artful pleading" rule.

Principles Governing the Duty To Defend

To begin, let us briefly outline those principals of insurance law that provide the foundation for the artful pleading jurisprudence. Jurisdictions almost uniformly agree on the following principles of insurance law regarding an insurer's duty to defend.

Principle One

An insurer owes a duty to defend any potentially covered claims; and, if an insurer has the duty to defend any claim within a complaint, then that insurer must defend the entire complaint until all potentially covered claims are extinguished.

- The process is one of envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy.(Footnote 11)
- If the underlying complaint alleges facts showing two or more grounds for liability, one being within the insurance coverage and the other not, the insurer is obligated to defend the entire suit.(Footnote 12)
- When multiple alternative causes of action are stated, the duty to defend will continue until every covered claim is eliminated.(Footnote 13)

Hart applied this rule by awarding the Harts their full "defense" costs through the resolution of the potentially covered escheat claim, even though, as TICOR pointed out, "the Harts' counsel's invoices for attorneys' fees 'do not indicate that any time was spent on the issue of escheat.'"(Footnote 14)

Principle Two

An insurer's duty to defend is determined at the outset of the claim; and the actual or probable outcome of the potentially covered claim has no bearing upon the duty to defend. This means that insurers owe a duty to defend potentially covered claims that exist at the time of tender—even claims that are obviously defective, meritless, otherwise subject to dismissal, and claims that ultimately fail.

- The potential merit of the claim is immaterial: the duty to defend is not abrogated by the fact that the cause of action stated cannot be maintained against the insured either in law or in fact—in other words, because the cause is groundless, false, or fraudulent.(Footnote 15)
- It is not the belief of any party as to the eventual outcome of the suit that determines a duty to defend but rather whether the complaint is reasonably susceptible of an interpretation that it threatens an insured interest.(Footnote 16)
- Even a complaint that is legally insufficient to withstand a motion to dismiss gives rise to a duty to defend if it shows an intent to state a claim within the insurance coverage.(Footnote 17)

Hart applied this principle by holding that the insurer had a duty to defend the escheat claim through its dismissal despite the fact that the claim had a fatal procedural defect—i.e., the State raised escheat as a reservation or defense to a land court matter, where Hawai'i law only allowed the State to pursue escheat claims by filing in circuit court.

Principle Three

If there is any doubt or ambiguity as to whether the insurer owes a duty to defend, then courts resolve that doubt or ambiguity in favor of the insured.

- The duty to defend need only arguably appear on the face of the pleadings.(Footnote 18)
- If the complaint is ambiguous, doubts should be resolved in favor of the insured and thus in favor of coverage.(Footnote 19)
- An insurer's obligation is not merely to defend in cases of perfect declarations, but also in cases where, by any reasonable intendment of the pleadings, liability of the insured can be inferred, and neither ambiguity nor inconsistency in the underlying writ can justify escape of the insurer from its obligation to defend. (Footnote 20)

To illustrate, if a complaint states a claim that is clearly covered, then the insurer owes a duty to defend; if a complaint states a claim that is clearly excluded, then the insurer does not owe a duty to defend; and, for all of the "gray area" cases in between, the insurer owes a duty to defend. Stated differently, an insurer only escapes the duty to defend if the complaint clearly and unambiguously excludes all potentially covered claims.

Hart applied this rule by holding that, although factually unsupported and speculative on its face, the State's escheat claim was potentially covered and not clearly and unambiguously excluded; therefore, TICOR owed the Harts a duty to defend it.

Principle Four

It is the facts that claimants allege, and not the legal labels that claimants attach to those facts, that control the duty to defend. For example, in ***Lime Tree Village Cmty. Club Ass'n, Inc. v. State Farm Gen.***

Ins. Co., 980 F.2d 1402 (11th Cir. Fla. 1993), a home owners' association attempted to amend its covenants and restrictions to limit the community to adults age 55 and older. Several home owners sued the association and certain officers and directors of the association, alleging, inter alia, discrimination in violation of certain federal and state statutes, false and malicious slander or disparagement of title, and restraint of trade.

The insurer denied a defense under exclusions for, inter alia, intentional acts; willful violations of penal statutes or ordinances; dishonest, fraudulent, criminal, or malicious acts; and violations of civil rights law, including discrimination on account of age. The insurer argued that the allegations of slander or disparagement of title and restraint of trade were "merely creative ways" of alleging violations of state and federal antidiscrimination laws.

The court held that:

> the duty to defend turns on the "grounds for liability" expressed by "allegations of fact" in the underlying complaints. The factual allegations set forth grounds, other than intentional acts and discrimination, upon which [the insured] could be held liable.... Based on the allegations here [the insured] could be held liable, for example, for unintended slander of title and unintended restraint of trade. Second, even if the counts are "merely" creative discrimination claims, the factual allegations triggered the duty regardless of the label [that the insurer] would like to attach to the cause of action. [The insurer] urges the court to characterize all the underlying claims as allegations of discriminatory actions, excluded from the policy as either intentional acts or violations of civil rights laws. The court cannot speculate as to the nature or merit of the claims; it may only look to the factual allegations of the underlying complaint. If the facts alleged show any basis for imposing liability upon the insured that falls within policy coverage, the insurer has a duty to defend. (Footnote 21)

The Duty To Defend Inartfully Pled Claims

Under these legal principles, insurers generally owe a duty to defend "inartfully pled" claims where the claimant alleges facts that support a theoretically covered claim but does not explicitly assert, or even assert at all, the covered claim. Such a claim is generally either (1) procedurally defective or (2) ambiguous as to whether the insured could ultimately be liable, neither of which excuses an insurer's duty to defend. ***Lime Tree,*** *supra,* is one example of this.

In another example, in ***St. Paul Fire & Marine Ins. Co. v. Green Tree Fin. Corp.—Tex.,*** 249 F.3d 389 (5th Cir. 2001), claimants alleged that the insured made frequent calls to the claimants and their families, at home and at work, using abusive and rude language, up to three times per week, sometimes threatening to inform claimants' employers of the debt collection efforts and to repossess the collateral. The claimants pleaded the following causes of action only: negligence, statutory and common law unfair debt collection practices, and claims under the applicable Deceptive Trade Practices Act. Although the claimants had not explicitly pled a cause of action for invasion of privacy, the court concluded that the relevant commercial general liability (CGL) policy, which had a very narrow insuring agreement, would cover claims of loss arising from an invasion of privacy. The court next held that telephone harassment could constitute an invasion of privacy and, therefore, that the claimants clearly alleged facts sufficient to support a claim of invasion of privacy. Finally, the court, applying Principal Four above, held that the factual allegations, and not the legal theories, determine the duty to defend; therefore, the insurer owed a duty to defend.

The insurer argued that the facts clearly supported a claim for unfair debt collection practices, an excluded claim under the policy, to which the court countered, applying Principals One and Three above, "[j]ust because factual allegations may favor one cause of action over another does not alleviate an insurer's duty to defend if the facts potentially state a cause of action covered under the policy."(Footnote 22)

For similar reasons, insurers generally owe a duty to defend inartfully pled claims in which a claimant alleges a legal claim with no supporting facts or with insufficient supporting facts. Such a claim is generally procedurally defective, factually meritless, or ambiguous as to whether the insured could ultimately be liable, none of which excuses an insurer's duty to defend. For example, in ***Voorhees v. Preferred Mut. Ins. Co.,*** 607 A.2d 1255 (N.J. 1992), a school teacher (claimant) sued a parent (insured) over comments that the parent made "questioning the teacher's competency and fitness."(Footnote 23) The dispute centered on whether the complaint alleged a covered claim. The insurer argued that the complaint only stated a claim for defamation, which was not covered. The insured argued that the complaint alleged various alternative causes of action, among them negligent infliction of emotional distress, which was covered. The court applied Principle One above, and held that:

> [t]here is little dispute that the complaint was inartfully drafted. It does not clearly articulate the facts necessary to prove any specific cause of action. The duty to defend, however, is determined by whether a covered claim is made, not by how well it is made. A third party does not write the complaint to apprise the defendant's insurer of potential coverage; fundamentally, a complaint need only apprise the opposing party of disputed claims and issues.
>
> As written, the complaint alleges outrage and negligent infliction of emotional distress just as convincingly or unconvincingly as it does defamation. It states that [the insureds] made statements "serving to ... inflict upon her humiliation, embarrassment, emotional distress and mental anguish," and that [insureds'] conduct was "willfull[ ], deliberate[ ], reckless[ ], and negligent[ ]." The complaint notified [the insurer] that [the claimant] would argue multiple, alternative causes of action, potentially including, but not limited to, defamation.(Footnote 24)

Also, in ***Rio Rouge Dev. Corp. v. Security First Nat. Bank,*** 610 So. 2d 172 (La. App. 3d Cir. 1992), the court considered whether an insurer owed a duty to defend a complaint for defamation where the claimant did not detail any derogatory statements and did not allege that they were false, two essential elements of a claim for defamation in the jurisdiction. Applying Principle Two above, the court ruled:

> Although the allegations of plaintiffs' petition are inartfully drawn and broadly stated, we find that the petition alleges sufficient facts which may constitute a claim for defamation. [The insured] allegedly made derogatory statements to third persons which called into question [claimants'] financial reputation.(Footnote 25)

Finally, ***Hart*** itself is a perfect example of this form of inartful pleading. In ***Hart,*** as discussed above, the State "reserved" a claim for any interests in the property that *may hav* e escheated to the State. Not only did the state not assert any facts to support its escheat claim, but also its use of "may have" strongly suggests that it had no facts to support such a claim. Furthermore, reasonable minds—i.e., the Hawai'i Intermediate Court of Appeals justices and the Hawai'i Supreme Court justices—disagreed as to whether the State was even asserting a claim for escheat. Nevertheless, the court held that the insurer owed a duty to defend this inartfully pled and clearly groundless claim.

No Duty To Defend Artfully Pled Claims

As ***Hart*** describes, artful pleading arises when a claimant asserts a covered cause of action but pleads facts that can only support a claim that is either not covered or excluded from coverage. The most common "artful pleading" occurs when a claimant alleges facts that the insured acted intentionally to cause the alleged injury and then pleads an alternative claim for "negligence" with no additional facts.

The court in ***Hart*** identified the purpose of artful pleading as an attempt to create a duty to defend. Drawing the line between such an attempt and mere inartful pleading was made easier in ***Hart*** by the fact that, unlike a plaintiff seeking to recover tort damages from a potentially impecunious defendant, the State was litigating over the disposition of a parcel of land and had no reason to assert claims in order to implicate insurance coverage.

Occasionally, artful pleading is fairly obvious. For example, take the following Colorado case:

> During the period of coverage, [the insured] was a college student in Florida. [The insured] is alleged to have tape-recorded a sexual encounter with [the claimant] in February 1994 without her consent and to have played this tape recording to undisclosed third parties.
>
> ... [The claimant] ... instituted a civil action alleging negligent invasion of privacy, intentional invasion of privacy, and unlawful interception of oral communications against [the insured][.](Footnote 26)

The insured argued, inter alia, that the presence of a negligence claim in the complaint gave rise to a duty to defend. The court applied Principle Four and held that:

> regardless of how the claims against an insured are denominated, a court looks to the essence of the claim rather than how it is characterized in the pleadings.... [H]ere, although the [claimant's] complaint is

> expressed in terms of negligence, it alleges only intentional conduct. Consequently, all the asserted claims based on invasion of privacy are barred by the intentional conduct exclusion.(Footnote 27)

This is an obvious example of "artful pleading" because, regardless of the claimant's motivation for pleading negligence, there is simply no way to construe the subjective intent of a person committing the alleged acts as other than intentional.

However, many artful pleading cases are less clear. Perhaps the most illustrative example, if not the most gruesome example, comes from the District of Colorado:

> [Claimant] and [insured] were occasional drinking buddies who were acquainted through work and softball team activities. On the night of December 5, 1982, they were drinking and socializing in a bar. The evening's events did not remain subdued and tranquil, however. Epithets were exchanged and fisticuffs ensued. [Claimant] and [insured] were asked to leave the bar premises. Round two took place in the parking lot. Though each claimed the other was the initial aggressor, [claimant] lost; his nose and ears were bitten off.... On May 3, 1984, [claimant] filed a civil complaint against [insured] in the state district court. The complaint sought damages from [insured] due to negligence!(Footnote 28)

The insurer denied the insured's tender of defense and then initiated a declaratory judgment action. The court ruled that "three bites do not a negligence case make" and dedined to find a duty to defend.

At first blush, ***West Am. Ins. Co. v. Maestas,*** 631 F. Supp. 1565 (D. Colo. 1986), seems like a clear "artful pleading" case: how could a man unintentionally bite the ears and nose off of another man? However, in ***Maestas,*** the court conceded that " *[a]rguably such activity could be described as gross negligence,* but I think the third bite pretty clearly elevates the activity to an intentional tort, however mindless it might seem." In a later opinion in a different case, the same judge recharacterized this concession: "My perhaps pawkish observation in ***Maestas*** was that, while *one bite might be construed as accidental,* 'three bites do not a negligence case make.'"(Footnote 29) The judge went on to explain that the law will infer intent from repetition. The problem is that, if the first bite was arguably not intentional so as to preclude coverage, then the insurer had a potential duty to indemnify for damages arising out of the first bite and, therefore, defend the entire case under Principal One. The third bite, or the second and the third bite, are inferred to have been intentional; but the judge recognized ambiguity as to whether the first bite was intentional as a matter of law. If the court perceived ambiguity as to the intent of the first bite, then it should have resolved that ambiguity in favor of coverage.

The Art of Inartful Pleading: Is Less More?

When we juxtapose the outcomes of duty to defend litigation of an "inartfully pled" claim and an "artfully pled" claim, we discover an interesting paradox: an attorney who truly wanted to "artfully plead" an excluded claim in a way that would trigger an insurer's duty to defend might find the most success by pleading the claims as " *inartfully* " as possible while still stating a valid claim for relief under the applicable rules of civil procedure. As discussed previously, a legal allegation of a covered claim with vague or limited supporting facts generally triggers a duty to defend, where a legal allegation of a covered claim supported by facts that unambiguously support only an excluded claim generally do not.

To illustrate, compare ***Maestas*** with ***Lavoie v. Dorchester Mut. Fire Ins. Co.,*** 560 A.2d 570 (Me. 1989), in which an insured sought a defense for an underlying complaint that alleged "damages for personal injuries resulting from assault and battery and negligence.... Specifically, Count II of the complaint alleged that the insureds '*negligently* caused personal injury to the [claimant]' and that '[a]s a proximate result of the [insureds'] *negligent* actions, [the claimant] has suffered personal injuries to his person[.]'"(Footnote 30) Applying Principles One through Three above, ***Lavoie*** held that the policy "excludes liability resulting from intentional acts. Thus, [the claimant's] allegation of personal injuries resulting from the [insureds'] negligence shows a potential that liability will be established within the insurance coverage."(Footnote 31) Had the underlying claimants in ***Maestas*** pled their claims "*inartfully*" and omitted the gory details of the incident, then the court may have had no option but to find the complaint ambiguous as to whether it stated an intent to pursue a potentially covered claim and, therefore, would have, in all likelihood, held that the insurer owed a duty to defend. On the other hand, if the underlying claimant in ***Lavoie*** had pled his claims more "*artfully*" and included more details surrounding the alleged assault, and if those details had clearly indicated intentional or otherwise excluded conduct, then the insurer would have escaped its duty to defend.

While this may seem like a wide loophole through which insurers might suffer injustice, several factors will severely limit an attorney's ability to exploit this paradox. The first several are beyond the scope of this article to explore: the lawyer's own ethics, the applicable rules of professional conduct, Fed. R. Civ. P. 11 or its applicable state counterparts, potential tort liability for abuse of process, and potential tort liability to the client for malpractice, as the attorney would have to plead the primary excluded claim poorly and risk forfeiting that primary claim for the sake of invoking a duty to defend.

Another possible impediment is the recent erosion of the liberal standard of "notice pleading" by the holding in ***Bell Atlantic Corp. v. Twombly,*** 550 U.S. 544 (2007), that, to avoid a motion to dismiss, a complaint must plead enough facts to state a claim to relief that is plausible on its face. The more stringent pleading standard may affect a plaintiff's ability to employ artful inartfulness in some situations. However, it would not likely have impeded the plaintiff in ***Maestas*** from alleging an altercation without mention of the particulars of the mayhem.

Public Policy Against Insuring for Intentional Misconduct

However, there is at least one more interesting factor lurking in the background of the artful and inartful pleading jurisprudence: the public policy against covering intentional tortious conduct. Many states have long recognized a public policy against providing coverage for injuries when the insured intended to cause the particular injury or harm.(Footnote 32) While courts rarely invoke this public policy, as most insurance policies adequately exclude intentional acts, a court may use this as a "last resort" to avoid awarding a defense for intentional acts. If a court is convinced that an insured does not deserve a defense for a particular claim, the court has the power to look past any artful or inartful pleading issues, and even the plain language of the policy, and deny coverage based upon public policy.

For example, in ***Marleau v. Truck Ins. Exch.,*** 963 P.2d 715 (Or. App. 1998), a claimant filed a complaint alleging that the insureds "'conspired with each other to harass, annoy, disgrace, humiliate, discredit and cause severe emotional distress' by 'intentionally' making 10 statements about them and that those statements were 'vicious, defamatory, intentional and constituted extraordinary transgressions of the bounds of socially tolerable conduct.'" (Footnote 33) The applicable CGL policy "expressly excluded from coverage injury 'arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.'"(Footnote 34)

The court determined that the exclusion did not apply because the insureds could have *intentionally* made the statements *without* knowledge of their falsity. Despite explicitly finding that the insurer owed a duty to defend under the language of the policy, the court refused to award coverage for the defense of intentionally tortious conduct, holding that:

> [t]he complaint alleges that [insureds] intentionally made statements about the [claimants], that they knew the [claimants] would be harmed by the statements, that they made the statements "with the intention of causing [claimants] ... emotional distress," and that they "strategically timed" their statements to maximize that harm. There can be no question that those allegations describe the sort of subjective intention to harm that triggers the public policy against coverage.(Footnote 35)

Interestingly, on appeal, the Supreme Court of Oregon upheld the Oregon Court of Appeals' decision on the basis that the complaint did not allege a covered "offense," without reaching the question of whether public policy precluded coverage.(Footnote 36)

Conclusion

The duty to defend is vast but far from infinite. Insurers generally owe a duty to defend any claims reasonably inferred from the allegations of the applicable pleadings, regardless of inartful pleading—i.e., failures to plead a specific covered cause of action or sufficient supporting facts. On the other hand, insurers generally do not owe a duty to defend allegations of injury arising from excluded conduct, such as intentional acts, no matter how artfully claimants may attempt to recast the excluded conduct in the pleadings through the use of legal labels, such as "negligence." Finally, while the general rules of coverage for inartfully pled claims, if exploited, might otherwise impose a duty to defend where none otherwise exists, courts will not find coverage where to do so would be contrary to public policy.

Alan Van Etten is a partner at Deeley King Pang & Van Etten, where he represents individual and commercial policyholders in insurance and insurance bad faith litigation. He served on the *CGL Reporter* Editorial Board in 2004–2007. He frequently speaks, writes, and teaches on Hawaii Insurance Law. He has cowritten the materials for, and been a panel presenter on, more than 30 insurance coverage and bad faith seminars just since 1997. Mr. Van Etten cofounded the Insurance Coverage Litigation Section of the Hawaii State Bar Association in 2006, is a vice-chair of the Insurance Coverage Litigation Committee of the Tort Trial & Insurance Practice Section of the ABA, was program chair for the TIPS section of the ABA's Insurance Coverage Litigation Committee's Annual Meeting in 2009, and recently completed a 3-year term on the ABA Standing Committee on the Federal Judiciary. He has been named one of the "Best Lawyers in America" and as a National Superlawyer and is the only insurance coverage litigation attorney named to the top 25 Hawaii Superlawyers for 2012. Mr. Van Etten can be reached at .

Aaron Loeser is an associate at Deeley King Pang & Van Etten, where his practice areas include insurance coverage, civil litigation, and civil practice. He worked for 6 years in insurance claims with Progressive Insurance and was a casenote editor for the law review at Richardson School of Law, where he graduated cum laude. Mr. Loeser recently lectured on insurance coverage law before the Hawaii State Bar Convention. He can be reached at .

Footnotes:

1 *Id.* at 1219 (emphasis omitted).

2 *Id.* (brackets omitted).

3 *Id.* at 1217–18 (emphasis omitted).

4 *Id.* at 1218.

5 *Id.* (brackets omitted).

6 *Id.* (brackets omitted).

7 *Id.* (brackets omitted).

8 *Id.* at 1224 (internal brackets and ellipses omitted).

9 *Id.* at 1221.

10 ***Hart,*** 272 P.3d at 1225, n.19.

11 ***Continental Cas. Co. v. Gilbane Bldg. Co.,*** 461 N.E.2d 209, 212 (Mass. 1984).

12 ***Lime Tree Village Cmty. Club Ass'n, Inc. v. State Farm Gen. Ins. Co.,*** 980 F.2d 1402 (11th Cir. 1993).

13 ***Voorhees v. Preferred Mut. Ins. Co.,*** 607 A.2d 1255, 1259 (N.J. 1992).

14 ***Hart,*** 272 P.3d at 1221.

15 ***Abouzaid v. Mansard Gardens Assocs., LLC,*** 23 A.3d 338, 347 (N.J. 2011) (quotations omitted).

16 ***Premier Homes, Inc. v. Lawyers Title Ins. Corp.,*** 76 F. Supp. 2d 110, 117 (D. Mass. 1999).

17 ***Travelers Indem. Co. v. Dingwell,*** 414 A.2d 220, 226 (Me. 1980).

18 ***Demaray v. De Smet Farm Mut. Ins. Co.,*** 801 N.W.2d 284, 287 (S.D. 2011).

19 ***Voorhees,*** 607 A.2d at 1259.

20 ***Northern Sec. Ins. Co. v. Connors,*** 20 A.3d 912, 916 (N.H. 2011).

21 ***Lime Tree,*** 980 F.2d at 1405–06 (internal quotations, citations, and footnote omitted).

22 *Id.* at 394.

23 ***Voorhees,*** 607 A.2d at 1257.

24 *Id.*

25 *Id.* at 176.

26 ***Fire Ins. Exch. v. Bentley,*** 953 P.2d 1297, 1299 (Colo. App. 1998).

27 *Id.* at 1302.

28 ***West Am. Ins. Co. v. Maestas,*** 631 F. Supp. 1565, 1565 (D. Colo. 1986).

29 ***American Family Mut. Ins. Co. v. Harris,*** Civ. No. 06–cv–02004–JLK–BNB, 2007 WL 2890132, *8 (D. Colo. Sept. 27, 2007).

30 *Id.* at 571.

31 *Id.*

32 *E.g.,* ***Marleau v. Truck Ins. Exch.,*** 963 P.2d 715, 718 (Or. App. 1998).

33 ***Marleau,*** 963 P.2d at 718.

34 *Id.* at 716 (brackets omitted).

35 *Id.* at 718.

36 ***Marleau v. Truck Ins. Exch.,*** 37 P.3d 148, 150 (Or. 2001).
