

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

WESTCHESTER FIRE INSURANCE	)	
COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:13-cv-02207
	)	
ZURICH AMERICAN INSURANCE	)	
COMPANY,	)	
	)	
Defendant.	)	DEMAND FOR JURY TRIAL

**COMPLAINT FOR DAMAGES**

Plaintiff, Westchester Fire Insurance Company (“Westchester”), by and through its undersigned counsel, and for its Complaint for Damages against the captioned Defendant Zurich American Insurance Company, alleges as follows:

**NATURE OF THE ACTION**

1. This is an insurance coverage action arising out of Defendant Zurich American Insurance Company’s wrongful failure and refusal to settle within its policy limits a premises liability bodily injury lawsuit filed against its Insured, F.H. Paschen, Inc. (“Paschen”). Defendant Zurich issued a primary commercial general liability insurance policy to Paschen, an Illinois domiciled company, for the period of October 1, 2006 through October 1, 2007 with \$1 million per occurrence limits of liability. Plaintiff Westchester issued an umbrella policy to Paschen for the same period that provided excess coverage to Paschen above Zurich’s primary policy. In July 2008, Paschen was named a defendant in a suit filed in the Superior Court of Los Angeles County, California by William Kelly. Paschen notified Zurich of the suit, Zurich agreed to defend Paschen against the suit, and it retained its captive law firm in California as Paschen’s

defense counsel. During the course of Zurich's defense of the Kelly Lawsuit, it became clear that the potential damages could exceed the limit of the Zurich policy. Yet, Zurich did little, if anything, to settle the suit; nor did Zurich at any time inform Paschen (or Westchester) of the potential for an adverse excess verdict or notify Paschen of its right to independent counsel as required by Seventh Circuit precedent. As a result of Zurich's wrongful conduct, judgments ultimately were entered against Paschen for amounts significantly in excess of Zurich's policy limit. Westchester thus was required to indemnify Paschen for the amount of the judgments in excess of the Zurich limit and incur significant additional costs, all totaling in excess of \$700,000. Westchester in this action seeks recovery of those amounts from Zurich on that basis that Zurich: breached its duty to settle the Kelly Lawsuit, inclusive of cross-complaints, within policy limits; breached its duty to notify Paschen of a potential adverse verdict in excess of the Zurich primary limit; and, breached its duty to offer Paschen an opportunity to retain independent counsel. Westchester therefore requests that this Honorable Court order Zurich to reimburse Westchester for all amounts expended in the Kelly Lawsuit as a result of Zurich's improper conduct.

### **JURISDICTION, VENUE & PARTIES**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332, as there is complete diversity between the parties and the amount in controversy exceeds \$75,000, exclusive of interest and costs. The Court has personal jurisdiction over all Defendants in this matter.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the Defendant's principal place of business is located in this District. 28 U.S.C. § 1391(b)(1). Venue is also proper in this District because a substantial part of the events or omissions giving

rise to this claim occurred in this district. 28 U.S.C. § 1391(b)(2). Specifically, the dispute in question involves two insurance policies that were issued in Illinois to an insured (Paschen) with its principal place of business in Illinois.

4. Plaintiff Westchester is Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania. At all times relevant hereto, Westchester was authorized to engage in the business of insurance in Illinois

5. Upon information and belief, Zurich is an insurance company incorporated under the laws of the state of New York with its principal place of business in Schaumburg, Illinois.

## **FACTS**

### ***The Policies***

6. Zurich issued a policy of primary Commercial General Liability insurance, Policy No. GLO 9139420-00, to Paschen with a policy period of October 1, 2006 through October 1, 2007 (the “Zurich Policy”). A true and accurate copy of the Zurich Policy is attached hereto as Exhibit A.

7. The Zurich Policy provides for a \$1 million per occurrence limit of liability subject to a \$2 million annual aggregate limit.

8. Westchester issued a policy of Commercial Umbrella Liability insurance, Policy No. G21986094 002, to Paschen with a policy period of October 1, 2006 through October 1, 2007 (the “Westchester Policy”). A true and accurate copy of the Westchester Policy is attached hereto as Exhibit B.

9. The Westchester Policy provides for a \$25 million limit of liability for each occurrence, subject to a \$25 million General Aggregate Limit and a \$25 million Products/Completed Operations Aggregate Limit.

***The Incident***

10. On or about September 19, 2007, William Kelly suffered head and neck injuries, inclusive of post-concussion syndrome, neck sprain, and contusions of the face, scalp and neck, when he was descending a stairwell in Hawthorne High School in Hawthorne, California.

11. At the time of the incident, Paschen was the general contractor for a construction project ongoing at the High School that included the stairwell within its scope of work.

12. In February 2008, and as a result of injuries from the September 2007 accident, Kelly underwent a fusion and decompression surgery during which he experienced a heart related complication.

13. Kelly thereafter was forced to undergo, as a result of his injuries, narcotic pain therapy, pain management treatment, and electro-therapy outside of the United States. Kelly also suffered lost wages as a result of his inability to work due to his accident-related injuries.

***The Underlying Lawsuit***

14. On June 26, 2008, Kelly filed a lawsuit in the Superior Court of Los Angeles County, California, Case No. XC057622 against Paschen and Does 1-10 (the “Kelly Lawsuit”). The Kelly Lawsuit alleged that the stairwell was in a “dangerous, defective and hazardous condition” and set forth a single cause of action for general negligence for an unspecified sum of damages for wage loss, hospital and medical expenses, general damage, loss of earning capacity, pain and suffering, and prejudgment interest. A true and accurate copy of the Kelly Lawsuit is attached hereto as Exhibit C.

15. Paschen timely notified Zurich of the Kelly Lawsuit, and Zurich appointed its own captive law firm, the firm of Pollard Mavredakis Cranert Crawford & Stevens (“Zurich’s Captive Firm”), as Paschen’s defense counsel in the case.

16. Westchester was not notified of the Kelly Lawsuit at the time it was filed, or at any time thereafter until after commencement of trial of the Kelly Lawsuit in November 2010.

17. Kelly thereafter amended his complaint on March 10, 2009, to name as additional defendants Harley Ellis Devereaux (“Harley”), Fields Devereaux Architects & Engineers (“Fields”) and BPI Inspection Services (“BPI”). A true and accurate copy of the March 2009 amended complaint is attached hereto as Exhibit D.

18. Kelly amended his complaint again in October 2009, to add as defendants Kuryl Corporation, Lynx Iron Corporation (“Lynx”) and R & D Drywall (“R&D”). A true and accurate copy of the October 2009 second amended complaint is attached hereto as Exhibit E.

19. On or about July 10, 2009, Kelly filed with the Superior Court a statement of damages setting forth general damages of \$2.5 million and special damages according to proof at time of trial, amounts totaling in excess of two times the Zurich policy’s per occurrence policy limit. A true and accurate copy of the statement of damages is attached hereto as Exhibit F.

20. On November 13, 2009, Centinela School District filed a complaint in intervention against Paschen, Fields Devereaux, BPI and Does 1-20 alleging that as a subrogated, self-insured employer, it had suffered damages for all wages and workers compensation benefits paid to or on behalf of Kelly, as well as attorney fees and costs pursuant to contract. A true and accurate copy of the complaint in intervention is attached hereto as Exhibit G.

21. On January 8, 2010, Lynx filed a cross-complaint against all of the defendants, including Paschen, that sought contribution and/or indemnification and declaratory relief from

the other defendants. A true and accurate copy of the cross-complaint is attached hereto as Exhibit H.

22. On February 18, 2010, HED filed a cross complaint for indemnification and declaratory relief against Paschen and Lynx. A true and accurate copy of the cross-complaint is attached hereto as Exhibit I.

23. On or about September 2, 2010, Zurich's Captive Firm forwarded a copy of Kelly's mediation statement to Stephen Dickason of Zurich via email, noting that Kelly had made a \$1.2 million settlement demand. A true and accurate copy of the September 2 email forwarding the mediation statement is attached hereto as Exhibit J.

24. On or about September 14, 2010, a mediation was held during which Kelly made a demand of \$1.25 million exclusive of a lien claim.

25. At the mediation, the mediator proposed a settlement of \$975,000, inclusive of the lien. The mediator allocated the proposed settlement as follows: \$300,000 each to Paschen and to BPI; and, \$187,500 each to Fields and to Lynx. The proposed settlement as to Paschen would have been well within Zurich's \$1 million policy limit.

26. Paschen, via Zurich's Captive Firm, did not respond to the proposal at the mediation.

27. On or about September 15, 2010, Zurich's Captive Firm notified Zurich's Mr. Dickason of Kelly's \$1,250,000 demand and the mediator's proposal. A true and accurate copy of the September 15 email notifying Zurich of the demand is attached hereto as Exhibit K.

28. On or about October 1, 2010, Kelly settled with Fields for \$185,000 and with BPI for \$375,000.

29. On or about October 14, 2010, Kelly served Paschen, via Zurich's Captive Firm, and Lynx with statutory settlement demands of \$1,000,000 as to each of them. A true and accurate copy of the statutory settlement demand is attached hereto as Exhibit L.

30. On or about October 14, 2010, Zurich's Captive Firm sent an email to Zurich forwarding Kelly's policy limits statutory settlement demand. A true and accurate copy of the October 14 email notifying Zurich of the statutory settlement demand is attached hereto as Exhibit M.

31. On or about October 22, 2010, Zurich's Captive Firm sent a letter to Dickason alerting Dickason that Kelly had made a policy limits demand of \$1 million and that Fields and BPI had settled with Kelly for a total of \$561,500. A true and accurate copy of the October 22 letter to Dickason is attached hereto as Exhibit N.

32. That same day, October 22, 2010, counsel for HED wrote to Zurich's Captive Firm and offered to settle HED's cross-complaint against Paschen for \$202,863.87. On information and belief, Zurich's Captive Firm did not forward HED's settlement offer to Paschen or to Zurich. A true and accurate copy of the October 22 letter to Zurich's captive firm is attached hereto as Exhibit O.

33. On November 1, 2010, trial of Kelly's lawsuit began.

34. On November 17, 2010, Zurich notified Westchester for the first time of the Kelly Lawsuit. The notification came after evidence had closed in the trial.

35. On November 18, 2010, the very next day after Westchester first was notified, the jury returned a verdict of \$1.6 million in Kelly's favor. The jury apportioned 75% fault to Paschen, 10% to Lynx and 15% to R&D.

36. On January 26, 2011, judgment was entered in the amount of \$1,641,009, which included \$541,009 in economic damages and \$1.1 million in non-economic loss. The judgment against Paschen, after accounting for settlement set-off, was \$1,310,789.70, or over \$300,000 in excess of Zurich's primary policy limit. The judgment against Lynx was \$145,643. Final judgment was entered on February 1, 2011. A true and accurate copy of the final judgment is attached hereto as Exhibit P.

37. On March 11, 2011, a trial began on the cross-complaints that still remained pending between Fields and Paschen and between Paschen and Lynx.

38. On April 11, 2011, the court entered judgment against Paschen in the amount of \$411,848.03 on Fields' cross-complaints.

39. Paschen and Zurich demanded that Westchester pay the amounts of the judgment entered against Paschen in excess of Zurich's \$1 million limit.

40. Westchester complied and ultimately paid \$727,820 to satisfy the judgments entered against Paschen in the Kelly Lawsuit.

41. Westchester also paid certain fees and costs in connection with retaining appellate counsel to assist in Paschen's defense of the Kelly Lawsuit.

#### **COUNT I - NEGLIGENCE**

42. Westchester realleges and incorporates by reference the allegations in paragraphs 1 to 41 of this Complaint.

43. Under Illinois law, Zurich had a duty to Paschen and to Westchester to act reasonably and in good faith in attempting to settle the Kelly Lawsuit within its limit of liability.

44. Zurich breached those duties by virtue of its conduct in controlling the defense and settlement of the Kelly Lawsuit, including but not limited to the following:

- a. Zurich provided and controlled the defense of the Kelly Lawsuit against Paschen through Zurich's Captive Firm without ever advising Paschen of its right to independent counsel in light of the potential excess limits exposure to Paschen.
- b. Zurich exercised control of the settlement negotiations in the Kelly Lawsuit without regard to the excess policy limits exposure that existed against Paschen.
- c. Zurich failed to keep Paschen and Westchester fully and appropriately advised of the settlement negotiations in the Kelly Lawsuit.
- d. Zurich failed to respond to or accept settlement demands, including mediator's proposals, in a correct and/or timely fashion.
- e. Zurich failed to resolve the liabilities that existed against Paschen for within Zurich's \$1 million policy limit when it had clear opportunities to do so, and without appropriately explaining the ramifications of a failure to settle.
- f. Zurich wrongly allowed the Kelly Lawsuit to proceed to trial against Paschen notwithstanding the excess exposure that course of conduct presented to Paschen, resulting in an excess limits verdict against Paschen.

45. Zurich had the opportunity to settle and resolve all of Paschen's liabilities arising out of the Kelly Lawsuit within its limit of coverage.

46. Despite Zurich's control of the defense and settlement negotiations in the Kelly Lawsuit, Zurich negligently failed to settle the Kelly Lawsuit within its limit of liability.

47. As a result of Zurich's negligence, Westchester has expended significant amounts to indemnify Paschen for settlements and judgments arising out of the Kelly Lawsuit and to defend Paschen in its post-trial and appellate activities.

WHEREFORE, Westchester prays that this Honorable Court find that Zurich breached its duty to settle the Kelly Lawsuit within its primary limit of coverage and therefore Zurich is liable to reimburse Westchester for: amounts Westchester paid in satisfaction of settlement and judgments against Paschen in connection with the Kelly Lawsuit; amounts Westchester paid to defend Paschen in connection with the Kelly Lawsuit; pre- and post-judgment interest; attorneys' fees; and any such further relief as this Honorable Court deems just and proper.

**COUNT II – BREACH OF FIDUCIARY DUTY**

48. Westchester realleges and incorporates by reference the allegations in paragraphs 1 to 47 of this Complaint.

49. Under Illinois law, Zurich owed a fiduciary duty of due care and good faith to Paschen, as its insured, and by extension to Westchester as Paschen's excess insurer, with respect to the Kelly Lawsuit, including a fiduciary duty to settle the exposures arising out of the Kelly Lawsuit within Zurich's policy limit.

50. Zurich breached the duties it owed to Paschen and Westchester in its conduct of the defense of the Kelly Lawsuit, including without limitation, the following:

- a. Zurich provided and controlled the defense of the Kelly Lawsuit against Paschen through Zurich's Captive Firm without ever advising Paschen of its right to independent counsel in light of the potential excess limits exposure to Paschen.
- b. Zurich exercised control of the settlement negotiations in the Kelly Lawsuit without regard to the excess policy limits exposure that existed against Paschen.
- c. Zurich failed to keep Paschen and Westchester fully and appropriately advised of the settlement negotiations in the Kelly Lawsuit.

- d. Zurich failed to respond to or accept settlement demands, including mediator's proposals, in a correct and/or timely fashion.
- e. Zurich failed to resolve the liabilities that existed against Paschen for within Zurich's \$1 million policy limit when it had clear opportunities to do so, and without appropriately explaining the ramifications of a failure to settle.
- f. Zurich wrongly allowed the Kelly Lawsuit to proceed to trial against Paschen notwithstanding the excess exposure that course of conduct presented to Paschen, resulting in an excess limits verdict against Paschen.

51. Zurich had the opportunity to settle and resolve all of Paschen's liabilities arising out of the Kelly Lawsuit within its limit of coverage.

52. Despite Zurich's control of the defense and settlement negotiations in the Kelly Lawsuit, Zurich failed to settle the Kelly Lawsuit within its limit of liability.

53. Zurich's failure to settle the Kelly lawsuit within its limit of coverage constitutes a breach of the duty of due care and good faith it owed to Paschen and Westchester.

54. As a result of Zurich's breach of the duty of due care and good faith, Westchester has expended significant amounts to indemnify Paschen for settlements and judgments arising out of the Kelly Lawsuit and to defend for Paschen in its post-trial and appellate activities.

WHEREFORE, Westchester prays that this Honorable Court find that Zurich breached its duty of due care and good faith by failing to settle the Kelly Lawsuit within its primary limit of coverage and that therefore Zurich is liable to reimburse Westchester for: amounts Westchester paid in satisfaction of settlement and judgments against Paschen in connection with the Kelly Lawsuit; amounts Westchester paid to defend Paschen in connection with the Kelly Lawsuit;

pre- and post-judgment interest; attorneys fees; and any such further relief as this Honorable Court deems just and proper.

**JURY DEMAND**

Westchester demands a trial by jury on all issues so triable.

Respectfully submitted,

WESTCHESTER FIRE INSURANCE COMPANY

/s/ Thomas G. Griffin

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