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United States District Court Addresses the Fortuity Principle in Assessing Coverage Under Commercial General Liability Policy

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In *Old Guard Ins. Co. v. Riverway Prop. Mgmt., LLC*, 2024 U.S. Dist. LEXIS 160517, the United States District Court for the Central District of Illinois addressed Old Guard Insurance Company's declaratory judgment request as respects its duty to defend under a Commercial General Liability policy. The declaratory action stemmed from two underlying state-court lawsuits: a lawsuit filed by Davie and Associates Dermatopathology, P.A. (DAAD) against Aaron Rossi ("Rossi"), Riverway, Mark, Reditus Labs, and others, as well as, a lawsuit filed by Reditus Labs by and through its receiver, against Rossi, Riverway, and others.

The underlying lawsuits alleged that DAAD made capital contributions to Reditus Labs in excess of \$220,000, but despite these contributions, Rossi, through his control of Reditus Labs, had begun a campaign in October 2019 to exclude DAAD from any role in Reditus Labs business. It was further alleged that Rossi willfully concealed financial information from DAAD and further misappropriated funds to which he had no right. As a result of the alleged misconduct, Old Guard asserted that there was no potential for coverage for Rossi or Riverside under Old Guard's policies. According to Old Guard, the underlying state-court lawsuits describe intentional misconduct by Rossi and the entities which he controlled, like Riverway, such that the alleged injuries do not count as "occurrences". Old Guard further asserted that disgorgement and other restitutionary remedies are not "losses" as that term is used in the insurance context. Old Guard's Complaint describes the Reditus Labs Lawsuit's operative underlying complaints as asserting that Rossi advanced a misappropriation scheme involving fraud and deceit to willfully and wantonly breach duties owed to Reditus Labs and its members by misappropriating Reditus Labs's funds in a variety of ways.

In ruling in favor of Old Guard, the court held that underlying all insurance is "the fortuity principle," which addresses those situations where a loss is not accidental, as it is against public policy to allow an insured to collect insurance proceeds for a known or expected loss. As noted by the court, "It would be a moral hazard to insure against liability arising from intentional and inherently harmful conduct, such as criminal conduct." The Court further held that a claim for damages is distinct from a claim for restitution, and that no one writes -- and no state would enforce -- insurance policies designed to cover the disgorgement of fraudulent proceeds. Per the Court, the underlying state-court lawsuits allege that Rossi and Riverway intentionally and knowingly engaged in misconduct which resulted in harms and ill-gotten gains, not that the complained-of injuries were the result of an unfortunate accident which could satisfy the Old Guard Policies' definition of "occurrence."

In addition, the Reditus Labs Lawsuit describes how Rossi engaged in intentional self-dealing via schemes "by which he would misappropriate unearned and unwarranted funds from Reditus Labs under the guise of legitimate payments." As stated by the Court, the gravamen of these allegations is that Rossi intentionally took money -- which was not his to take -- such that these allegations do not fall within the Policies' definition of "occurrence." Further, these allegations relate to funds to which Rossi and Riverway had no claim of right, and the proceeds of such fraudulent behavior are not losses in the insurance sense. For these and other reasons, the Court ruled that none of the allegations of either the underlying state-court lawsuits "potentially" fall within the Policies' coverage, and Old Guard owed no duty to defend Rossi and Riverway against those allegations.