

# Daily Journal

## VERDICTS AND SETTLEMENTS

### Attorneys

Legal Malpractice

## Continental Casualty Co. v. Raymond J. Tittmann and Wargo French, LLP

Published: Feb. 5, 2021 | Result Date: Oct. 14, 2020 | Filing Date: Nov. 14, 2018 |

Case number: 18STCV04963

Summary Judgment – **Defense**

Judge

[John P. Doyle](#)

Court

Los Angeles County Superior Court

### Attorneys

Plaintiff

[John M. Moscarino](#)

(Valle & Makoff LLP)

[Susan L. Klein](#)

(Valle & Makoff LLP)

Defendant

[Victoria V. Tsyлина](#)

(Lurie, Zepeda, Schmalz, Hogan & Martin)

[Kurt L. Schmalz](#)

(Lurie, Zepeda, Schmalz, Hogan & Martin)

**Jonathan M. Starre**  
(Nemecek & Cole APC)

Facts

In the underlying action, lawyer Raymond Tittmann was engaged by Resolute Management, Inc. on behalf of National Indemnity Company, Inc. to defend an insurance company, Continental Casualty Company, in connection with a bankruptcy adversary proceeding entitled Barry A. Chatz, as Trustee for the CFB/WFB Liquidating Trust v. Continental Casualty Company (Adversary Action). Barry A. Chatz, as Trustee for the CFB/WFB Liquidating Trust, alleged that the insurer Continental failed to adhere to the claims-handling process that Continental and the Trust negotiated in the bankruptcy proceeding of one of Continental's insured, Chicago Fire Brick. The Adversary Action complaint sought a declaration that Continental must pay on the claims, up to its remaining policy limits of \$2.5 million (claims submitted by the time the Adversary Action complaint was filed totaled more than \$4.6 million) and that Continental engaged in "bad faith" claims handling, obliging Continental to pay the Trust's attorneys' fees and costs, and related penalties.

Although Continental was the named defendant in the Adversary Action, as the issuer of the relevant insurance policies, the action was handled by Resolute on behalf of NICO because in 2010, Continental transferred all of its legacy asbestos and environmental liabilities, including those asbestos liabilities pursuant to the policies involved in the subject bankruptcy and the Adversary Action, to Berkshire Hathaway's NICO, with NICO acquiring all of

Continental's liabilities in exchange for Continental's payment of \$2 billion to NICO, and NICO assuming up to \$4 billion of Continental's asbestos and environmental liabilities. After this transfer, Continental was completely taken out of the picture with regard to the asbestos and environmental liabilities, with NICO assuming all claims handling and claims payments up to the \$4 billion limit. NICO hired its affiliate company, Resolute, as NICO's subcontractor for claims handling.

In defending the Adversary Action, Tittmann asserted coverage defenses in Continental's answer, and filed a motion for partial summary judgment on the allocation issue, contending that Continental is responsible for less than 100 percent of each of the submitted claims. From the outset, Tittmann advised Continental to settle for its policy limits, given the amount of claims submitted (with the amount only increasing as the Adversary Action progressed) and exposure to extra-contractual damages sought by the Trust. Throughout the Adversary Action, Tittmann communicated only with Resolute and not Continental.

After the motion for partial summary judgment was denied (with the finding that the Trust's allocation of 100 percent liability to Continental was correct), Continental did not settle the case, but attempted to pursue other coverage defenses, hiring additional defense counsel to press those defenses. The Trustee opposed Continental's attempts to raise those defenses and filed a motion, in lieu of setting the case for trial, to recover on the Continental policies and for substantial attorneys' fees, costs and penalties, based on Illinois law.

On November 16, 2017, the bankruptcy court granted the Trustee's Motion for Attorneys' Fees and Costs, held that Continental was estopped from asserting its other coverage defenses, and awarded the Trustee the remaining balance of \$2.5 million on the policies issued by Continental, over \$200,000 in prejudgment interest, a statutory penalty of \$60,000, and the Trustee's attorneys' fees and costs of approximately \$800,000, totaling nearly \$4 million (the "adverse judgment"). Continental appealed the adverse judgment to the U. S. District Court, but the judgment was affirmed. In October 2018, Continental settled the judgment with a payment to the Trustee of \$4,006,980.08. The settlement of the adverse judgment, all of Continental's attorneys' fees and expenses, and all other associated costs in the Adversary Action were paid by Resolute, out of NICO's bank account. Continental did not pay anything toward the settlement of the adverse judgment or any other fees and costs, nor did it have to reimburse NICO and/or Resolute for any part of the payments they made. Subsequently, on November 14, 2018, Continental filed its legal malpractice action against Tittmann and the law firm Wargo French, LLP, where Tittmann practiced during some of the time the Adversary Action was pending.

#### Contentions

**PLAINTIFF'S CONTENTIONS:** In the legal malpractice action, Continental contended that Defendants Tittmann and Wargo French committed legal malpractice in the Adversary Action by not pursuing Continental's coverage defenses and waiving the defenses, telling the

bankruptcy court that a trial was not necessary, and that the court could enter judgment against Continental following the court's adverse ruling on a motion for partial summary judgment. Continental further alleged that its coverage defenses to the asbestos personal injury claims in the Adversary Action were meritorious and Continental would have had a better result in the case had it been allowed to pursue those coverage defenses. Continental claimed damages in the legal malpractice action of more than \$5 million, including the costs of settling the adverse judgment, and attorneys' fees and related costs Continental allegedly spent to remedy Defendants' conduct.

**DEFENDANT'S CONTENTIONS:** Defendants denied Continental's contentions, including, but not limited to, their failure to assert certain coverage defenses and/or that those coverage defenses had any merit. After several months of discovery, including depositions of Continental's persons most knowledgeable and other key witnesses, and production of documents, Defendant Tittmann filed a motion for summary judgment, on the grounds that Continental was not the real party in interest to bring the malpractice action because it did not suffer any damages as a result of the alleged legal malpractice in that the undisputed evidence showed that the adverse judgment and all other expenses and associated costs in the Adversary Action were paid by NICO and not by Continental. Defendant Wargo French joined in Tittmann's Motion. Continental filed a motion for summary adjudication that Defendants Tittmann and

Wargo French owed a duty of care to Continental in connection with the Adversary Action. In Opposition to Tittmann's motion for summary judgment, Continental argued that Defendants appeared and served as counsel for Continental in the Adversary Action and the adverse judgment was entered against Continental due to Defendants' neglect, so it had the legal right to sue its own attorney for malpractice. Continental also argued that it was damaged because NICO's payments for the adverse judgment and related costs in the Adversary Action were pursuant to Continental's reinsurance coverage with NICO and the collateral source rule applied such that NICO's payments were inadmissible and irrelevant. Continental also argued it suffered actual damage because the sums paid by NICO diminished Continental's reinsurance coverage amounts from NICO. In opposition to Continental's motion for summary adjudication, Tittmann/Wargo French argued that they did not owe a duty to Continental because third party Resolute Management, Inc. directed and paid for their services.

#### Result

The court granted Continental's motion for summary adjudication holding that Tittmann and Wargo French owed Continental a duty of care because they represented Continental in the Adversary Action. The Court granted Tittmann's Motion, holding that Continental did not suffer any actual damages in the underlying Adversary Action as a result of Defendants' alleged legal malpractice. Among other things, the Court stated that the collateral source rule did not apply and that the

diminution in Continental's \$4 billion coverage was a hypothetical injury and did not constitute actual damages. After parties' arguments at the hearing on Tittmann's Motion, the Court granted summary judgment in favor of Defendants and ordered counsel for Tittmann to submit a judgment of dismissal.

Other Information

Shortly after the hearing on Tittmann's motion, the parties resolved the case in a confidential settlement.

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