



NEWMAYER & DILLION LLP

## YOU MAKE A BETTER WALL THAN A WINDOW: WHY POLICYHOLDERS CAN REST ASSURED THAT INSURERS SHOULD PAY LEGAL BILLS FOR CLAIMS WITH *POTENTIAL* FOR COVERAGE

*By: Graham Mills & Alan Packer*



Graham Mills

### Contact

925.988.3200  
garaham.mills@ndlf.com

### Practice Areas

Business Litigation  
Construction Litigation  
Insurance Law  
Real Estate Litigation



Alan Packer

### Contact

925.988.3200  
alan.packer@ndlf.com

### Practice Areas

Business Litigation  
Construction Litigation  
Insurance Law  
Real Estate Litigation

Unfortunately, policyholders, such as manufacturers and contractors, routinely face the unnecessary challenge of how to access all of the insurance coverage which they have purchased. Frequently, the most pressing need is to get the insurance company to pay the legal bills when the policyholders have been sued. The recent Iowa federal district court opinion in *Pella Corporation v. Liberty Mutual Insurance Company* should help a policyholder in a dispute to require its insurance company to pay those legal bills sooner rather than later by highlighting that the duty to defend arises from the *potential* for coverage, and the insurer may not force the policyholder to prove the damage to obtain a defense.

In *Pella*, a window manufacturer purchased several years of insurance coverage from Liberty Mutual. Similar to many companies, Pella had many “layers” of insurance coverage in any given year. These layers collectively function like a tower. The general idea is that each layer provides a certain amount of coverage after the insurance policy below it had paid its money. The Liberty Mutual insurance policies provided excess coverage.

After the *Pella* window manufacturer made and sold its windows, it was sued in numerous lawsuits alleging that its windows were defective and that those defective windows caused a wide variety of damage to the structures in which they were installed. The window manufacturer tendered those lawsuits to its insurance companies in its tower of coverage, asking that the insurance companies pay its legal bills incurred in its defense. As to Liberty Mutual, the window manufacturer argued that the Liberty Mutual insurance policies were triggered, and so obligated to reimburse it, if a window was installed during the years that those policies provided coverage or if there was a mere allegation that a window was installed during the years that those policies provided coverage. Liberty Mutual opposed, arguing that the date of installation of the windows was insufficient to trigger the policies, and that the manufacturer was required to demonstrate the date that damage actually occurred to trigger a defense.

The key issue before the *Pella* Court in this decision was a simple one: which insurance policies, if any, issued by Liberty Mutual had an obligation to pay the window manufacturer’s legal bills? The answer to that question is critical and financially significant. Getting an insurance company to honor its obligations and start paying the legal bills as soon as possible is very important for a policyholder because of the cost of defending oneself in a lawsuit; often the key reason why an insurance policy is even purchased is to provide the policyholder with the right to



NEWMAYER & DILLION LLP

call upon the insurance company's financial resources to defend it should it be sued.

In a ruling that will be welcomed by policyholders, the *Pella* Court held that Liberty Mutual's multiple insurance policies were triggered, and so obligated to pay for the window manufacturer's defense, if one of two events occurred during the years in which those insurance policies provided coverage: (1) a window was actually installed during a year when the insurance policy provided coverage or (2) the window was alleged to be installed in the year that the insurance policy provided coverage. The Court agreed with the policyholder that once the windows were installed, property damage was alleged and "may *potentially* have occurred" from that point on, thus the policies on the risk from that point forward. The practical effect of this ruling meant that Liberty Mutual had to reimburse the window manufacturer for the defense fees and costs that it had paid.

While *Pella* was decided under Iowa law, the principles upon which it relied are similar to those applied under California law. Importantly, both California and Iowa law hold that an insurance company must provide a defense in response to a claim that is, or could be, covered by the insurance policy. The mere potential that the claim might be covered is enough for the insurance company to be obligated to pay for policyholder's legal fees and costs.

Establishing that an insurance company must pay legal fees and costs as soon as possible allows a policyholder to save its own money. Why should a policyholder pay legal bills when it purchased an insurance policy as protection to ensure that it did not have to pay those bills? The answer is that a policyholder should not and, under *Pella*, the policyholder does not have to. Rather, the insurance company must start paying for that defense from a very early date. *Pella* confirms for policyholders the position that their insurance companies should pay legal bills earlier rather than later.

*Alan Packer is a partner in the Walnut Creek office for Newmeyer & Dillion, LLP, representing homebuilders, property owners, and business clients on a broad range of legal matters, including risk management, insurance matters, wrap consultation and documentation, efforts to counter solicitation of homeowners, subcontract documentation, as well as complex litigation matters. Alan can be reached at [alan.packer@ndlf.com](mailto:alan.packer@ndlf.com).*

*Graham Mills is a partner in the Walnut Creek office of Newmeyer & Dillion, LLP, representing clients in the area of complex insurance law with an emphasis on insurance recovery, construction litigation, real estate litigation, and business litigation. He regularly examines and analyzes a wide variety of insurance policies. Graham can be reached at [graham.mills@ndlf.com](mailto:graham.mills@ndlf.com).*

## ABOUT NEWMAYER & DILLION LLP

For more than 30 years, Newmeyer & Dillion has delivered creative and outstanding legal solutions and trial results for a wide array of clients. With over 70 attorneys practicing in all aspects of business, employment, real estate, construction and insurance law, Newmeyer & Dillion delivers legal services tailored to meet each client's needs. Headquartered in Newport Beach, California, with offices in Walnut Creek, California and Las Vegas, Nevada, Newmeyer & Dillion attorneys are recognized by The Best Lawyers in America®, and Super Lawyers as top tier and some of the best lawyers in California, and have been given Martindale-Hubbell Peer Review's AV Preeminent® highest rating.

For additional information, call 949.854.7000 or visit [www.ndlf.com](http://www.ndlf.com).