

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: _____**

ALLIED WORLD SURPLUS LINES
INSURANCE COMPANY, an Arkansas
corporation,

Plaintiff,

v.

BECKER & POLIAKOFF, P.A., a Florida
corporation,

Defendant.
_____ /

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff Allied World Surplus Lines Insurance Company (“Allied World”) brings this action seeking declaratory relief against the Defendant Becker & Poliakoff, P.A. (“Becker”) and alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. This is a diversity action for declaratory relief pursuant to 28 U.S.C. § 2201 to declare the rights and other legal relations of the parties regarding an insurance policy issued by Allied World.
2. Allied World is a corporation organized and existing under the laws of the State of Arkansas with its principal place of business in the State of New York.
3. Becker is a corporation organized and existing under the laws of the State of Florida with its principal place of business in Fort Lauderdale, Florida.
4. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a). There is complete diversity of citizenship between Allied World and Becker. The amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

5. This Court has personal jurisdiction over Becker, and venue is proper in this District under 28 U.S.C. § 1391.

6. This action is brought pursuant to 28 U.S.C. § 2201, which provides that the Court may declare the rights and other legal relations of the parties. Allied World and Becker are both parties having an interest in the insurance policy referenced herein.

7. All conditions precedent to filing this action have been satisfied or waived.

BACKGROUND

The Underlying Action

8. This matter arises out of the June 24, 2021 collapse of the Champlain Towers South (“CTS”) condominium building in Surfside, Florida.

9. On November 16, 2021, plaintiffs filed a Consolidated Second Amended Class Action Complaint against Becker, among other defendants, in a case styled *In re: Champlain Towers South Collapse Litigation*, Case No. 2021-015089-CA-01, pending in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County (the “Underlying Action”). A true and accurate copy of the Consolidated Second Amended Class Action Complaint is attached hereto as **Exhibit 1**.

10. The plaintiffs filed the Underlying Action on behalf of themselves and on behalf of putative class and subclass members who were unit owners, residents, occupants, or guests at CTS at the time of the collapse. (Ex. 1 ¶ 6.)

11. The plaintiffs in the Underlying Action allege that Becker rendered continuous legal services to the Champlain Towers South Condominium Association, Inc. (“CTS Association”) from 1993 until after the collapse. (Ex. 1 ¶ 246.) Plaintiffs further allege that

Becker acted as both legal advisor and general counsel for day-to-day running of the CTS condominium. (Ex. 1 ¶ 253.)

12. According to the plaintiffs in the Underlying Action, Becker advised the CTS Association on issues, including but not limited to “responding to owners’ and residents’ concerns about the condition of the building, need for repairs, and ongoing construction of the 87 Park property being developed by the Terra group next door.” (Ex. 1 ¶ 255.)

13. According to the Consolidated Second Amended Class Action Complaint, Becker allegedly had been informed on numerous occasions that there were serious issues with the CTS building and had been provided a 2018 report by Morabito Consultants, Inc. that detailed major structural damage to the building. (Ex. 1 ¶¶ 276-77.)

14. The plaintiffs in the Underlying Action also allege that Becker received and responded to correspondence and complaints from concerned residents regarding the condition of the CTS building. (Ex. 1 ¶¶ 278-85.)

15. Based on the foregoing allegations, plaintiffs in the Underlying Action allege that Becker “knew or should have known that a failure to advise Defendant CTS that the building was at risk of an imminent collapse and that it should be evacuated until the necessary and life-saving repairs could be made would expose the occupants of the building to an unreasonable and unacceptable risk of harm.” (Ex. 1 ¶ 541.)

16. Notwithstanding this alleged knowledge, plaintiffs in the Underlying Action claim that Becker “failed to do what was right and chose not to advise that the Champlain Towers South condominium building was at risk of a collapse and further failed to advise that the CTS Association evacuate the building until the necessary repairs could be made and the structural stability of the building ensured.” (Ex. 1 ¶ 542.)

17. Plaintiffs in the Underlying Action further claim that “Becker had an ethical, legal, and professional obligation to warn and advise the residents and occupants of CTS of the danger of an imminent collapse and to take further investigative measures to determine the condition of CTS’s subsurface structural condition.” (Ex. 1 ¶ 543.)

18. Given Becker’s alleged failure to warn or “take any life-saving measures,” plaintiffs in the Underlying Action allege that Becker was grossly negligent, reckless, and demonstrated a willful and wanton disregard for the safety and health of the residents and occupants of CTS. (Ex. 1 ¶ 545.)

19. As a result of Becker’s alleged conduct, the plaintiffs in the Underlying Action seek damages based on the loss of their loved ones, their homes, and personal property in the collapse. (Ex. 1 ¶ 6.)

20. On December 30, 2021, CTS Association filed a cross-claim against Becker in the Underlying Action for damages arising from the allegations of the Consolidated Second Amended Class Action Complaint (the “Cross-claim”). A true and accurate copy of the Cross-claim is attached hereto as **Exhibit 2**.

21. In the Cross-claim, CTS Association seeks damages from Becker, its co-defendant in the Underlying Action, arising from Becker’s alleged breaches of its duties to properly advise, counsel, and inform CTS Association on matters related to the CTS building. (Ex. 2 ¶ 1).

22. According to the Cross-claim, CTS Association was vested with the authority and obligation to maintain, manage, and operate CTS, as well as to contract and sue with respect to matters for which CTS Association was legally responsible. (Ex. 2 ¶ 3).

23. CTS Association alleges that Becker had rendered legal services to CTS Association for many years, and that the scope of its representation of CTS Association was documented most recently in a written retainer agreement dated April 20, 2017. (Ex. 2 ¶ 15).

24. In this regard, CTS Association alleges that it considered Becker its legal advisor and general counsel regarding both day-to-day operational matters and major decisions affecting CTS. (Ex. 2 ¶ 21).

25. According to CTS Association, however, Becker failed to carry out its duties as legal advisor and general counsel with the requisite attention and care on critical matters affecting the structural integrity and safety of CTS. (Ex. 2 ¶ 26).

26. Specifically, CTS Association alleges that Becker improperly disregarded the findings and conclusions of two reports prepared by Morabito Consultants, Inc. – one prepared in 2018 which detailed major structural damage to the building, and a second prepared in 2020 which concluded that the structural damage had worsened exponentially – and failed to provide adequate legal advice to CTS Association with respect to those reports. (Ex. 2 ¶¶ 38, 54-56).

27. CTS Association further alleges that Becker improperly disregarded a letter from a concerned resident of CTS regarding the condition of the CTS building, (Ex. 2 ¶¶ 33-43); failed to advise CTS Association that its reserves were inadequate to address the need for urgent repairs detailed in the 2018 Morabito report, (Ex. 2 ¶ 52); failed to adequately investigate claims that construction work on a neighboring development was affecting the structural integrity of CTS, (Ex. 2 ¶¶ 58-59); and failed to advise CTS Association of a conflict of interest involving a Becker attorney who was involved in the neighboring development's acquisition of land rights from the City of Miami Beach, (Ex. 2. ¶¶ 66-72).

The Policy

28. Allied World issued a Lawyers Professional Liability Insurance Policy to Becker as the Named Insured for the Policy Period of December 22, 2020 to December 22, 2021, that provides certain coverage to Becker in excess of this Court's jurisdictional threshold pursuant to the policy's terms, conditions, and exclusions (the "Policy"). A true and accurate copy of the Policy is attached hereto as **Exhibit 3**.

29. The Insuring Agreement in the Policy provides:

The **Insurer** will pay on behalf of an **Insured**, subject to the applicable Limit of Liability set forth in Item 3.I. of the Declarations, all amounts in excess of the Retention shown in the Declarations, that an **Insured** becomes legally obligated to pay as **Damages** and **Claim Expenses** because of a **Claim** arising out of any of the following **Wrongful Acts** by an **Insured** first made during the **Policy Period** or any Extended Reporting Period:

A. **Legal Services Wrongful Act**

B. **Privacy Wrongful Act**

C. **Network Security Wrongful Act**

It is a condition precedent to coverage under this Policy that any **Wrongful Act** upon which a **Claim** is based occurred:

1. during the **Policy Period**; or
2. on or after the **Retroactive Date** and prior to the **Policy Period**, provided that all of the following three conditions are met:
 - (a) the **Insured** did not notify any prior insurer of such **Wrongful Act** or **Related Act or Omission**; and
 - (b) prior to December 22, 2019 no **Insured** had any basis (1) to believe that any **Insured** had breached a professional duty; or (2) to foresee that any fact, circumstance, situation, transaction, event or **Wrongful Act** might reasonably be expected to be the basis of a **Claim** against any **Insured**; and

- (c) there is no policy that provides insurance to the **Insured** for such liability or **Claim**.

Subject to the applicable Limit of Liability set forth in the Declarations, the **Insurer** shall have the right and duty to defend any **Claim** seeking **Damages** that are covered by this Policy and made against an **Insured** even if any of the allegations of the **Claim** are groundless, false or fraudulent.

(Policy, § I, as amended by Endorsement No. 7.)

30. The Policy defines “**Claim**,” in relevant part, to mean “any written notice or demand for monetary relief or **Legal Services**” and “any civil proceeding in a court of law.”

(Policy, § III, C.)

31. “**Wrongful Act**” as used in the Policy is defined to include a “**Legal Services Wrongful Act**,” which means

1. any actual or alleged act, error or omission committed by any **Insured**, solely in the performance of or failure to perform **Legal Services**; or
2. any actual or alleged **Personal Injury** committed by any **Insured**, solely in the performance of or failure to perform **Legal Services**.

(Policy, § III, Q. & HH.)

32. The Policy defines “**Legal Services**” as:

those services performed on behalf of the **Named Insured** for others by an **Insured**, whether or not performed for a fee or other consideration, as a licensed lawyer in good standing, arbitrator, mediator, title agent, notary public, administrator, conservator, receiver, executor, guardian, trustee, fiduciary or escrow agent, but only where such services were performed in the ordinary course of the **Insured’s** activities as a lawyer. **Legal Services** also include services rendered by an **Insured** as a: (a) member of a formal accreditation, ethics, peer review or licensing board, standards review board, bar association, or any similar board or committee; (b) expert witness in a legal malpractice proceeding; or (c) author, publisher or presenter of legal research or legal articles and papers, but only if the compensation received by the **Insured** annually

from such services is less than \$5,000. **Legal Services** do not include services rendered as a real estate agent or broker, as an insurance agent or broker or as a certified public accountant.

(Policy, § III, P.)

33. Insurance afforded by the Policy is subject to the following exclusion:

This Policy does not cover any **Claim** or **Disciplinary Proceeding** based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving, in whole or in part:

* * *

7. **Bodily Injury**, and injury to, or destruction of, any tangible property, including the loss of use resulting therefrom; provided however, that the exclusion of **Bodily Injury** does not apply to that portion of a **Claim** for mental injury, mental anguish, mental tension, or emotional distress caused by:

- (a) **Personal Injury**;
- (b) a **Non-Profit Director and Officer Wrongful Act**; or
- (c) a **Privacy Wrongful Act**.

(Policy, § IV, B.7 (the “Bodily Injury/Property Destruction Exclusion”).)

34. The Policy defines “**Bodily Injury**” as “injury to the body, sickness or disease sustained by any person, including death resulting from such injuries; including any mental injury, mental anguish, mental tension, emotional distress, pain or suffering or shock sustained by any person, whether or not resulting from injury to the body, sickness, disease or death of any person.”(Policy, § III, B.)

35. The Policy defines “**Personal Injury**” to mean “libel, slander, violation of a right of privacy, false arrest, detention, imprisonment, wrongful entry, eviction, malicious prosecution or abuse of process, when insurable under the law pursuant to which this Policy shall be construed.”(Policy, § III, Z.)

36. A “**Non-Profit Director and Officer Wrongful Act**” is defined as “any actual or alleged act, error or omission committed by an individual **Insured** lawyer while serving in his or her capacity as a director, officer or committee member of a **Non-Profit Organization.**” (Policy, § III, X.)

37. The Policy defines a “**Privacy Wrongful Act**” as

[A]ny actual or alleged act, error, misstatement, misleading statement, omission, neglect or breach of duty committed by any **Insured**, solely in connection with the performance of or failure to perform **Legal Services**, which results in:

1. the misappropriation or disclosure of **Confidential Information**; or
2. a breach or violation of U.S. federal or state law or regulations or any similar or related laws or regulations of any foreign jurisdiction associated with the of the actual or potential unauthorized access to or disclosure of **Confidential Information**, or any similar or related laws or regulations of any foreign jurisdiction.

Privacy Wrongful Act shall not include any breach or violation of any U.S. federal or state law or any similar or related laws or regulations of any foreign jurisdiction if such breach or violation is not the result of the actual or potential unauthorized disclosure of, or access to **Confidential Information**.

(Policy, § III, CC.)

Allied World’s Reservation of Rights

38. On or about November 15, 2021, Becker provided notice to Allied World of a draft Complaint in the Underlying Action, which was anticipated to include Becker. On November 17, 2021, Becker provided Allied World with a copy of the Consolidated Second Amended Class Action Complaint.

39. On November 18, 2021, Allied World informed Becker that the Bodily Injury/Property Destruction Exclusion applied to bar coverage for the Underlying Action,

specifically as relates to the claims asserted against Becker in the Consolidated Second Amended Class Action Complaint. A true and accurate copy of the November 18, 2021 letter is attached hereto as **Exhibit 4**.

40. In response to the subsequent filing of the Cross-claim in the Underlying Action on December 30, 2021, Allied World informed Becker on January 10, 2022 that the Bodily Injury/Property Destruction Exclusion similarly applied to bar coverage for the Cross-claim. A true and accurate copy of the January 10, 2022 letter is attached hereto as **Exhibit 5**.

41. Notwithstanding the application of the Bodily Injury/Property Destruction Exclusion, Allied World agreed to recognize defense coverage for Becker in the Underlying Action and with respect to the Cross-claim subject to a complete reservation of rights.

42. In its November 18, 2021 reservation of rights letter, Allied World initially only agreed to recognize defense coverage for Becker in the Underlying Action subject to the right to seek repayment of defense expenses in the event that a court confirms the Underlying Action is not covered under the terms of the Policy.

43. By letter dated December 17, 2021, Becker rejected Allied World's right to seek reimbursement of any defense expenses in connection with the Underlying Action in the event that there is a determination of no coverage under the Policy.

44. There is an actual controversy regarding the application of the Policy, and specifically the Bodily Injury/Property Destruction Exclusion, to the claims asserted in the Underlying Action and Cross-claim.

COUNT I
Declaration of No Coverage under the Policy

45. Allied World hereby incorporates by reference and re-alleges, as if fully stated herein, each and every allegation of Paragraphs 1 through 44 of this Complaint.

46. The allegations asserted against Becker in the Underlying Action and Cross-claim are based upon, arise out of, directly or indirectly result from, in consequence of, and involve bodily injury and/or destruction of property.

47. The Underlying Action and Cross-claim do not allege mental injury, mental anguish, mental tension, or emotional distress caused by **Personal Injury**, a **Non-Profit Director and Officer Wrongful Act**, or **Privacy Wrongful Act**, as those terms are defined in the Policy.

48. There is no coverage for the Underlying Action or the Cross-claim under the Policy because the Bodily Injury/Property Destruction Exclusion applies.

49. Allied World is entitled to a declaratory judgment in its favor, stating that Allied World has no liability under the Policy issued to Becker for any Damages or Claim Expenses of any kind arising out of or related to the Underlying Action or Cross-claim because the allegations fall within the scope of the Policy's Bodily Injury/Property Destruction Exclusion.

WHEREFORE, Allied World prays that the Court declare the rights of the parties and declare that Allied World has no liability to Becker under the Policy for any Damages, including Claim Expenses, that are the subject of the Underlying Action or Cross-claim and for such other and further relief as the Court may deem just and proper.

Respectfully submitted this ___ day of _____, 2022.

/s/ Heidi Hudson Raschke
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