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MAY 28 2010
J. DAVID NAVARRO, Clerk
By E. CHILD
Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

COUNTY OF BOISE, a political subdivision of the State of Idaho,

Plaintiff,

vs.

IDAHO COUNTIES RISK MANAGEMENT PROGRAM, UNDERWRITERS (ICRMP), and DOES 1 through X,

Defendants.

Case No. CV OC 2009-20083

DECISION

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This case involves a coverage dispute between Idaho Counties Risk Management Program Underwriters (ICRMP) and its insured, the County of Boise. Boise County filed this declaratory judgment action on October 21, 2009, and alleged ICRMP's denial of coverage and refusal to defend certain federal litigation breached its contract with it.

ICRMP moved for summary judgment on February 10, 2010. Boise County filed its motion for summary judgment on March 24, 2010. The Court heard argument on May 20, 2010, and took the matter under advisement on May 21, 2010.

Based on the following, the Court grants summary judgment to the Idaho Counties Risk Management Program Underwriters.

FACTUAL BACKGROUND

In January 2008, Alamar Ranch LLC (Alamar) filed a lawsuit against Boise County in the United States District Court for the District of Idaho. After reviewing the allegations in the complaint, ICRMP denied coverage and refused to defend on the grounds the allegations in the Alamar Ranch complaint did not allege claims that were covered under the terms and conditions of the ICRMP insurance policy.

Relevant to the Court's analysis, Alamar alleged in its Complaint the following facts relevant to the Court's analysis:

1. On April 19, 2007, Alamar applied for a conditional use permit ("CUP") to develop a residential treatment facility and private school on its property for

handicapped persons (at risk youth). Alamar further alleged it satisfied all the conditions for obtaining a CUP.

2. Boise County held public hearings on Alamar's application before the planning and zoning ("P&Z") board on August 2, 2007 ,and August 15, 2007. There was considerable public opposition to Alamar's application for a CUP.

3. In a written decision dated September 28, 2007, the P&Z board denied Alamar's application for a CUP on the basis that a residential treatment center was inappropriate for the location at the current time and that the County lacked sufficient infrastructure or money to monitor and enforce the conditions proposed for the application.

4. Alamar filed a timely appeal on October 18, 2007, to the Boise County Board of Commissioners ("Board").

5. The Board heard the appeal at a public hearing on January 28, 2008.

6. The Board deliberated the matter at a March 10, 2008 meeting, and imposed various restrictions that Alamar claimed made the project economically unfeasible.

7. The Board issued a written decision and order on April 21, 2008.

8. The conditions imposed by the Board were a pretext for the Board's discriminatory motive.

In particular, Alamar alleged that Boise County violated the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, by:

1. Failing to accommodate handicapped individuals by "placing onerous, arbitrary and unreasonable conditions on the approval of the application which destroyed the feasibility of the project."

2. Engaging in impermissible disparate treatment by placing "onerous, arbitrary and unreasonable conditions on the permit," while approving other developments without such conditions.

3. Unlawfully interfering with the anticipated residents of such project "by obstructing the construction or availability of housing...."

In its complaint, Alamar more specifically alleged that the P&Z commissioners violated the Fair Housing Act in denying it a CUP "[b]ecause there was no basis within the CUP standards to deny the application, the P&Z commissioners, <u>as a pretext, manufactured</u> ... reasons for the denial...." (Emphasis added.) Alamar further alleged that on appeal to the County Board of Commissioners, the Board "carried out its discriminatory purpose of preventing the project from being built by <u>knowingly</u> imposing numerous conditions on the CUP that individually or cumulatively made the proposed use of the property impossible," and that "the conditions were a pretext <u>designed</u> to conceal the Board's discriminatory motive of preventing the project from being

built." According to Alamar, "[i]n essence, Boise County refused Alamar's request for reasonable accommodations by placing conditions on the CUP aimed at ensuring the project would not be economically feasible,"

At the time, Boise County had in force a Public Entity Multi-Lines Insurance Policy (Policy) which it had procured from ICRMP and it tendered a claim for defense and indemnification which was denied by ICRMP. Boise County claims ICRMP had a duty to defend based on the Errors and Omissions Insuring Agreement found at Section IV, pg. 24 of the Policy. Section IV provided in relevant part as follows:

> **COVERAGE A.** We agree, subject to the terms and conditions of this Coverage, to pay on your behalf all sums which you shall become legally obligated to pay as ***damages*** because of any ***claim*** which is ***first made*** against you during this Policy Period, arising out of any ***wrongful act*** by you.
>
> All ***wrongful acts***, including all related ***wrongful acts***, must take place after the retroactive date, if any, shown in the Declaration Page and before the end of this Policy Period. A ***claim*** may also be ***first made*** against you if it is made during any Extended Reporting Period we may provide pursuant to the Specific Conditions outlined in this section below.

(Emphasis in the original.) The term "wrongful act" is defined at Para. 7, as follows:

> "***Wrongful Act***" means the negligent performance of or failure to perform a legal duty or responsibility in a tortious manner pursuant to the Idaho Tort Claims Act or be premised upon allegations of unlawful violations of civil rights pursuant to Federal law arising out of public office or position.

(Emphasis in the original.) The relevant exclusions in the Errors & Omissions Section are found at pages 25 through 26 of the Policy and read as follows:

> The Errors and Omissions Insuring Agreement does not cover any ***claim***:
>
> ...
>
> 2. Arising out of any dishonest, fraudulent, criminal, malicious, deliberate or intended ***wrongful act*** committed by you or at your direction.
>
> ...
>
> 4. Resulting from a ***wrongful act*** intended or expected from the standpoint of any ***insured*** to cause ***damages.*** This exclusion applies even if the ***damages*** claimed are of a different kind or degree than that intended or expected.
>
> ...
>
> 12. To any ***claim*** of liability arising out of or in any way connected with the operation of the principles of eminent domain, condemnation proceedings, inverse condemnation, annexation, regulatory takings, land use regulation or planning and zoning activities or proceedings, however characterized, whether such liability accrues directly against you or by virtue of any agreement entered into by or on your behalf.

...

16. No ***claim*** exists where the alleged harm for which compensation is sought derives from performance or nonperformance of terms of a contract, concerns the measure of performance or payment related to contract performance, derives from fines, penalties or administrative sanctions imposed by a governmental agency, or is generated by intergovernmental handling or allocation of funds according to the law. The ***claims*** for which this section[1] provides defense and indemnification must arise out of conduct of a tortious nature or be premised upon allegations of unlawful violation of civil rights pursuant to state or federal law.

(Emphasis in the original.)

The Policy General Exclusions section, at page 7, sets forth the Policy's coverage for civil penalties and punitive damages as follows:

Unless otherwise stated, these exclusions are applicable to ALL Sections of this Policy.

1. **Civil and Criminal Penalties.** This Policy does not cover any ***claim***, loss or damage resulting from any civil and criminal penalties imposed or provided for pursuant to any federal, state, or local law, statute, ordinance, or regulation, however characterized.

...

6. **Punitive Damage.** This Policy does not cover any ***claim***, loss or damage for exemplary or punitive ***damages***, however, characterized.

(Emphasis in the original.)

The Policy General Conditions at page 3 require ICRMP to defend as follows:

Unless otherwise stated, the following conditions are applicable to ALL Sections of this Policy.

...

8. **Defense of Claims or Suit.** We may investigate or settle any covered ***claim*** or ***suit*** against you. We will provide a defense with counsel of our choice, at our expense, if you are sued for a covered ***claim***.

(Emphasis in the original.)

It is against these provisions in the Policy that the Court analyzes the parties' motions.

ANALYSIS

These motions are before the Court as cross motions for a summary judgment. Rule 56(c) of the Idaho Rules of Civil Procedure provides that summary judgment is "rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

[1] Unlike other paragraphs throughout the Policy, the term, section, is *not* capitalized.

law." I.R.C.P. § 56(c); *see also First Security Bank of Idaho, N.A. v. Murphy*, 131 Idaho 787, 790, 964 P.2d 654, 657 (1998). A party against whom summary judgment is sought may not merely rest on allegations contained in his pleadings, but must come forward and produce admissible evidence to contradict the assertions of the moving party and establish a genuine issue of material fact. *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). Any sworn statements that are part of the record are to be considered by the trial court in deciding whether there is a genuine issue of material fact.

In this case, neither party identified any disputed facts material to the issues before the Court.. Thus, the question before this Court is whether the allegations contained in the Alamar Ranch complaint describe claims which are entitled to coverage under the sections of the ICRMP Policy described above and, thus, imposing a duty to defend on ICRMP. The Court finds that if coverage exists, it arises only under the Errors and Omissions Insuring Agreement.[2]

ICRMP argues that the alleged civil rights violations and claims for punitive damages are unambiguously excluded from coverage under the Errors & Omissions Section of the Policy. Boise County, on the other hand, claims the Errors & Omissions Section provides coverage and that none of the exclusions apply to the Alamar complaint. Based on the following, the Court finds the Policy does not provide coverage.

The parties agree that the Errors & Omissions Section of the Policy applies to Alamar's allegation and that absent an exclusion, ICRMP would have a duty to defend. However, ICRMP contends that Alamar's claims fall within the exclusions for deliberate or intentional acts (Exclusion Paragraph 2), result from wrongful acts intended or expected (Exclusion Paragraph 4), or arise out of or are connected to land use regulation or planning and zoning activities or proceedings (Exclusion Paragraph 12). Boise County, on the other hand, urges the Court to find either that none of the exclusions enumerated by ICRMP apply or that the last sentence in Exclusion Paragraph 16 essentially re-animates coverage.

[2] In its opening memorandum, ICRMP moved the Court to find that there is no general liability coverage under the Policy. Because Boise County did not respond to that argument the Court finds it conceded the only Policy Section that would provide coverage would potentially be found in the Errors & Omissions Section.

I. If a policy is clear and unambiguous, the determination of the policy's meaning and legal effect is a matter of law.

Where the language in an insurance policy is clear and unambiguous, coverage must be determined in accordance with the plain meaning of the words used unless its provisions are against public policy. *Erland v. Nationwide Ins. Co.,* 136 Idaho 131, 133, 30 P.3d 286, 288 (2001); *Featherston v. Allstate Ins. Co.*, 125 Idaho 840, 875 P.2d 937 (1985). Whether an insurance policy is ambiguous is a question of law for this Court to determine. *Potlatch Grain & Seed v. Millers Mut. Fire Ins. Co.,* 138 Idaho 54, 58, 57 P.3d 765, 769 (2002); *Erland, supra*; *Mutual of Enumclaw Life Ins. Co. v. Lincoln,* 131 Idaho 454, 958 P.2d 1140, 1141 (1997); *Bondy v. Levy*, 121 Idaho 993, 997, 829 P.2d 1342, 1346 (1992). The Court finds that the provisions at issue are clear and unambiguous.

The Idaho Supreme Court has likewise ruled that if an insurance policy is clear and unambiguous, the determination of the insurance policy's meaning and legal effect are questions of law. *City of Idaho Falls v. Home Indem. Co.,* 126 Idaho 604, 607, 888 P.2d 383, 386 (1995). The meaning of the insurance policy and the intent of the parties must be determined from the plain meaning of the insurance policy's own words. *Id.*

The Idaho Supreme Court has repeatedly stated that courts must "construe a contract of insurance as it is written, and the court by construction cannot create liability not assumed by the insurer, nor make a new contract for the parties, or one different from that plainly intended, nor add words to the contract of insurance to either create or avoid liability." *Kromrei v. Aid Ins. Co.*, 110 Idaho 549, 551-552, 716 P.2d 1321, 1323-1324 (1986) (citing *Unigard Ins. Group v. Royal Globe, Etc.*, 100 Idaho 123, 128, 594 P.2d 633 (1979), quoting *Miller v. World Ins. Co.*, 76 Idaho 355, 357, 283 P.2d 581, 582 (1955)).

The steps in interpreting an insurance policy to determine coverage are well established: First, the Court examines the insuring agreement, in this case, the Policy. If there is potential coverage, the Court looks next to the exclusions. "Under Idaho law and consistent with other states, an insurer's duties to defend and indemnify are separate duties." *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 375, 48 P.2d 1256 (2002). "The duty to defend is broader than the duty to indemnify." *Id.* The duty to defend arises upon the filing of a complaint whose allegations, in whole or in part, read broadly, reveal a potential for liability that would be covered by the insured's policy. *Id.* at 372, 48 P.2d at 1261 (citing *Constr. Mgmt. Sys., Inc. v. Assurance Co. of Am.*, 135 Idaho 680, 682, 23 P.3d 142, 144 (2001); *Union Warehouse & Supply Co., Inc. v. Illinois R.B. Jones, Inc.*, 128 Idaho

660, 667, 917 P.2d 1300, 1307 (1996); *Kootenai County v. W. Cas. and Sur. Co.,* 113 Idaho 908, 910, 750 P.2d 87, 89 (1988)). How and when an insurer must determine its potential for liability and duty to defend has also been established:

> [W]here there is doubt as to whether a theory of recovery within the policy coverage has been pleaded in the underlying complaint, or which is potentially included in the underlying complaint, the insurer must defend regardless of potential defenses arising under the policy or potential defenses arising under the substantive law under which the claim is brought against the insured. . . The proper procedure for the insurer to take is to evaluate the claims and determine whether an arguable potential exists for a claim covered by the policy; if so, then the insurer must immediately step in and defend the suit.

Id. (quoting *Kootenai County,* 113 Idaho at 910-911, 750 P.2d at 89-90). Therefore, under Idaho law, if there is an arguable potential that the claims would be covered by the Policy, ICRMP must defend the Alamar suit.

The duty to defend arises "upon the filing of a complaint, whose allegations, in whole or in part, read broadly, reveal a potential for liability that would be covered by the insured's policy." *Amco Ins. Co. v. Tri-Spur Inv. Co.,* 140 Idaho 733, 737, 101 P.3d 226, 230 (2004). However, where there is clearly no coverage according to the policy, there is no duty to defend. *See Treasure Valley Transit v. Phila. Indem. Ins. Co.,* 139 Idaho 925, 929, 88 P.3d 744, 748 (2004); *see also Hoyle, supra,* 137 Idaho at 373 (holding that because of intentional act exclusion, there was no duty to defend as to claim of intentional breach of the covenant of good faith). Moreover, if a third-party's complaint, read broadly, reveals no potential liability for purposes of the duty to defend, there can be no duty to indemnify. *Hoyle,* 137 Idaho at 375, 48 P.3d at 1264. If there is a later change during the third party litigation bringing the claims within coverage, the duty to defend and indemnify may arise. *Id.*

In making its analysis of the underlying lawsuit, the Court cannot consider extrinsic evidence. *See Hoyle,* 137 Idaho at 373, 48 P.3d at 1262 (citing *Construction Management v. Assurance Co. of America,* 135 Idaho 680, 684, 23 P. 3d. 142, 146 (2001)). Rather, the Court, like the insurer, is confined to examining the claims set forth in the underlying complaint filed by Alamar and the terms of the Policy to determine if there is coverage for those claims as they are asserted in the underlying complaint. *See also Amco Ins. Co.,* 140 Idaho at 738, 101 P.3d at 231. If the Court's analysis fails to reveal coverage, ICRMP is not required to defend the liability complaint and is not obligated to indemnify the insured if it is found liable. *See Hoyle,* 137 Idaho at 375, 48 P.3d at 1264.

Against this background the Court examines both the Alamar complaint and the Policy.

II. The claims asserted in Alamar's complaint allege deliberate, intentional acts committed in, or arising out of, the planning and zoning activities and proceedings.

As set forth more fully in the Court's Factual Background, the Alamar complaint alleges it applied to the P&Z for a CUP (conditional use permit) to develop a residential treatment facility on its property for handicapped persons (at risk youth). Alamar further alleges that at the time it applied, it satisfied all the conditions for obtaining a CUP. The P&Z denied the CUP on the basis that a residential treatment center was inappropriate for the location at the current time and that Boise County lacked sufficient infrastructure or money to monitor and enforce the conditions proposed for the application..

Alamar further alleges that on appeal to the Board of Commissioners, the CUP was approved, but with several onerous conditions that made the project economically unfeasible. These general facts form the basis for the Fair Housing Act claims asserted by Alamar, and are, in fact, specifically incorporated into each of its claims.

Alamar further alleges that the P&Z's reasons given to support its decision to deny the CUP were "manufactured" as a "pretext"[3] for discrimination. Alamar then alleges that the Board on appeal only granted the CUP because the Board knew it could not deny it the CUP. However, Alamar contended that the Board carried out its discriminatory purpose to prevent the project from being built by "knowingly imposing" numerous conditions that made the proposed use impossible. Alamar then alleges the "conditions were a pretext designed to conceal the Board's discriminatory motive of preventing the project from being built."

The Court finds that plain text of the Alamar complaint clearly alleges that all of the claims arise out of or are related to the disputed Boise County planning and zoning activities or proceedings. The Court further finds that Alamar clearly alleges Boise County's actions were deliberately taken with the specific intent to commit the wrongful act of discriminating against Alamar or the intended handicapped residents in violation of the Fair Housing Act. The claims also allege that Boise County deliberately tried to disguise its discriminatory motives by designing and imposing the onerous conditions for the specific purpose of making the project uneconomic.

[3] According to Merriam-Webster's On-Line Dictionary, "pretext" is defined as "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs."

In summary, the undisputed facts establish that Alamar's complaint alleges a series of acts specifically intended to commit the wrongful act of discriminating against Alamar or the intended handicapped residents. Likewise, the undisputed facts establish that Alamar's complaint alleges claims that all claims arise out of the disputed Boise County planning and zoning activities or proceedings.

Finally, Alamar also requests both punitive damages pursuant to 42 U.S.C. § 3613(c), which authorizes a court to award actual and punitive damages, and injunctive relief. Punitive damages are not automatic in every Fair Housing Act claim. *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1121 (7th Cir. 1974). "Punitive damages are limited 'to cases in which the [defendant] has engaged in intentional discrimination and has done so with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'" *United States v. Space Hunters, Inc.*, 429 F.3d 416, 427 (2nd Cir. 2005) (quoting *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 529-30 (1999). In other words, by making a claim for punitive damages, Alamar was, again, alleging intentional conduct on the part of Boise County.

III. The Terms Of The Policy Exclude Coverage.

Neither party argues that exclusions are ambiguous and the Court agrees. As a matter of law, the Court finds the exclusions relevant to the Alamar complaint are clear and unambiguous. Therefore, the Court must determine whether the exclusions act to defeat coverage of the Alamar complaint.

A. There is no coverage for intentional wrongful acts or acts intended or expected to cause damages.

The Court finds that the intentional act exclusion found at page 25, paragraph 4of the Errors & Omissions Policy defeats coverage for any claim arising from a ***wrongful act***[4] intended or expected by the insured to cause damage. Likewise, the companion exclusion found at page 25, paragraph 2 of the Errors & Omissions Policy defeats coverage for any claim arising from any deliberate or intended wrong ***wrongful act.***

[4] "*Wrongful Act*" means the negligent performance of or failure to perform a legal duty or responsibility in a tortious manner pursuant to the Idaho Tort Claims Act or be premised upon allegations of unlawful violations of civil rights pursuant to Federal law arising out of public office or position.

The fact the damage claimed is different from what the insured intended or expected is irrelevant. *See Farmers Ins. Group v. Sessions,* 100 Idaho 914, 918, 607 P.2d 422 (1980) (intentional act exclusion required insurer to show the insured intended to cause the injury even where the actual injury is different than originally intended.), *see also Maxson v. Farmers Ins. of Idaho, Inc.*, 107 Idaho 1043, 695 P.2d 428 (1985). As the Court has found, Alamar alleges several intentional wrongful acts throughout its suit.

The Court finds the Alamar Complaint is clear in alleging that Boise County intended the wrongful act of discrimination in violation of the Fair Housing Act. The Court further finds that, contrary to Boise County's contentions, under a reasonable reading of the Alamar complaint there is no arguable potential that Alamar's claims could be interpreted as alleging negligent actions. Thus, the Court finds that coverage is excluded under the Policy and, for that reason, ICRMP does not have a duty to either defend or indemnify Boise County as to the Alamar suit.

B. There is no coverage for claims arising from or in any way connected to planning and zoning decisions and activities.

The Errors & Omissions Policy, at page 26, paragraph 12, also excludes coverage for claims arising out of land use decisions and activities, including planning and zoning. Specifically, the Errors & Omissions Policy provides an exclusion for "any ***claim***[5] of liability arising out of or in any way connected with . . . land use regulation or planning and zoning activities or proceedings, however characterized, whether such liability accrues directly against you or by virtue of any agreement entered into by or on your behalf." (Emphasis added). All of the actions that form the basis of the Alamar complaint clearly arise out of and are connected with land use regulation or planning and zoning activities or proceedings. Even Boise County, in its Complaint for Declaratory Relief acknowledged in relevant as follows .

> On or about January 13, 2009, *Alamar Ranch, LLC*, filed an action in U.S. District Court, District of Idaho, against County of Boise alleging violations of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* The violations are alleged **in connection with** the: (1) County of Boise Planning and Zoning Commission's denial of a conditional use permit for a residential treatment facility designed to house individuals allegedly protected under the Fair Housing Act ...; and/or (2) County of Boise Board of Commissioners' imposition of conditions of permit approval that Alamar Ranch alleges were "pretext designed to conceal the Board's discriminatory motive

(Emphasis added.)

5 The bolded word is in the original.

The Court finds that based on the plain language of the exclusion, Alamar's claims "arise out of" and are "connected with" the land use and planning activities conducted by the County. The Court further finds that, contrary to Boise County's contentions, under a reasonable reading of the Alamar complaint there is no arguable potential that Alamar's claims could be interpreted as anything other than alleging Boise County's discriminatory actions arose out of planning and zoning or land use regulation activities or proceedings. For that reason any claims associated with Boise County's consideration of the Alamar Ranch application for a conditional use permit are excluded from coverage. Because of the exclusion, ICRMP is relieved of any duty to provide a defense for any of the claims in the Alamar complaint.

C. The ICRMP Policy excludes coverage for punitive damages.

The Alamar complaint also requests punitive damages pursuit to 42 U.S.C. § 3613(c). As described above, in order to recover punitive damages, Alamar must establish intentional discrimination undertaken with malice and reckless indifference to the rights of the plaintiff. These claims are excluded from Policy coverage under the intentional act exclusion discussed above.

Additionally, the Errors & Omissions Policy contains a very specific exclusion which reads, "[t]his policy does not cover any claim, loss or damage for exemplary or punitive damages, however characterized." *See* Policy pg. 7, paragraph 6. This policy language is unambiguous. For that reason, all claims in the Alamar complaint seeking punitive damages are also excluded from coverage and the Court finds that ICRMP is not obligated to defend Boise County for these particular claims.

D. The last sentence in the Errors & Omissions Policy exclusion found at page 26, paragraph 16, does not change the Court's analysis.

Finally, Boise County claims that the last sentence in Paragraph 16 overrides all the other exclusions listed in the Errors & Omissions coverage, Section IV of the Policy. As discussed in the Court's analysis, however, the Court disagrees and finds that this paragraph does not apply to any claim raised in the Alamar complaint. Paragraph 16 reads as follows:

> 16. No ***claim*** exists where the alleged harm for which compensation is sought derives from performance or nonperformance of terms of a contract, concerns the measure of performance or payment related to contract performance, derives from fines, penalties or administrative sanctions imposed by a governmental agency, or is generated by intergovernmental handling or allocation of funds according to the law. The ***claims*** for which this section provides defense and indemnification must arise

> out of conduct of a tortious nature or be premised upon allegations of unlawful violation of civil rights pursuant to state or federal law.

(Emphasis in the original.)

The Court finds that Paragraph 16 excludes certain contractual claims from coverage under the Errors & Omissions Section. The claims Alamar made in its lawsuit did not derive from performance or nonperformance of terms of a contract, concern the measure of performance or payment related to contract performance, derive from fines, penalties or administrative sanctions imposed by a governmental agency, and did not arise from intergovernmental handling or allocation of funds. Therefore, Paragraph 16 does not apply to the Alamar complaint claims.

Moreover, contrary to Boise County's contentions, the Court finds that the last sentence simply makes clear that Paragraph 16 does not affect the general coverage for civil rights violations arising out of contract performance (like an employment contract) provided by the Errors & Omissions Section. It does not apply beyond the paragraph in which it appears. Throughout the Policy when the parties intend for the word, section, to refer to the particular Policy Section in which it appears, the word is capitalized. However, in Paragraph 16, the word, section, is not capitalized. Therefore, the Court finds that this last sentence only modifies the exclusions found in that same paragraph.

This interpretation is consistent with the General Exclusions found at page 7 of the Policy which states as follows:

> 3. **Contractual Liability.** This Policy does not cover any ***personal injury, property damage,*** or any other claimed loss, however characterized, arising directly or indirectly from the performance or nonperformance of terms of a contract, whether written, oral or implied, excepting, however, employment contract ***claims*** premised upon implied contracts pursuant to Section IV (Errors & Omissions).

(Emphasis in original.)

Therefore, while Boise County argues that the use of the word, section, refers to Section IV (Errors & Omissions) making that sentence applicable to the entire set of exclusions, the Court finds it does not. The Court finds that its effect is clearly and unambiguously limited to Paragraph 16.

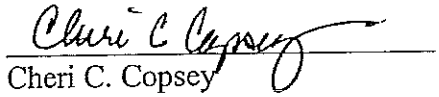
E. CONCLUSION.

The claims set forth in Alamar's Complaint all arise from or are connected with Boise County's actions and decisions regarding a planning and zoning and/or land use application. Alamar has also alleges that the wrongful conduct—discrimination of handicapped youth in violation of the

Fair Housing Act—was intentional and state a claim for punitive damages. The Policy specifically excludes coverage for intentional acts, or claims that arise from or are connected with land use and P&Z decisions or punitive damages. Because the Policy clearly excludes coverage for the claims alleged by Alamar, ICRMP is relieved of its duty to defend the suit. *Treasure Valley Transit v. Phila. Indem. Ins. Co.*, 139 Idaho 925, 929, 88 P.3d 744, 748 (2004); *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 373, 48 P.3d 1256, 1262 (2002). Accordingly, to the extent the breach of contract claim in the declaratory judgment complaint alleges ICRMP improperly refused to defend and denied coverage, ICRMP is entitled to summary judgment. The Court hereby grants ICRMP's Motion for Summary Judgment.

IT IS SO ORDERED.

DATED this 28th day of May 2010.



Cheri C. Copsey
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 28th day of May 2010, mailed (served) a true and correct copy of the within instrument to:

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Clerk of the District Court

E. CHILD SEAL

~~John Weatherby~~ Emily Child
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