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Subdivision of the State of Idaho

**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 I through X,

Defendants.

Case No. CV OC 09-20083

**PLAINTIFF'S MEMORANDUM
IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT
REGARDING THE DUTY TO
DEFEND AND IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

COMES NOW Plaintiff, by and through its counsel of record, Brassey, Wetherell & Crawford, and respectfully submits this Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment Regarding the Duty to Defend and In Opposition to Defendant's Motion for Summary Judgment.

I. INTRODUCTION

This case arises from a coverage dispute between Idaho Counties Risk Management Program Underwriters (ICRMP) and its insured, the County of Boise. In January of 2009, Alamar Ranch LLC (“Alamar”) filed a civil rights Complaint against County of Boise (“Boise County”), a political subdivision of the state of Idaho, alleging civil rights violations of the Fair Housing Act, 42 U.S.C. §3601 *et seq.* See Affidavit of Robert T. Wetherell in Support of Motion for Partial Summary Judgment Regarding the Duty to Defend and in Opposition to Defendant’s Motion for Summary Judgment (hereinafter “Aff. of RTW”), Exhibit “A” (hereinafter “Alamar Complaint”). Boise County tendered the lawsuit to its insurer, ICRMP, and requested that ICRMP defend the lawsuit under Boise County’s Public Entity Multi-Lines Insurance Policy in effect at the time of the alleged civil rights violation and the Complaint filed by Alamar, Policy No. 28A01008100108 (“the Policy”). See Aff. of RTW, Exhibit B (hereinafter “ICRMP Policy”). Boise County sought coverage pursuant to the General Liability portion of the Policy and the specific portion of the Policy which included Errors and Omissions insurance coverage. See Complaint for Declaratory Relief. ICRMP denied coverage and refused to defend the Alamar Ranch litigation, claiming that the civil rights allegations in Alamar’s Complaint were not covered under the terms of the ICRMP insurance policy. See Complaint for Declaratory Relief ¶¶9, 17, 18. Boise County then filed the current declaratory judgment action on October 21, 2009, seeking a declaration that ICRMP had a duty to defend Boise County against Alamar’s lawsuit. See Complaint for Declaratory Relief. Plaintiff has fulfilled all conditions precedent to filing the current action as required by the policy here at issue. See Complaint for Declaratory Relief ¶¶6, 8, 18, 20.

For the reasons set forth below, the allegations made against Boise County in the Alamar litigation require ICRMP to defend Boise County as the plain language of the ICRMP Policy provides coverage or, at the very least, the policy is ambiguous as applied to the facts of this case and a duty to defend is owed. In addition, a decision on the duty to indemnify under the policy is premature as the Alamar Complaint alleges both covered and non-covered claims.

II. SUMMARY JUDGMENT STANDARD

Upon motion for summary judgment, the Court will liberally construe all controverted facts in favor of the non-moving party and will draw all reasonable inferences in favor of that party. *Arreguin v. Farmers Insurance Company of Idaho*, 145 Idaho 459, 461, 180 P.3d 498, 500 (2008). Under Idaho Rule of Civil Procedure 56(c), a grant of summary judgment is proper when “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 judgment as a matter of law.” If there is no genuine issue of material fact, there is only a question of law over which the Court will exercise free review. *Infanger v. City of Salmon*, 137 Idaho 45, 47, 44 P.3d 1100, 1102 (2002). “The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits.” *Intermountain Forest Mgmt., Inc. v. La. Pac. Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001).

III. INTERPRETATION OF INSURANCE POLICIES IN IDAHO

In Idaho, insurance policies are to be interpreted in accordance with general rules of contract law “subject to certain special canons of construction.” *Arreguin*, 145 Idaho at 461, 180 P.3d at 500 (quoting *Clark v. Prudential Prop. & Cas. Ins. Co.*, 138 Idaho 538, 540, 66 P.3d 242, 244 (2003)). When reviewing and interpreting contracts of insurance drafted by an insurance company, “any ambiguity that exists in the contract ‘must be construed most strongly against the insurer.’” *Arreguin*, 145 Idaho at 461, 180 P.3d at 500 (quoting *Farmers Ins. Co. of Idaho v. Talbot*, 133 Idaho 428, 432, 987 P.2d 1043, 1047 (1999)). Furthermore, a provision that seeks to exclude coverage must be strictly construed in favor of the insured. *Moss v. Mid-America Fire and Marine Ins. Co.*, 103 Idaho 298, 300, 647 P.2d 754, 756 (1982). Since an insurance policy is typically drafted by the insurer, the insurer has the burden of using “clear and precise language if it wishes to restrict the scope of coverage and exclusions not stated with specificity will not be presumed or inferred.” *Clark*, 138 Idaho at 541, 66 P.3d at 245. *See also Harman v. Northwestern Mut. Life Ins. Co.*, 91 Idaho 719, 721, 429 P.2d 849, 851 (1967) (concluding that “the burden was upon the defendant to show that the loss or injury was from a risk or cause excepted from the insuring provision.”).

It is a question of law as to whether an insurance policy is ambiguous. *Purvis v. Progressive Cas. Ins. Co.*, 142 Idaho 213, 216, 127 P.3d 116, 119 (2005). In determining whether a policy is ambiguous, the relevant inquiry is whether the language is “reasonably subject to differing interpretations.” *Clark*, 138 Idaho at 541, 66 P.3d at 245 (citing *Moss*, 103 Idaho at 300, 647 P.2d at 756).

In the absence of ambiguity, interpretation of the unambiguous contract is a question of law. *DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986). The court in *Stein-McMurray Insurance Inc., v. Highlands Ins. Co.*, 95 Idaho 818, 820, 520 P.2d 865, 867 (1974) held that “where a word or phrase used in an insurance contract has a settled legal meaning or interpretation, that meaning or interpretation will be given [effect] even though other interpretations are possible.” If there is no settled legal meaning, courts will determine coverage “according to the plain meaning of the words employed.” *Komrei v. AID Ins. Co. (Mut.)*, 110 Idaho 549, 551, 716 P.2d 1321, 1323 (1986). These general rules of interpretation are tempered by the following:

It is a long established precedent of this Court to view insurance contracts in favor of their general objectives rather than on a basis of strict technical interpretation of the language found therein . . . [A]n insurance contract is to be construed most favorably to the insured and in such a manner as to provide full coverage for the indicated risks rather than to narrow protection. This Court will not sanction a construction of the insurer's language that will defeat the very purpose or object of the insurance.

Bonner County v. Panhandle Rodeo Ass'n, 101 Idaho 772, 776, 620 P.2d 1102, 1106 (1980).

IV. ANALYSIS

A. ICRMP HAS A DUTY TO DEFEND BOISE COUNTY IN THE ALAMAR LITIGATION BECAUSE ALAMAR'S COMPLAINT ASSERTS CIVIL RIGHTS CLAIMS THAT ARE COVERED UNDER THE ICRMP POLICY.

Under Idaho law, an insurer's duty to defend is separate from its duty to indemnify. *Hirst v. St. Paul Fire & Marine Ins. Co.*, 106 Idaho 792, 798, 683 P.2d 440, 446 (Ct. App. 1984). The duty to defend is much broader than the duty to pay damages under an insurance policy. *Id.*

In Idaho, an insurance company's 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." *Hoyle v. Utica Mutual Ins. Co.*, 137 Idaho 367, 371-72, 48 P.3d 1256, 1260-61 (2002). The Idaho Supreme Court has further elaborated:

[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 to be covered by the policy; if so, then the insurer must immediately step in and defend the suit.

Hoyle, 137 Idaho at 372, 48 P.3d at 1261 (quoting *Kootenai County v. W. Cas. and Sur. Co.*, 113 Idaho 908, 910-11, 750 P.2d 87, 89-90 (1988)).

Idaho courts have demonstrated a "progressive attitude" in their treatment of claims for breach of the duty to defend. *Black v. Fireman's Fund American Insurance Co.*, 115 Idaho 449, 455, 767 P.2d 824, 830 (Ct. App. 1989). While an insurer's duty to defend is "framed" by the allegations of a plaintiff's complaint, "those pleadings are not to be read narrowly. Rather, a court must look at the full breadth of the plaintiff's claim." *Hirst*, 106 Idaho at 798, 683 P.2d at 446.

In accordance with the canons of insurance contract interpretation set forth in Section III, *supra*, any doubts as to whether there is coverage must be resolved in favor of the insured, and therefore, an insurer seeking to establish that it has no duty to defend confronts a difficult burden. *See Construction Management Systems, Inc. v. Assurance Co. of America*, 135 Idaho 680, 683, 23 P.3d 142, 145 (2001). Even if an insurer believes that the policy itself provides a basis for noncoverage, i.e., an exclusion, it may seek declaratory relief, but "**this does not abrogate the necessity of defending the lawsuit until a determination of noncoverage is made.** The insurer should not be allowed to "guess wrong" as to the potential for coverage." *Kootenai County*, 113 Idaho at 911, 750 P.2d at 90 (emphasis added).

1. **A comparison of the insuring agreement with the underlying complaint in the instant case reveals a potential for coverage.**

i. **General Allegations of the Underlying Complaint.**

On or about January 8, 2009, Alamar Ranch filed a *Complaint and Demand for Jury Trial* against Boise County in United States District Court for the District of Idaho. *See* Alamar Complaint. After setting forth the parties, jurisdiction and venue requirements of the Complaint, the Plaintiff makes “general allegations” beginning at Paragraph 4. The very first paragraph of the general allegations section states: “This case arises out of Boise County’s violations of the Fair Housing Act, 42 U.S.C. §3601 *et seq.* (“FHA”).” *See* Alamar Complaint ¶4.

Alamar makes this allegation in connection with a request of Boise County Commissioners to allow Alamar to operate a residential treatment facility and private school on a portion of a 123-acre parcel located in Boise County, Idaho. *See* Alamar Complaint ¶¶1, 6. The residential treatment facility was designed to house individuals allegedly protected under the Fair Housing Act, namely teenage males suffering from mental and/or emotional illnesses and/or drug/alcohol addiction. *See* Alamar Complaint ¶6.

Alamar submitted its application for a conditional use permit to Boise County Planning and Zoning Commission (“P&Z”) on April 19, 2007, and public hearings on that application were held on August 2, 2007 and August 15, 2007. *See* Alamar Complaint ¶¶6, 7. At the conclusion of the August 15, 2007 hearing, P&Z arrived at a 3-3 tie vote on the motion, which was deemed by Boise County to be a denial of the application. *See* Alamar Complaint ¶10. In its written decision denying Alamar’s application, issued on September 28, 2007, P&Z stated that the residential treatment facility was not appropriate in the proposed location at that time and that the County lacked sufficient infrastructure or money to monitor and enforce the conditions proposed for approval of the application. *See* Alamar Complaint ¶11. Rather than appeal the Planning and Zoning decision under a Planning and Zoning standard, Alamar challenged the decision as a civil rights violation before the Boise County Board of Commissioners.

Alamar appealed to Boise County Board of Commissioners (“Board”) on October 18, 2007, and informed the Board of County Commissioners that it had a duty under the Fair Housing Act to approve the conditional use permit and allow the project in order to make housing available to the “handicapped” youth the facility was designed to serve. *See* Alamar Complaint ¶12. Furthermore, Alamar requested that Boise County make reasonable accommodations under Title VIII of the 1968 Civil Rights statute to allow the residential treatment facility to be built. *See* Alamar Complaint ¶12.

On January 28, 2008, the Board held a public hearing and then deliberated on the record on March 10, 2008. *See* Alamar Complaint ¶¶13, 14. The Board reversed the denial of the application but imposed various restrictions on the project, which Alamar claims violated the civil rights of the handicapped by making the proposed use of the property impossible. *See* Alamar Complaint ¶14.

Other allegations in the Alamar Complaint include claims: 1) that Boise County violated Title VIII of the Civil Rights Act of 1968 by refusing to make reasonable and necessary accommodations to allow the treatment facility to be built by “placing onerous, arbitrary and unreasonable conditions on the approval of the application which destroyed the feasibility of the project” (Count One), *see* Alamar Complaint ¶¶23-25; 2) that Boise County effectively denied the permit by “placing onerous, arbitrary and unreasonable conditions on the permit”(Count Two), *see* Alamar Complaint ¶29; and 3) that Boise County unlawfully interfered with the exercise of the civil rights of would-be residents to housing under the FHA by obstructing the construction or availability of housing to them (Count Three), *see* Alamar Complaint ¶¶35-36.

a. The “Four Corners” or “Eight Corners” Doctrine.

In determining whether a duty to defend exists, a majority of courts have adopted the Four Corners Rule, also known as the Eight Corners Rule, which requires the court to compare the four corners of the insurance policy against the four corners of the underlying complaint. *See generally* John B. Mumford & Kathryn E. Kransdorf, *CAIC Int’l, Inc. v. St. Paul Fire & Marine Ins. Co.—Courts Continue to Struggle with the Boundaries of the “Eight Corners Rule,”* COVERAGE, Nov/Dec 2009, at 18 (discussing the issues surrounding the application of this rule) (attached as

Exhibit D to Aff. of RTW for the convenience of the Court). If any of the claims in the underlying complaint are potentially covered by the policy, the insurer is obligated to provide a defense. In many states, courts struggle over the application of this rule, and there is disagreement over whether the court should be allowed to look to documents outside of the Four Corners in deciding the duty to defend. In applying the rule in Idaho, the Idaho Supreme Court has generally focused on the allegations found in the underlying complaint but has also looked to matters intrinsic to the complaint, such as the elements of an underlying cause of action, in determining whether a duty to defend exists. *See Hoyle*, 137 Idaho at 373, 48 P.3d at 1262 (*see discussion infra* pp.19-20).

Accordingly, in order to understand the claims being made against Boise County, and thus to determine if those claims are potentially covered by the ICRMP Policy, a brief summary of Title VIII of the 1968 Civil Rights Act is necessary.

b. Summary of the Civil Rights Act of 1968, Title VIII, and its Amendments.

Title VIII of the Civil Rights Act of 1968 (“Title VIII”), popularly known as the Fair Housing Act (“FHA”), was enacted to prohibit housing discrimination based on race, color, religion, or national origin. 1988 U.S.C.C.A.N. 2173, 2176. While the Fair Housing Act of 1968 expressed a clear national policy against discrimination in housing, it provided only limited means for enforcing the law. 1988 U.S.C.C.A.N. 2173, 2176. The shortcomings of the FHA were addressed by the Fair Housing Amendments Act of 1988 (“FHAA”), 42 U.S.C. §3601 *et seq.*, which strengthened enforcement mechanisms and also expanded civil rights protection partly to include people with disabilities. *Id.* As amended by the FHAA, the FHA provides, in part, that it is unlawful to:

discriminate in the sale or rental, *or to otherwise make unavailable* or deny, a dwelling to any buyer or renter because of a handicap of--

- (A) that buyer or renter;
- (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
- (C) any person associated with that buyer or renter.

42 U.S.C. §3604(f)(1) (emphasis added). In passing the FHAA, Congress recognized that housing discrimination is not limited to intentional acts of discrimination and that “[a]cts that have the effect of causing discrimination can be just as devastating as intentional discrimination.” 1988 U.S.C.C.A.N. 2173, 2186. Similarly, the United States Supreme Court has observed that discrimination against the handicapped is primarily the result “not of invidious animus, but rather of thoughtlessness and indifference— of benign neglect.” *Alexander v. Choate*, 469 U.S. 287, 295, 105 S.Ct. 712, 717 (1985).

In interpreting Title VIII, Courts have recognized that Congress did not contemplate an intent requirement for violations of the Act. *See Larkin v. State of Michigan Dep’t of Social Services*, 89 F.3d 285 (6th Cir. 1996). Analogizing Title VIII to Title VII of the Civil Rights Act of 1964, most courts have concluded that a violation can be established with a showing (1) that the defendants were motivated by an intent to discriminate against the handicapped (“disparate treatment” or “discriminatory intent”) or (2) that the defendant’s otherwise neutral action has an unnecessarily discriminatory effect (“disparate impact”). *Larkin*, 89 F.3d at 289.

ii. **The ICRMP Policy.**

The Errors and Omissions Insuring Agreement of the ICRMP Policy (hereinafter “Section IV”) provides:

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.¹ ICRMP Policy, p. 24. The relevant terms of that provision are

defined as follows:

“**Claim**” means a demand received by you for money **damages** alleging a **wrongful act** of a tortious nature by you . . .

“**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

¹Boldfaced terms found in original.

be premised upon allegations of unlawful violations of civil rights pursuant to Federal law arising out of public office or position.

ICRMP Policy, p. 24 (italics added).

As set forth in the preceding section, Alamar's Complaint alleges that Boise County violated civil rights pursuant to the Fair Housing Act, and therefore, the allegations fall squarely within the definition of "wrongful act" under Section IV of the ICRMP Policy. At this stage of the analysis, Alamar's civil rights Complaint clearly falls within Policy coverage.

2. **The ICRMP Policy does not contain an exclusion for claims arising under Title VIII of the Civil Rights Act of 1968, or any other claim for civil rights violations, and the Court should not infer one.**

The following exclusions contained in the ICRMP policy, which will be further explored in turn *infra*, are relevant to a determination of whether there is coverage for the civil rights Complaint filed by Alamar:

SECTION IV- ERRORS AND OMISSIONS INSURANCE

...
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 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 the performance or nonperformance of terms of a contract, concerns the measure of nonperformance or payment related to contract performance, derives from fines, penalties or administrative sanction 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.

ICRMP Policy, pp. 25-26.

None of the exclusions relied on by ICRMP (Paragraphs 2,4 and 12 *supra*) exclude violations of civil rights or claims alleging discrimination from coverage. It is the position of Boise County that if ICRMP wanted to exclude such claims, it should have done so. Idaho courts have held that an insurer has the burden of using “clear and precise language if it wishes to restrict the scope of coverage and exclusions not stated with specificity will not be presumed or inferred.” *Clark*, 138 Idaho at 541, 66 P.3d at 245. For example, in *Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Insurance Company*, 95 Idaho 501, 507, 511 P.2d 783, 789 (1973), the Idaho Supreme Court found that an insurance policy that did not specifically exclude liability for punitive damages covered such damages. The Court concluded that absent any public policy to the contrary, the controversy over whether punitive damages were covered should be resolved in favor of the insured. *Id.*

Similarly, the ICRMP Policy at issue did not exclude claims of discrimination from coverage even though such claims could have been contemplated when the policy was drafted. In the absence of such an exclusion the Court should not infer one. *See Clark*, 138 Idaho at 541, 66 P.3d at 245. Following the Court’s reasoning in *Abbie Uriguen Oldsmobile Buick, Inc.*, the controversy over whether civil rights claims are covered under the ICRMP Policy, when they were not excluded by the plain language of the policy, should be resolved in favor of Boise County. *See Abbie Uriguen Oldsmobile Buick, Inc.*, 95 Idaho at 507, 511 P.2d at 789.

3. **The claims asserted in Alamar’s Complaint are not subject to any of the exclusions from Errors and Omissions coverage under the ICRMP Policy.**

Even though civil rights and discrimination claims are not excluded specifically from the ICRMP Policy, ICRMP argues that they are not entitled to coverage under a strained or inferred interpretation of other exclusions. The Idaho Supreme Court has found that “an insurer seeking to defeat a claim because of an exception or limitation in the policy has the burden of proving that the

loss, or a part thereof, comes within the purview of the exception or limitation set up . . .”*Harman*, 91 Idaho at 721, 429 P.2d at 851 (quoting 29A Am. Jur. *Insurance* § 1854, p. 918). As set forth below, in the present case ICRMP has not met the burden of proving that Alamar’s civil rights claims fall within any of the exclusions from coverage found in the ICRMP Policy.

i. **The intentional act exclusions do not apply to the claims asserted by Alamar when the breadth of those claims are analyzed.**

The ICRMP Policy specifically excludes from coverage under Section IV of the Policy claims arising from intended wrongful acts or wrongful acts expected by the insured to cause damage. It states in pertinent part:

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.

See ICRMP Policy, p. 25. ICRMP claims that Alamar’s Complaint alleges only intentional conduct on the part of Boise County and therefore the claims are excluded from coverage. This conclusion is not supported by the plain language of the Alamar Complaint.

As set forth earlier, a violation of Title VIII of the 1968 Civil Rights Act can be either intentional or unintentional. At the outset of the “General Allegations” section of its Complaint, Alamar states: “This case arises out of Boise County’s violations of the Fair Housing Act, 42 U.S.C. §3601 *et seq.* (“FHA”).” See Alamar Complaint ¶4. Under notice pleading, Alamar is putting Boise County on “notice” that it has violated all sections of the Fair Housing Act, 42 U.S.C. §3601 *et seq.* Nowhere does the allegation state that the violation was intentional. Reading Alamar’s Complaint under a notice pleading standard, the essence of the Complaint is that the Defendant, Boise County, violated the Fair Housing Act by arbitrarily and unreasonably placing conditions on Alamar’s permit.

As more fully explored below, the Alamar Complaint broadly alleges that Boise County violated civil rights and includes causes of action based on unintentional conduct.

Under the Plaintiff's First Count (COUNT ONE, VIOLATION OF THE FHA: REASONABLE ACCOMMODATION), the Plaintiff realleges Paragraphs 1 through 19. *See* Alamar Complaint ¶20. After that, Alamar sets forth its claims against Defendant, Boise County. Paragraph 21 states that Alamar submitted an application to develop a residential treatment center for handicapped individuals. Paragraph 22 specifically states that "Boise County knew or reasonably should have known the application was for housing for handicapped individuals." The legal term of art "knew or should have known" sets out a negligence standard. *See Steed v. Grand Teton County*, 144 Idaho 848, 854, 172 P.3d 1123, 1129 (2007).

Furthermore, the specific activity that Boise County is accused of engaging in is placing "onerous, arbitrary, and unreasonable conditions on the approval of the application which destroyed the feasibility of the project," thereby violating the civil rights of the handicapped. *See* Alamar Complaint ¶25. The phrase "arbitrary and unreasonable" clearly sets forth a negligence standard. By way of analogy, not every District Judge who is reversed by the Idaho Supreme Court for making an arbitrary and capricious decision is guilty of intentional conduct, nor is that Judge accused of intentionally attempting to harm one of the litigants before it.

The closest to any "intentional" conduct alleged on the part of Boise County is contained in Plaintiff's Second Count (COUNT TWO: VIOLATION OF THE FHA DISPARATE TREATMENT). *See* Alamar Complaint ¶¶27-32. As set forth above, a violation of the FHA can be established by a showing of disparate treatment, which is intentional, or disparate impact, which is unintentional and neutral on its face. *See Larkin*, 89 F.3d 285. Count Two of the Complaint generally alleges a disparate treatment claim, which does require intent. However, the first paragraph of that Count states: "The allegations included in the above paragraphs are incorporated by reference and made a part hereof." *See* Alamar Complaint ¶27. By Paragraph 27, Alamar has reincorporated a broad based allegation of violations of civil rights and has included paragraphs under this Count which clearly implicate the negligence of disparate impact.

Additionally, even what initially seems to be an allegation of intentional conduct under Count Two fades as the Count is further examined. Paragraph 29 states that Boise County “effectively denied the permit by placing onerous, arbitrary and unreasonable conditions on the permit.” Once again, the Plaintiff uses language that sounds in negligence.

Alamar itself shows that it is on shaky ground in alleging intentional conduct under Count Two of its civil rights Complaint. In fact, it would be hard to fashion a weaker allegation of intentional conduct. Paragraph 31 of Count Two states: “Upon information and belief, a discriminatory reason more likely than not motivated the challenged decision of Boise County.” To state that somebody did some intentional act “upon information and belief” and that the motivation was “more likely than not” a result of intentional conduct, would not meet muster when presenting the case to the Court unless there was some factual basis for such an allegation. Such statements certainly do not meet the clear and convincing standard required to prove claims alleging intentional conduct and requesting punitive damages. Even if the language in Count Two is deemed to allege intentional conduct, it does not overcome the incorporating language of Paragraph 27 as discussed *supra*, which realleges allegations of negligent conduct.

The first paragraph of Count Three of the Alamar Complaint, (COUNT THREE: VIOLATION OF THE FHA PROHIBITION AGAINST INTERFERENCE), again incorporates all previous paragraphs as set forth above. *See* Alamar Complaint ¶33. The primary allegation of that Count simply states that Boise County unlawfully interfered with the exercise of the rights of would-be residents of Alamar’s facility to housing under the FHA by obstructing the availability of housing to the handicapped. *See* Alamar Complaint ¶¶35-36.

Finally, Plaintiff requests punitive damages pursuant to 42 U.S.C. § 3613(c). Interestingly, however, this final count of the Complaint does not reallege any of the preceding paragraphs or incorporate them by reference. Clearly, punitive damages would require intentional conduct on the part of Boise County. However, since the Plaintiff controls the drafting of the Complaint, Alamar obviously purposely left out the general allegations of the Complaint and the specific allegations under each of the previous three Counts because of the possibility that those facts would be used to defeat a claim for punitive damages. It would defeat a claim for punitive damages because much of

the activity being described in the general allegations and in Counts One, Two and Three clearly implicate only negligent conduct.

In fact, the Complaint ends with a request that the Court award Alamar “damages in an amount to be proven at trial” and “such other and further relief as the Court deems just and proper.” See Alamar Complaint ¶39. This leaves the door wide open for the Plaintiff to seek damages against Boise County for unintentional conduct under the Civil Rights Act of 1968.

Under the liberal notice pleading standard, there is no doubt the Alamar Complaint contains the factual basis and the necessary allegations to put Boise County on notice of a disparate impact claim under Title VIII. Based on the Complaint, Alamar would be able to argue that Boise County was fully on notice that a claim for an unintentional violation of Plaintiff’s civil rights was being pursued in addition to a disparate treatment claim. Accordingly, the allegations of the underlying complaint reveal a potential for coverage under the ICRMP Policy and trigger ICRMP’s duty to defend.

The Idaho Supreme Court’s holding in *Hoyle* supports this conclusion. In that case, every claim in the underlying complaint alleged the acts in question were committed in a “fraudulent, improper and illegal manner.” *Hoyle*, 137 Idaho at 373, 48 P.3d at 1262. *Hoyle* argued that the insurance company had a duty to defend, despite the insurance policy’s exclusion for intentional acts, because facts behind the complaint revealed negligent acts. *Id.* The Court held the facts behind the complaint were irrelevant and that coverage under the insurance policy did not give rise to a duty to defend because the underlying complaint clearly only contained claims for fraudulent, improper, and illegal acts. *Id.*

While the Idaho Supreme Court did not look to the facts behind the complaint in reaching its conclusion, it did look to the basis of the underlying claims and the elements needed to prove these causes of action. See *Hoyle*, 137 Idaho at 373, 48 P.3d at 1262. For instance, the Court noted that an implied covenant of good faith and fair dealing claim sounds in contract. *Id.* Furthermore, looking at the claim for breach of fiduciary duty the Court stated, “although the breach of a fiduciary duty sounds in tort, and can be actionable for either intentional or negligent breaches of such duties, it is clear from the complaint that [the plaintiff] is not alleging breach of these duties were

committed in a negligent manner.” *Id.* Rather, the plaintiff specifically alleged in its complaint that the duties were breached in an intentional manner. *Id.*

Similarly, the Court in the instant case must review the elements of a Title VIII claim to determine if ICRMP has an obligation to defend. Violations of the 1968 Civil Rights Act can be actionable for both intentional and negligent conduct. Unlike *Hoyle*, however, the claims asserted in the instant case do not clearly allege only intentional conduct. To the contrary, the gravamen of Alamar’s Complaint is a general allegation that Boise County violated Title VIII of the Civil Rights Act of 1968, and unintentional claims are included in the allegations of the Complaint.

Furthermore, any doubt as to whether Alamar has asserted claims for unintentional conduct must be resolved in favor of Boise County, and ICRMP must defend the suit. This duty to defend exists despite the fact that intentional conduct is a required element of Alamar’s claim for punitive damages; the broad, sweeping allegations of Alamar’s Complaint reveal the basis for claims based on unintentional conduct. If one claim for relief is covered all claims must be defended. *See Kootenai County*, 113 Idaho at 910, 750 P.2d at 89 (“The duty to defend arises upon the filing of a complaint whose allegation, in whole or in part, read broadly, reveal a potential for liability that would be covered by the insured’s policy.”).

ii. **Alamar’s claims are not subject to the so called “Planning and Zoning” exclusion of the ICRMP policy.**

ICRMP also argues there is no coverage under the Policy due to the operation of another exclusion. The relevant provision states that there is no Errors and Omissions coverage:

12. To any **claim** of liability arising out of or in any way connected with the operation of 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.

ICRMP Policy, p. 26. As an exclusively government entity insurer, ICRMP clearly could have contemplated the possibility that claims could be brought against its insureds under Title VIII of the Civil Rights Act of 1968, yet such claims were not specifically excluded by the ICRMP Policy.

Instead, ICRMP asks the Court to stretch the exclusion found in Paragraph 12 to include the civil rights claims alleged against Boise County in the instant case.

Idaho has rejected the doctrine of reasonable expectations in interpreting insurance contracts, and instead, such contracts are to be “understood in their plain, ordinary and proper sense, according to the meaning derived from the plain wording of the contract.” *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 509, 600 P.2d 1387, 1391 (1979). Therefore, to determine what claims are specifically excluded by this provision, we turn to the plain meaning of the words used. *See Komrei*, 110 Idaho at 551, 716 P.2d at 1323. The relevant terms of that exclusion are defined in pertinent part as follows:

Eminent Domain:

- The right of a government to appropriate private property for public use. *The American Heritage Dictionary* (4th ed. 2001).
- The inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking. *Black's Law Dictionary* (2nd ed.).

Condemnation:

- To appropriate (property) for public use. *The American Heritage Dictionary* (4th ed. 2001).
- The determination or declaration that certain property (esp. land) is assigned to public use, subject to reasonable compensation; the exercise of eminent domain by a governmental entity. *Black's Law Dictionary* (2nd pocket ed.).

Inverse Condemnation:

- An action brought by a property owner for compensation from a governmental entity that has taken the owner's property without bringing formal condemnation proceedings. *Black's Law Dictionary* (2nd pocket ed.).

Annexation:

- To incorporate (territory) into a larger existing political unit . *The American Heritage Dictionary* (4th ed. 2001).
- The point at which a fixture becomes part of the realty to which it is attached. . . A formal act by which a nation, state, or municipality incorporates land within its dominion. *Black's Law Dictionary* (2nd pocket ed.).

Taking:

- To get possession of; capture; seize. *The American Heritage Dictionary* (4th ed. 2001).

- The act of seizing an article, with or without removing it, but with an implicit transfer of possession or control. *Black's Law Dictionary* (2nd pocket ed.).

Land use planning:

- The deliberate systematic development of real estate through methods such as zoning, environmental-impact studies, and the like. *Black's Law Dictionary* (2nd pocket ed.).

Planning:

- To formulate, draw up, or make a plan or plans. *The American Heritage Dictionary* (4th ed. 2001).

Zoning:

- To divide into zones. *The American Heritage Dictionary* (4th ed. 2001).
- The legislative division of a regions, esp. a municipality, into separate districts with different regulations within the districts for land use, building size, and the like. *Black's Law Dictionary* (2nd pocket ed.).

A review of the relevant definitions clearly reveals that claims for a violation of Title VIII of the 1968 Civil Rights Act are not included in the plain language of the exclusion. *See Clark*, 138 Idaho at 541, 66 P.3d at 245 (insurer has the burden of using “clear and precise language if it wishes to restrict the scope of coverage and exclusions not stated with specificity will not be presumed or inferred.”). Furthermore, all the principles specifically listed in Paragraph 12 relate to real property and the claims thereunder derive from constitutional rights. While it seems as if the Policy is attempting to exclude constitutional claims from coverage, the same cannot be said of statutory civil rights claims. There is a huge difference between a property claim brought under the Constitution (taking, condemnation, etc.) and a claim brought under a federal statutory law first enacted in 1968. There is absolutely no indication that such civil rights claims are excepted from coverage under this provision. *See Harman*, 91 Idaho at 721, 429 P.2d at 851 (the burden is on the insurer to show that the loss or injury was from a risk or cause excepted from the insuring provision). Boise County is not saying that ICRMP cannot make such an exclusion as part of its policy but that such an exclusion would need to be specifically stated in order to be given effect. Interpreting Paragraph 12 by looking at the plain meaning of the words used, this exclusion clearly only covers typical land use and planning and zoning issues such as those stated in the exclusion (i.e. eminent domain,

condemnation, annexation, takings, etc.). It would be improper for the Court to “infer” an exclusion for statutory discrimination and civil rights under a provision that only references claims arising from constitutional rights. *See Clark*, 138 Idaho at 541, 66 P.3d at 245.

In presenting its case to Boise County Board of Commissioners, Alamar did not ask Boise County Board of Commissioners to decide a planning and zoning issue. Instead, Alamar asked the Board to decide Boise County’s duties under Title VIII of the 1968 Civil Rights Act, which is not excluded from coverage under Paragraph 12 of the Policy: “In its appeal, Alamar informed Boise County that it had a duty under the FHA to approve the CUP and allow the project to be built so that housing could be made available for the “handicapped” youth that Alamar proposed to serve. In its appeal brief, Alamar requested Boise County to make reasonable accommodations to allow this housing to be built to serve “handicapped” youth.” *See Alamar Complaint* ¶12. In an attempt to address the civil rights issue before it and to provide reasonable accommodation to the handicapped, Alamar alleges Boise County Board of Commissioners acted arbitrarily and unreasonably, thereby violating civil rights under Title VIII of the 1968 Civil Rights Act. *See Alamar Complaint* ¶¶14-17. If Boise County Board of Commissioners’ decision was a “planning and zoning” decision, the next step would be for Alamar to file a petition for judicial review in the district court under Idaho Code §67-6521(d), part of the Local Land Use Planning Act. *See City of Burley v. McCaslin Lumber Co.*, 107 Idaho 906, 907, 693 P.2d 1108, 1109 (Ct. App. 1984) (after exhausting remedies under local ordinances, the proper procedure for a city disagreeing with the zoning board’s decision is to seek judicial review under the Local Planning Act rather than to file an “appeal.”). Such a petition would not create a covered event under the ICRMP policy. That Alamar instead filed its Complaint in United States District Court for the District of Idaho further emphasizes the fact that its claims against Boise County are civil rights claims under federal law, not traditional planning and zoning claims.

The fact that Boise County Planning and Zoning Commission made the initial decision on Alamar’s application does not turn a civil rights claim into a traditional real property cause of action excluded from coverage by Paragraph 12 of Section IV of the ICRMP Policy. If a civil rights claim is made for jail overcrowding, is the claim excluded because the suit “arose out of” a planning and

zoning decision approving the jail's construction? If a claim is brought under the Idaho Tort Claims Act for negligent road design, is the claim denied because the claim "arose out of" a planning and zoning decision approving the design and construction of the road? It is hard to imagine any local government activity that cannot be traced back to an activity that "arose out of" a planning and zoning decision. Under the interpretation of the Policy which ICRMP seeks this Court to accept, the exclusion could be used to deny coverage in any of these cases and innumerable others.

In fact, in the instant case, ICRMP used this exclusion to deny coverage for a prosecuting attorney fulfilling his statutory duties. Idaho Code §31-2604 and §31-2607. I.C. §31-2604 states in part: "It is the duty of the prosecuting attorney . . . 3.) To give advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers." I.C. §31-2607 further clarifies this duty: "The prosecuting attorney is the legal adviser of the board of commissioners; he must attend their meetings when required, and must attend and oppose all claims and accounts against the county when he deems them unjust or illegal." Pursuant to his duties under these sections, then Boise County Deputy Prosecutor Tim McNeese advised Boise County Board of Commissioners on many matters, including planning and zoning matters. After Alamar filed suit against Boise County, Mr. McNeese inquired of ICRMP to determine if he was entitled to have an attorney represent him at his deposition but was told he would not be provided with an attorney because his activities "arose out of" planning and zoning issues. *See* Affidavit of Timothy R. McNeese. To stretch the "planning and zoning" exclusion in this manner could have very serious ramifications, virtually crippling prosecuting attorneys in their role as legal advisers to county commissioners in any of the innumerable circumstances that might be said to "arise" from a planning and zoning decision. Due to the fear that any professional negligence would not be covered by professional liability insurance, lawyers working for ICRMP's insureds would be well advised to keep their advice to themselves. Citizen volunteers on Planning and Zoning boards, if sued, are totally uninsured under the stretched ICRMP interpretation of the policy. ICRMP insureds are entitled to know, with specific and precise language, that they are uninsured if they are sued in Federal Court for alleged activities which have nothing to do with traditional Planning and Zoning functions. (It

should be noted that under a traditional Planning and Zoning matter, individuals face no personal liability and the County is on its own when a petition is filed in the State Court and handled by the County Prosecutor. This appears to be what the exclusion is attempting to accomplish on its face.) Such a broad interpretation of the "planning and zoning" exclusion defeats the very purpose or object of Errors and Omissions insurance, a construction that this Court cannot sanction. *See Bonner County*, 101 Idaho at 776, 620 P.2d at 1106. To be given effect, therefore, the Court must look to the plain language used in the exclusion and apply it only to traditional planning and zoning claims pursuant to Idaho's statutory scheme.

iii. **In the event that Alamar's claims are subject to exclusions from Errors and Omissions coverage under the ICRMP Policy, an exception to that exclusion resurrects coverage.**

Even assuming, *arguendo*, that the claims in Alamar's Complaint are excluded from coverage by any of the exclusions in the Errors and Omissions section of the ICRMP Policy, an exception to an exclusion found in Paragraph 16 of Section IV of the ICRMP Policy resurrects coverage for torts and civil rights claims. The relevant provision of Section IV, which ICRMP fails to even acknowledge in its memorandum, states:

SECTION IV- ERRORS AND OMISSIONS INSURANCE

...

16. No **claim** exists where the alleged harm for which compensation is sought derives from the performance or nonperformance of terms of a contract, concerns the measure of nonperformance or payment related to contract performance, derives from fines, penalties or administrative sanction 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.*

ICRMP Policy, p. 26 (italics added).

The first full sentence of this exclusion further explains, modifies and expands the last sentence of the exclusion found in Paragraph 12, which speaks of liability accruing by virtue of "any agreement entered into by or on your behalf." *See* ICRMP Policy, p. 26. In a like manner, Paragraph 16 further modifies Paragraph 12 and the rest of the Section when it states in the last sentence: "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.” This sentence unequivocally states that Section IV of the ICRMP Policy provides coverage for claims arising from tortious conduct or premised on allegations of violations of federal or state civil rights law. This is stated in an unqualified manner. It would be reasonable to interpret this provision as removing such claims from the scope of the so called “Planning and Zoning” exclusions, preserving coverage for claims such as those of the underlying complaint that allege violations of civil rights pursuant to federal law. It is not uncommon for an insurance policy to resurrect coverage for an excluded matter by providing a later stated exception to the exclusion. *See* Aff. of RTW, Exhibit C. At the very least, this sentence results in an ambiguity that must be resolved in favor of the insured. *See Arreguin*, 145 Idaho at 461, 180 P.3d at 500. The only time that civil rights claims are mentioned under “Section IV, Errors and Omissions Insurance” of the Policy, (claims clearly anticipated by this exclusively Idaho governmental entity insurer), such claims are mentioned in the context of providing coverage under the policy.

B. ICRMP’S DUTY TO DEFEND BOISE COUNTY UNDER THE ICRMP POLICY IS SEPARATE FROM AND UNRELATED TO ITS DUTY TO INDEMNIFY.

The claims in Alamar’s civil rights Complaint, in part, are covered under the Errors and Omissions Insuring Agreement of the ICRMP Policy and are not subject to the operation of any of the exclusions found therein. Accordingly, ICRMP has a duty to defend Boise County in the Alamar litigation.

“Once it is determined that an insurer owes a duty to defend, that duty to defend and pay defense costs continues until such time as the insurer can show that the claim against the insured cannot be said to fall within the policy’s scope.” *County of Kootenai*, 113 Idaho at 911, 750 P.2d at 90. In the case at hand, though ICRMP has a duty to defend Boise County based on the allegations in the Alamar Complaint, ICRMP’s duty to indemnify Boise County may be limited depending on facts determined through the course of litigation and the damages, if any, awarded to Alamar. *Cf. County of Kootenai*, 113 Idaho at 911, 750 P.2d at 90 (citing *C. Raymond Davis & Sons, Inc. v.*

Liberty Mutual Ins. Co., 467 F.Supp. 17, 19 (E.D.Pa.1979)) (“if coverage (indemnification) depends upon the existence or nonexistence of facts outside of the complaint that have yet to be determined, the insurer must provide a defense until such time as those facts are determined, and the claim is narrowed to one patently outside the coverage.”). As to the duty to indemnify under the Policy, such a decision is premature as the duty to indemnify requires a more complete record before this Court.

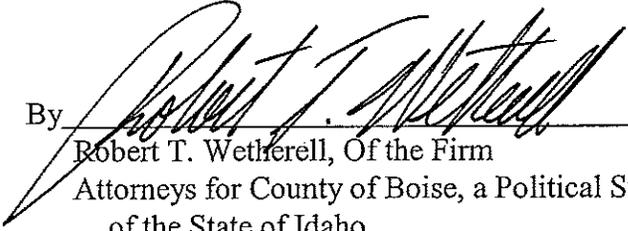
V. CONCLUSION

The allegations made against Boise County in the Alamar litigation require ICRMP to defend Boise County or, at the very least, the policy is ambiguous as applied to the facts of this case and a duty to defend is owed. Accordingly, Boise County respectfully requests that the Court grant its Motion for Partial Summary Judgment Regarding the Duty to Defend. As to ICRMP’s duty to indemnify, a decision on that matter would be premature at this stage as the Court has not been presented with a sufficient record of undisputed facts to make a such a determination and declaration.

DATED this 24 day of March, 2010.

BRASSEY, WETHERELL & CRAWFORD

By


Robert T. Wetherell, Of the Firm

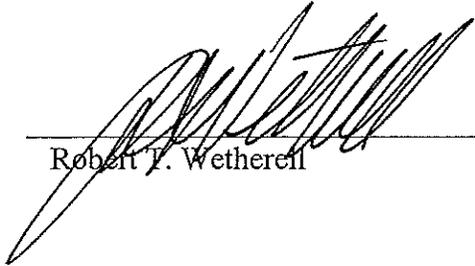
Attorneys for County of Boise, a Political Subdivision
of the State of Idaho

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of March, 2010, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Phillip J. Collaer
Anderson, Julian, & Hull
P.O. Box 7426
Boise, Idaho 83707

U.S. Mail, postage prepaid
 Hand-Delivered
 Overnight Mail
 Facsimile 344-5510



Robert F. Wetherell