UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appellate Case No. 18-3392

EMMIS COMMUNICATIONS CORPORATION,	)	
Plaintiff–Appellee,	)	Appeal from the United States District Court for the Southern District of Indiana
v.	)	Case No. 1:16-cv-0089-WTL-DML
ILLINOIS NATIONAL INSURANCE COMPANY,	)	District Judge William T. Lawrence
Defendant–Appellant.	)	

PLAINTIFF–APPELLEE'S COMBINED PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

Steven C. Shockley, Counsel of Record
Richard A. Kempf
Thomas F. O'Gara
Taft Stettinius & Hollister LLP
One Indiana Square, Suite 3500
Indianapolis, Indiana 46204
Phone: 317.713.3500

Attorneys for Plaintiff-Appellee,
Emmis Communications Corporation

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-3392

Short Caption: Emmis Communications Corporation v. Illinois National Insurance Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Emmis Communications Corporation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Taft Stettinius & Hollister LLP

3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's signature: /s/ Steven C. Shockley Date: July 16, 2019

Attorney's Printed Name: Steven C. Shockley

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d): **Yes**

Address: One Indiana Square, Suite 3500, Indianapolis, Indiana 46204

Phone Number: 317.713.3510 Fax Number: 317.713.3699

E-Mail Address: sshockley@taftlaw.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-3392

Short Caption: Emmis Communications Corporation v. Illinois National Insurance Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Emmis Communications Corporation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Taft Stettinius & Hollister LLP

3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's signature: /s/ Richard A. Kempf Date: July 16, 2019

Attorney's Printed Name: Richard A. Kempf

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d): **No**

Address: One Indiana Square, Suite 3500, Indianapolis, Indiana 46204

Phone Number: 317.713.3609 Fax Number: 317.713.3699

E-Mail Address: rkempf@taftlaw.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

Rule 35 Statement in Support of Rehearing En Banc

Illinois National Insurance Company ("INIC") issued a directors and officers liability policy ("Policy") to Emmis Communications Corporation ("Emmis") for claims first made in the policy period from October 1, 2011 to October 1, 2012. The Policy contained an exclusion for claims "as reported" under a D&O policy issued by another insurer ("Chubb") for the policy period October 1, 2009 to October 1, 2010. In this diversity case, the Panel Opinion interpreted the exclusion to mean "as reported *at any time*," and therefore held it excluded coverage of a claim first made, and first reported to both INIC and Chubb, in April 2012. The Panel Opinion did not cite or apply substantive Indiana law (or other state or federal law) to support its interpretation, which was contrary to settled Indiana jurisprudence. Panel rehearing should be granted, because the Panel Opinion overlooked controlling Indiana law governing interpretation of insurance contracts.

If panel rehearing is denied, en banc rehearing should be granted, because the Panel Opinion conflicts with these decisions:

- *New York Life Insurance Co. v. Jackson*, 304 U.S. 261, 262 (1938) (per curiam) (vacating Court of Appeals decision because "[t]he court considered the question [of policy interpretation] as one of general law. Its decision should have been made according to the applicable principles of state law which governed the interpretation of the policy." (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938))).

- *National American Insurance Co. v. Artisan & Truckers Casualty Co.*, 796 F.3d 717, 723 (7th Cir. 2015) ("In diversity cases, we apply federal procedural law and state substantive law. Questions of insurance-policy interpretation are substantive. So our interpretation of this insurance policy must be according to state law." (Citing *Erie*, 304 U.S. at 78 (other citations omitted))).

Factual and Procedural Background

In 2010, Jeff Smulyan—Emmis's largest shareholder and CEO—attempted to take the company private, with financing supplied by Alden Capital. [Doc. 54-2 at 538–39, ¶58.] This attempt spawned seven shareholder suits against Smulyan, Alden, Emmis, and its directors, seeking to prevent the go-private transaction at the tendered share price. [Doc. 54-2 at 501–02.] Chubb Insurance Company covered the claims under a D&O liability policy covering the period October 1, 2009 to October 1, 2010. [Doc. 1 at 13, ¶73.] The go-private attempt failed when Alden withdrew its financing. [Doc. 54-2 at 574, ¶15.] This led to spin-off litigation by Alden, filed in February 2011, against Emmis's directors [Doc. 54-2 at 577–602.]. Although the Alden suit was filed outside its policy period, Chubb covered the claim, because the suit was related to the 2010 shareholder suits. [Doc. 1 at 15, ¶¶83–84.]

In September 2011, Emmis purchased the INIC Policy at issue here, for D&O and entity coverage for "Claims" and "Securities Claims" first made during the policy period October 1, 2011 through October 1, 2012. [Doc. 1-1 at 22–

92.] The INIC Policy required INIC to advance Emmis's "Defense Costs" for defending covered Claims and Securities Claims. [Doc. 1-1 at 38.]

From November 2011 through March 2012, Emmis entered a series of securities transactions by which it gained voting control of two-thirds of its preferred stock. [Doc 1-3 at 152–62.] Emmis's purpose was to change the rights of its preferred shares to eliminate debt on its balance sheet, reduce its borrowing costs, and enhance the value of its common stock. *See Corre Opportunities Fund, LP v. Emmis Commc'ns Corp.*, 892 F. Supp. 2d 1076, 1081 (S.D. Ind. 2012).[1]

On April 16, 2012, Corre Opportunities Fund and four other preferred shareholders sued Emmis and its officers and directors, seeking to enjoin Emmis from directing the vote of its preferred shares ("COF Suit"). [Doc. 1-2 at 93–148.] Two days later, Emmis's insurance broker ("Marsh") gave notice of the COF Suit to INIC, Chubb, and a dozen other insurers that might conceivably provide coverage of the Securities Claims alleged. [Doc. 54-2 at 737–40.]

INIC did not make its initial determination of coverage until June 2013 [Doc. 60-5 at 1001]—14 months after receiving notice. INIC denied coverage based on two of the four exclusions in an endorsement to its Policy, but did *not*

[1] The Panel Opinion stated that, "[i]n 2012, Emmis tried to gain control of enough of its shares *to go private*." [Slip Op. at 2 (emphasis added).] This overlooked the facts the district court found in *Corre*: "We find no support in the evidence for the conclusion that [Emmis's] acquisition of Preferred Stock was intended to or likely to result in" a go-private transaction. 892 F. Supp. 2d at 1098.

assert the Reported Claims Exclusion now at issue. [Doc. 60-5 at 1003–04; Doc. 1-1 at 87.] That Exclusion provides that INIC

> shall not be liable to make any payment for Loss in connection with: …
>
> (i) any of the Claim(s), notices, events, investigations or actions listed under EVENT(S) below …
>
> EVENT(S)
>
> * * *
> 2) All notices of claim or circumstances *as reported* under policy number 8181-0668 issued to Emmis Corporation by Chubb Insurance Companies.

[Doc. 1-1 at 87 (emphasis added).]

In February 2014, the district court entered summary judgment for Emmis in the COF Suit. [Doc. 54-2 at 29–74.] On appeal, this Court affirmed. *Corre Opportunities Fund, LP v. Emmis Commc'ns Corp.*, 792 F.3d 737 (7th Cir. 2015). INIC continued to deny coverage, and Emmis sued to recover $3,100,000 in Defense Costs it paid (in excess of the $1,000,000 Securities Retention) in successfully defending the COF Suit. [Doc 1.]

On cross-motions for summary judgment, INIC argued that four separate exclusions eliminated Emmis's coverage including, for the first time, the Reported Claims Exclusion. [Doc. 54.] On that Exclusion, the district court disagreed with INIC that the Exclusion was unambiguous. It found that "[t]he term 'as reported under [the Chubb Policy]' could be read to refer to any claim that is reported under the Chubb Policy at any time, as urged by INIC, but it also reasonably could be read to refer to any claims that had been reported under the Chubb Policy at the time the INIC Policy went into effect, October 1, 2011,

as urged by Emmis." [Doc. 72 at 1173.] The court thought Emmis's reading was correct, both because "as reported" was written in the past tense, and because INIC's reading would, unreasonably, trigger the Reported Claim Exclusion even if a claim were reported to Chubb by mistake. [*Id.* at 1173–74.] The court concluded that "the language [of the Reported Claim Exclusion] is subject to the rule of *contra proferentem* and the Court, interpreting it against the insured [*sic*, read 'insurer'], finds that it refers only to those claims that had been reported under the Chubb Policy as of the effective date of the INIC policy." [*Id.* at 1175.]

The district court also found that none of the other three exclusions in INIC's policy applied and granted summary judgment for Emmis. [*Id.* at 1174–84.] After the parties stipulated to the entry of a final judgment for Emmis for $3,500,000 [Doc. 95, 96], INIC filed this appeal.

I. Petition for Panel Rehearing

Panel rehearing should be granted, because the Panel Opinion overlooked controlling Indiana law governing interpretation of insurance contracts. The Panel Opinion acknowledged the parties' opposing interpretations of the phrase "as reported" in the Reported Claim Exclusion:

> Illinois National argued that this provision excluded all notices that were reported to Chubb *at any time*—which of course would include the notice in dispute. Emmis, on the other hand, claimed it excluded only those notices that had been reported *at the time the policy went into effect*—two years[2] before this notice was reported.

[2] In fact, the INIC policy went into effect six months (not two years) before the COF Suit was reported. [Doc. 1-1 at 26; Doc. 54-2 at 737–40.]

[Slip Op. at 2 (emphasis original).] The Panel Opinion did not decide whether Emmis's interpretation was reasonable. Instead, the Opinion simply found that "Illinois National's proposed interpretation is correct. The phrase ['as reported'] has no discernable temporal limitations. Once Emmis or one of its agents reports a claim to Chubb, *at any time*, then that claim is 'reported'—and so is excluded." [Slip Op. at 3 (emphasis added).] Thus, the Panel Opinion did not purport to apply the plain language of the Reported Claim Exclusion—"as reported"—but interpreted the phrase to mean "as reported *at any time*" [*id.*], using words that do not appear in the Exclusion to ascribe meaning to it.

Under controlling Indiana law, the Panel Opinion could not interpret the Reported Claim Exclusion unless it first determined, as a threshold matter, whether "as reported" is ambiguous. To make this determination, Indiana law required the panel to decide whether, from the perspective of ordinary policyholders of average intelligence, Emmis's interpretation of the phrase was reasonable. Because ordinary policyholders could agree that Emmis's interpretation was reasonable, the phrase, "as reported," is ambiguous. Indiana law uniformly holds that ambiguous language in a policy exclusion must be construed in favor of coverage and against application of the exclusion. Thus, by overlooking well-settled Indiana law governing interpretation of insurance contracts, the Panel Opinion erroneously held that Marsh's report of the COF Suit to Chubb in April 2012 forfeited Emmis's coverage.

A. Under Indiana law, before a court may interpret policy language, it must make a threshold determination that the language is ambiguous.

As Emmis has argued, under Indiana law, the language of an insurance policy is ambiguous if reasonable people could honestly differ on whether it is susceptible to more than one interpretation. [Appellee's Brief at 18 (citing *Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 698 N.E.2d 770, 773 (Ind. 1998).] Ambiguity is necessarily a threshold issue, because the insurer bears the burden of showing that an exclusion "'clearly and unmistakably bring[s] within its scope the particular act or omission that will give rise to the exclusion.'" [*Id.* (quoting *Keckler v. Meridian Sec. Ins. Co.*, 967 N.E.2d 18, 22–23 (Ind. Ct. App. 2012)).]

The Indiana Supreme Court recently elaborated on this standard in *Erie Indemnity Co. v. Estate of Harris*, 99 N.E.3d 625 (Ind. 2018).

> When confronted with a dispute over the meaning of insurance policy terms, Indiana courts afford clear and unambiguous policy language its plain, ordinary meaning. By contrast, courts may construe—or ascribe meaning to—ambiguous policy terms *only*.
>
> *Our first task, therefore, is to determine whether the policy term at issue is ambiguous*. We have said that failure to define a term in an insurance policy does not necessarily make it ambiguous and thus subject to judicial construction. As we see it, failing to define a policy term merely means it has no exclusive special meaning, and the courts can interpret it.
>
> … [A]mbiguity does not arise from mere disagreement over a policy term's meaning—that is, where one party asserts an interpretation contrary to that asserted by the opposing party. Rather, insurance policy provisions are ambiguous only if they are susceptible to more than one **reasonable** interpretation.
>
> When evaluating alleged ambiguities—whether there exist *two* reasonable interpretations for one policy term—courts read insurance policies from the perspective of ordinary policyholder[s] of average

> intelligence. If reasonably intelligent policyholders would honestly disagree on the policy language's meaning, then we will find the term ambiguous and subject to judicial construction. Conversely, if reasonably intelligent policyholders could not legitimately disagree as to what the policy language means, we deem the term unambiguous and apply its plain ordinary meaning.

Id. at 630 (citations and internal quotation marks omitted; emphasis by italicization added; other emphasis the Court's).

B. The Panel Opinion interpreted the phrase "as reported" to mean "as reported *at any time*," without first analyzing whether the phrase is ambiguous.

The Panel Opinion necessarily "construed" or "interpreted" the phrase "as reported." The phrase is not defined in INIC's Policy, and thus "has no exclusive special meaning" and is subject to interpretation. *Id.* By concluding the phrase means "as reported *at any time*" [*see* Slip Op. at 2, 3], the Opinion ascribed meaning to the phrase with words that do not appear in the Reported Claim Exclusion. To "ascribe meaning to" a policy term is to "construe" it. *Id.* Under Indiana law, however, before the Panel could "interpret the [Reported Claim Exclusion] and thereby endorse [INIC's] proposed meaning, there [was] a *necessary threshold inquiry*: whether ['as reported'] is an ambiguous term amenable to judicial construction." *Id.* (emphasis added).

The Panel Opinion overlooked this threshold requirement of Indiana law. It was not sufficient that the Opinion found that INIC's "proposed interpretation is correct." [Slip Op. at 3.] While that finding implies that, in the Panel's view, INIC's interpretation was reasonable, the Panel Opinion never considered whether Emmis's proposed interpretation was *also* reasonable, as Indiana law

requires. *Id.* at 630 (courts evaluate ambiguity by determining "whether there exist *two* reasonable interpretations for one policy term" (emphasis added)); *see id.* at 631 ("Faced with these competing proposed interpretations, we must assess whether *both* are reasonable from the standpoint of an ordinary policyholder before diving into judicial construction." (Emphasis added.)) If Emmis's interpretation was reasonable, then the phrase, "as reported," is ambiguous, and only then amenable to judicial construction.

C. Ordinary policyholders could agree that Emmis's interpretation of "as reported" was reasonable.

INIC has interpreted "as reported [under the Chubb policy]" to mean "as reported at any time." [*See* Doc. 72 at 1173.] Emmis has interpreted the phrase to mean "as reported under the Chubb policy before the INIC Policy took effect on October 1, 2011." [*Id.*] Reasonably intelligent policyholders could honestly agree with Emmis's reading of the phrase, and therefore could "honestly disagree [with INIC] on the policy language's meaning," rendering it ambiguous.[3] *Erie*, 99 N.E.3d at 630.

First, INIC wrote the phrase "as reported" in its Exclusion in the past tense, so ordinary policyholders could read it as referring to Claims that had already

[3] Even INIC must have doubted that "as reported" referred to claims reported *after* the INIC Policy had issued. Despite evidence that it knew Chubb had been notified of the COF Suit no later than May 23, 2013 [Doc. 54-2 at 737–40; Doc. 60-10 at 1030], INIC did not assert the Reported Claim Exclusion in its initial denial of coverage on June 10, 2013 [Doc. 60-5 at 1001–05]. INIC surely would have done so if, as it later claimed in its summary judgment brief, the report of the COF Suit to Chubb in April 2012 excluded coverage under the "plain language" of the Reported Claim Exclusion. [Doc. 54 at 373.]

been reported to Chubb when the INIC Policy took effect. [*See* Doc. 72 at 1173.] *Second*, ordinary policyholders would likely agree that in common usage, "as reported" almost always refers to reports previously made: for example, "as reported in yesterday's news," or "as reported in Smith's 2012 tax return." It is difficult to think of a common usage of the phrase that means "as reported at any time—before now or in the future." The phrase "whenever reported" seems better suited to express that meaning. *Third*, the Reported Claim Exclusion applies to claims "as reported under [the policy] issued to Emmis … by Chubb," which had been effective in 2009 and 2010. So ordinary policyholders, reading the Exclusion on October 1, 2011, could reasonably understand "as reported [under the Chubb policy]" to refer to claims reported before that date.[4]

The Panel Opinion understood "as reported" to have "no discernable temporal limitations" [Slip Op. at 3], but its understanding is, respectfully, irrelevant. The question, under Indiana law, is whether "'ordinary policyholder[s] of average intelligence'" would understand the phrase to be unlimited as to time. *Erie*, 99 N.E.3d at 630 (quoting *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 246–47 (Ind. 2005)). Ordinary policyholders might reasonably discern

[4] While not dispositive of what ordinary policyholders would find reasonable, courts typically use the phrase to refer to past events. A Westlaw search of the phrase "as reported" made on July 10, 2019, revealed that (i) in the 203 instances the phrase has appeared in a Seventh Circuit opinion since 1893, (ii) in the 145 instances the phrase has appeared in an Indiana Supreme Court opinion since 1852, and (iii) in the 230 instances the phrase has appeared in an Indiana Court of Appeals opinion since 1892, virtually all of them use "as reported" to refer to something that had been reported before the opinion was issued.

that, by its use of the past tense and reference to Chubb's antecedent policy, the Reported Claim Exclusion was temporally limited to claims "as reported" before the INIC Policy's effective date.

For these reasons, ordinary policyholders of average intelligence could agree that Emmis's interpretation of "as reported" was reasonable. Assuming ordinary policyholders could agree that INIC's "at-any-time" interpretation was also reasonable, "there exist two reasonable interpretations for one policy term," making the phrase ambiguous and subject to judicial construction. *Erie*, 99 N.E.3d at 630.

D. Because "as reported" is ambiguous, Indiana law required the Panel Opinion to construe it in favor of coverage and against application of the Reported Claim Exclusion.

In construing the ambiguous phrase, "as reported," the Panel Opinion was not free to choose what it believed to be the "correct" interpretation from two that were reasonable. [Slip Op. at 3.] Under blackletter Indiana law, the Panel Opinion was bound to construe the ambiguous Reported Claim Exclusion in favor of coverage for Emmis, "to further the policy's basic purpose of indemnity." *Meridian*, 698 N.E.2d at 773; *see also Bradshaw v. Chandler*, 916 N.E.2d 163, 166 (Ind. 2009) ("Where an ambiguity exists, that is, where reasonably intelligent people may interpret the policy's language differently, we construe insurance policies strictly against the insurer. … This is particularly the case where a policy excludes coverage." (Citations omitted.))[5] Instead, the Panel Opinion

[5] In summarizing the district court's decision, the Panel Opinion noted the court's reliance on *Bradshaw* for "the rule favoring coverage when multiple reasonable readings of an insurance policy might apply." [Slip Op. at 2–3.] But the

held that INIC's interpretation of "as reported" was "correct" and that Emmis's coverage was forfeited by Marsh's report of the COF Suit to Chubb. [Slip Op. at 3.]

Indiana law has long disfavored forfeiture of insurance coverage; that is one reason ambiguous policies are construed in favor of coverage. *Supreme Lodge of the Knights of Honor v. Abbott*, 82 Ind. 1, 6 (1882); *Meridian*, 698 N.E.2d at 773 (citing *Masonic Acc. Ins. Co. v. Jackson*, 164 N.E. 628, 631 (Ind. 1929) ("Where any reasonable construction can be placed on a policy that will prevent the defeat of the insured's indemnification for a loss covered by general language, that construction will be given." (Citation omitted.)) Forfeiture of Emmis's coverage in this case would be an especially harsh result. By reporting the COF Suit to INIC, Chubb, and a dozen other insurers, Marsh did what prudent policyholders and insurance brokers do. They err on the side of over-reporting, both to find coverage wherever it might exist and to avoid denials of coverage for untimely notice. When it gave notice of the COF Suit to Chubb, Marsh had no reason to suspect that, seven years later, a panel of this Court would interpret "as reported" broadly, to mean "as reported at any time." The Panel Opinion's conclusion, that Emmis's coverage was forfeited by Marsh's prudent and industry-wide practice of reporting claims to all insurers who *might* provide coverage, is a result disfavored by controlling Indiana law.

Opinion overlooked *Bradshaw* when it endorsed INIC's proposed interpretation of "as reported" as "correct" and held that Emmis's coverage was excluded. [*Id.* at 3.]

Panel rehearing should therefore be granted to apply Indiana law governing the assessment and interpretation of ambiguous language in an insurance policy and to hold that Marsh's report of the COF Suit to Chubb, six months after the INIC Policy took effect, did not trigger the Reported Claim Exclusion.

II. Petition for Rehearing En Banc

If panel rehearing is denied, the Court should hear this case en banc, because the Panel Opinion conflicts with both the United States Supreme Court's decision in *New York Life* and this Court's decision in *National American* (cited above at 1–2). *See* Fed. R. App. Pro. 35(b)(1)(A).

Less than a month after the United States Supreme Court announced the *Erie* doctrine in 1938, the Court held the doctrine—and substantive state law—applies to interpretation of insurance policies. *New York Life*, 304 U.S. at 262. More recently, this Court held that, because questions of policy interpretation are questions of substantive law, "our interpretation of [insurance policies] must be according to state law" under the *Erie* doctrine. *National American*, 796 F.3d at 723.

The Panel Opinion conflicts with these decisions. In this diversity case, the Opinion did not cite or follow substantive Indiana law in holding that the Reported Claim Exclusion applied to preclude coverage of the COF Suit. The Panel Opinion did note the district court's holding that both INIC's and Emmis's interpretation of the phrase "as reported" were reasonable, and thus that the phrase is ambiguous. [Slip Op. at 2–3.] But before interpreting the phrase by endorsing INIC's reading of it, *Erie*, 99 N.E.3d at 630, the Opinion did not

apply the standards enunciated by the Indiana Supreme Court (*see* part I, above) to assess for itself whether the phrase is ambiguous. The Panel Opinion did not even acknowledge what both parties accepted: that Indiana law applies in this diversity case. Untethered to any substantive law, the Opinion simply concluded that INIC's "proposed interpretation is correct" and that Emmis's coverage was excluded. [Slip Op. at 3.]

In conflict with *New York Life* and *National American*—both of which, under the *Erie* doctrine, mandate application of substantive state law to the interpretation of insurance policies—the Panel Opinion did not interpret the Reported Claim Exclusion according to the substantive law of Indiana. The *Erie* doctrine is "fundamental," and expresses "'a policy that touches vitally the proper distribution of judicial power between State and federal courts.'" *Van Dusen v. Barrack*, 376 U.S. 612, 638 (1964) (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)). Consideration of this case by the full Court is therefore necessary to maintain uniformity of the decisions of this Court and conformity with the decisions of the United States Supreme Court. Rehearing en banc should be granted.

Conclusion

If INIC intended its Exclusion to apply to claims "as reported" under the Chubb Policy *at any time*—requiring Emmis and Marsh to deviate from industry-wide practices for reporting claims—it was up to INIC to write an exclusion that "clearly and unmistakably" applied to Marsh's report to Chubb in April 2012. *Keckler*, 967 N.E.2d at 22–23. Instead, INIC wrote "complex exclusion

provisions" using "Byzantine exclusion language" raising "many legal issues," most of which the Panel Opinion chose not to grapple with. [Slip Op. at 2, 3.] Emmis should not forfeit coverage for the millions of dollars of Defense Costs it incurred in successfully defending the COF Suit simply because INIC's "provisions limiting coverage are not clearly and plainly expressed." *Meridian*, 698 N.E.2d at 773.

Emmis respectfully requests that its petition for panel rehearing and petition for rehearing en banc be granted.

Respectfully submitted,

/s/ Steven C. Shockley
Steven C. Shockley, Counsel of Record
Richard A. Kempf
Thomas F. O'Gara
Taft Stettinius & Hollister LLP

Attorneys for Appellee,
Emmis Communications Corporation

Certificate of Compliance

This Combined Petition for Panel Rehearing and Petition for Rehearing En Banc ("Petition") complies with the word limit of Fed. R. App. P. 35(b)(2)(A) and 40(b)(1) because, excluding the parts exempted by Fed. R. App. P. 32(f), this Petition contains 3,880 words.

This Petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this Petition has been prepared in proportionally spaced typeface using Word version 10 in 12-point Bookman Old Style font.

/s/ Steven C. Shockley
Steven C. Shockley
Attorney for Appellee,
Emmis Communications Corporation
July 16, 2019

Certificate of Service

I certify that on July 16, 2019, I electronically filed this Combined Petition for Panel Rehearing and Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Steven C. Shockley
Steven C. Shockley
Attorney for Appellee,
Emmis Communications Corporation
July 16, 2019