SIMPSON THACHER

INSURANCE LAW ALERT

APRIL 2013

This Alert discusses decisions relating to waiver and estoppel of coverage defenses, exhaustion and stacking of policy limits and late notice under reinsurance certificates and claims-made policies. We also address rulings relating to the spoliation of evidence, jurisdictional requirements, and the scope of Colorado statutory law governing "first-party claimants." Please "click through" to view articles of interest.

- ***Pennsylvania Court Rules That Delay in Issuing Reservation of Rights Does Not Prevent Excess Insurer From Denying Coverage***

  A Pennsylvania federal court ruled that where an excess policy does not contain a duty to defend, the excess insurer is not estopped from raising coverage defenses if it failed to reserve its rights when notified of a claim. *TIG Insurance Co. v. TYCO Int'l Ltd.*, 2013 WL 249973 (M.D. Pa. Jan. 23, 2013). *Click here for full article*

- ***New York Appellate Court Finds Issue of Fact as to Whether Insurers Waived Late Notice Defense***

  A New York appellate court ruled that excess insurers were not entitled to summary judgment on a late notice defense because issues of fact remained as to whether the insurers waived the defense by failing to issue a timely disclaimer. *Long Island Lighting Co. v. Allianz Underwriters Insurance Co.*, 2013 WL 1197750 (N.Y. App. Div. 1st Dep't Mar. 26, 2013). *Click here for full article*

- ***California Appellate Court Applies Horizontal Exhaustion and Anti-Stacking Doctrines to Asbestos Coverage Litigation***

  A California appellate court ruled that an excess insurer has no indemnity obligation until the limits of all applicable primary policies have been exhausted and that in determining whether primary insurance has been exhausted, the limits of primary polices issued by the same insurer may not be stacked. *Kaiser Cement & Gypsum Corp. v. Insurance Co. of the State of Pennsylvania*, 2013 WL 1400920 (Cal. Ct. App. Apr. 8, 2013). *Click here for full article*

- ***New York Court Rules That Prejudice Not Required for Reinsurer's Late Notice Defense***

  Applying Illinois law, a New York district court ruled that a ceding insurer forfeited coverage under reinsurance certificates by failing to provide prompt notice of its claims, regardless of prejudice to the reinsurer. *A1U Insurance Co. v. TIG Insurance Co.*, 2013 WL 1195258 (S.D.N.Y. Mar. 25, 2013). *Click here for full article*

- ***Seventh Circuit Strictly Enforces Notice Requirement in Claims-Made Policy***

  The Seventh Circuit ruled that a law firm's failure to give notice to its professional liability insurer of circumstances that might give rise to a claim resulted in a forfeiture of coverage under the policy. *Koransky, Bouwer & Poracky, P.C. v. The Bar Plan Mutual Insurance Co.*, 2013 WL 1296724 (7th Cir. Apr. 2, 2013). *Click here for full article*

- ***Court May Consider Extrinsic Evidence to Determine That Insurer Has No Duty to Defend, Says Eleventh Circuit***

  The Eleventh Circuit ruled that under Alabama law, a court may look beyond the pleadings in the underlying complaint in order to find that an insurer had no duty to defend. *American Safety Indemnity Co. v. T.H. Taylor, Inc.*, 2013 WL 978804 (11th Cir. Mar. 14, 2013). *Click here for full article*

- ***Third Circuit Rules That Insurer's Spoliation of Evidence Warrants Adverse Inference Jury Instruction***

  The Third Circuit ruled that a Pennsylvania district court did not abuse its discretion by issuing an adverse inference jury instruction based on the insurer's failure to preserve evidence. *Indemnity Insurance Co. of N. America v. Electrolux Home Products, Inc.*, 2013 WL 1303780 (3d Cir. Apr. 2, 2013) (unpublished opinion). *Click here for full article*

- ***U.S. Supreme Court Rules That Plaintiffs Cannot Avoid Federal Jurisdiction by Stipulating to Damages of Less Than Statutory Minimum Under CAFA***

  The United States Supreme Court ruled that a class action plaintiff cannot escape federal jurisdiction under the Class Action Fairness Act ("CAFA") by agreeing to seek less than $5 million in damages, the minimum amount in controversy set forth in CAFA. *Standard Fire Insurance Co. v. Knowles*, 2013 WL 1104735 (U.S. Mar. 19, 2013). *Click here for full article*

- ***Where Insurer Agrees to Provide Defense, Declaratory Judgment Action Is Not Ripe for Adjudication, Says Illinois Appellate Court***

  An Illinois appellate court affirmed the dismissal of a declaratory judgment action relating to an insurer's defense and indemnification obligations, finding that there was no actual controversy given the insurer's agreement to defend the underlying action. *Byer Clinic & Chiropractic, Ltd. v. State Farm Fire & Casualty Co.*, 2013 WL 1189252 (Ill. App. Ct. Mar. 12, 2013). *Click here for full article*

- ***Colorado Courts Disagree as to Whether "First-Party Claimant" Statute Applies to Third-Party Insurance***

  A Colorado court ruled that a statute allowing first-party claimants to recover attorneys' fees and double contractual damages under certain circumstances applied to an additional insured under a third-party liability policy. *D.R. Horton, Inc.-Denver v. Mountain States Mutual Casualty Co.*, 2013 WL 674032 (D. Colo. Feb. 25, 2013). *Click here for full article*

Waiver and Estoppel Alerts:

Pennsylvania Court Rules That Delay in Issuing Reservation of Rights Does Not Prevent Excess Insurer From Denying Coverage

Addressing a matter of first impression under Pennsylvania law, a federal court ruled that where an excess policy does not contain a duty to defend, the excess insurer is not estopped from raising coverage defenses if it failed to reserve its rights when notified of a claim. *TIG Insurance Co. v. TYCO Int'l Ltd.*, 2013 WL 249973 (M.D. Pa. Jan. 23, 2013).

In 1997, a fire destroyed a document storage building. The policyholder had installed the fire protection system in the building, which was not activated at the time of the fire. In 1998, numerous companies that lost documents in the fire filed suit against the policyholder. The actions were consolidated and defended by the policyholder's primary insurers. Notice was provided to the excess insurers in 2002 and 2003. In 1999, a separate claim arising out of the fire was filed against the policyholder. Notice of this claim was provided to the excess insurers in 2007. In 2008, a third-level excess carrier issued a reservation of rights and filed a declaratory judgment action.

The policyholder argued that the excess carrier was estopped from denying coverage in light of the five-year delay in reserving its rights. The excess insurer moved for summary judgment on the estoppel defense, which the court granted.

An insurer may be equitably estopped from asserting a defense if the policyholder establishes three conditions: (1) an inducement, by act or silence, that causes the policyholder to believe the existence of certain facts; (2) justifiable reliance on that inducement; and (3) resulting prejudice. The court concluded that here, the policyholder failed to demonstrate both inducement and prejudice. The court rejected the argument that by failing to reserve its rights prior to 2008, the excess insurer induced the policyholder to believe that it would cover the fire-related claims. The court explained that "inducement by silence cannot be established unless there is a duty to speak" and here, there was no contractual duty to defend and thus no duty to reserve rights. The court also dismissed the policyholder's prejudice argument. The court reasoned that the policyholder's contentions that an earlier reservation of rights would have resulted in a more favorable or comprehensive resolution of the fire-related claims were purely speculative.

In its decision, the *TYCO* court relied largely on the absence of a contractual duty to defend in the excess policies. Therefore, excess carriers are advised to issue prompt reservation of rights at least where applicable policies include a duty to defend or where controlling jurisdictional law has found such an obligation on the part of excess carriers. *See Johnson Controls, Inc. v.*

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London Market, 2010 WL 2520941 (Wis. June 24, 2010) (Wisconsin Supreme Court rules that despite absence of defense provision in excess policy, excess insurer had duty to defend by virtue of a "follow form" provision) (discussed in our July/August 2010 Alert).

New York Appellate Court Finds Issue of Fact as to Whether Insurers Waived Late Notice Defense

Reversing in part a trial court decision, a New York appellate court ruled that excess insurers were not entitled to summary judgment on a late notice defense because issues of fact remained as to whether the insurers waived the defense by failing to issue a timely disclaimer. *Long Island Lighting Co. v. Allianz Underwriters Insurance Co.*, 2013 WL 1197750 (N.Y. App. Div. 1st Dep't Mar. 26, 2013).

Long Island Lighting Company ("LILCO") sought coverage from its insurers for environmental damage claims at several sites. The insurers issued reservation of rights which, among other things, preserved the right to deny coverage on the basis of late notice. In ensuing coverage litigation, the insurers moved for summary judgment, arguing that they had no duty to defend or indemnify the claims due to LILCO's failure to provide timely notice. The trial court denied the insurers' motion as to all sites except one (the Bay Shore site), finding that factual issues existed as to when LILCO's duty to give notice arose. With respect to Bay Shore, the court granted the insurers' summary judgment motion, finding that LILCO's notice was untimely as a matter of law. The trial court rejected LILCO's argument that the insurers had waived their late notice defense by failing to disclaim coverage for the Bay Shore claims prior to the filing of their answers in the coverage action. The appellate court reversed this ruling.

The appellate court acknowledged that LILCO violated the notice provisions of the excess policies with respect to the Bay Shore claims. The court also noted that the insurers had reserved their right to disclaim coverage based on late notice. Nonetheless, the appellate court concluded that these facts did not preclude a finding that the insurers had waived the late notice defense by failing to issue a timely disclaimer. Noting that the insurers had requested additional information from LILCO in their reservation of rights, the court found that based on the additional information provided, a jury could find that the insurers "possessed sufficient knowledge to require that they meet the obligation to issue a written notice of disclaimer on the ground of late notice."

The appellate court ruling serves as a reminder that under New York law, a reservation of rights may not insulate an insurer from a finding of waiver as to certain defenses. Rather, an insurer is advised to provide a written disclaimer "as soon as is reasonably possible" after it has actual or constructive knowledge of grounds for a disclaimer of liability.

EXHAUSTION ALERT:

California Appellate Court Applies Horizontal Exhaustion and Anti-Stacking Doctrines to Asbestos Coverage Litigation

A California appellate court ruled that an excess insurer has no indemnity obligation until the limits of all applicable primary policies have been exhausted, but also ruled that the limits of primary policies issued by the same insurer may not be stacked for any one occurrence. *Kaiser Cement & Gypsum Corp. v. Insurance Co. of the State of Pennsylvania*, 2013 WL 1400920 (Cal. Ct. App. Apr. 8, 2013).

The coverage dispute involved Kaiser, a manufacturer of asbestos-containing products, Truck, one of Kaiser's primary insurers, and Insurance Company of the State of Pennsylvania ("ICSOP"), a first-layer excess insurer. In accordance with prior

rulings issued in the case determining that each asbestos claim is a separate occurrence, Kaiser selected Truck's 1974 primary policy, which had a $500,000 per occurrence limit but no products aggregate limit, to respond to all asbestos claims alleging injury during that year. Following this selection, two coverage issues arose: (1) whether coverage under ICSOP's 1974 excess policy was triggered upon the exhaustion of all primary policies in effect during the continuous injury period (*i.e.*, horizontal exhaustion) or whether it required only exhaustion of the 1974 Truck policy immediately underlying ICSOP's excess coverage; and (2) whether, for exhaustion purposes, Truck was liable for only one per occurrence limit, or whether its policies could be stacked such that Truck would pay multiple occurrence limits based on the nineteen policies it issued during the continuous injury period. The appellate court issued the following rulings:

Horizontal Exhaustion As To All Primary Policies: The court concluded that under the language of the ICSOP excess policy, ICSOP's indemnity obligation did not attach until all collectible primary policies were exhausted. In rejecting Kaiser's argument that only the underlying 1974 Truck policy must be exhausted, the court relied on the ISCOP policy provision that defined Kaiser's retained limit as the limits of the underlying policy "plus the applicable limit(s) of any other underlying insurance collectible by the Insured." This ruling comports with other California decisions requiring horizontal exhaustion of primary policies as a prerequisite to triggering excess coverage.

Anti-Stacking As To The Truck Policy: Despite ruling that the primary policies must be exhausted before the ICSOP policy is triggered, the court ruled that for purposes of determining Truck's obligation under nineteen years of primary coverage, only one occurrence limit applied under the language of the Truck policies. Specifically, the court reasoned that the following language in Truck's primary policies constituted an anti-stacking provision: "the limit of the Company's liability as respects any occurrence … shall not exceed the per occurrence limit designated in the

Declarations." The court stated that "[w]e do not know what more Truck could have said when the policy was drafted … to make clear that its policy's limitation-of-liability term was an absolute cap on its per occurrence exposure—and, as such, it is fundamentally inconsistent with 'stacking' the liability limits of the several Truck policies." Notably, the court held that the anti-stacking ruling applied only to Truck's policies, and declined to consider whether, in light of applicable policy language, the limits of other carriers' policies could be stacked.

The *Kaiser* court expressly referenced *State v. Continental Insurance Co.*, 55 Cal. 4th 186 (2012) (*see* September 2012 Alert), in which the California Supreme Court endorsed stacking of primary policies. However, the *Kaiser* court concluded that *Continental* was distinguishable in that *Continental* addressed whether the limits of policies issued by different insurers could be stacked, whereas here, the court considered whether the limits of multiple policies issued by the same insurer could be stacked. The *Kaiser* court further noted that *Continental* involved slightly different policy language—the *Continental* policy provided that "the limit of the Company's liability under this policy shall not exceed the applicable amount [listed as the policy limit]," whereas the Truck policy provided that "the limit of the company's liability as respects any occurrence … shall not exceed the per occurrence limit designated in the Declarations." It remains to be seen whether the California Supreme Court will view these distinctions as sufficient to justify a different result.

Late Notice Alerts:

New York Court Rules That Prejudice Not Required for Reinsurer's Late Notice Defense

Applying Illinois law, a New York federal district court ruled that a ceding insurer forfeited coverage under reinsurance certificates by failing to provide prompt notice of its claims, regardless of prejudice to the reinsurer. *AIU Insurance Co. v. TIG Insurance Co.*, 2013 WL 1195258 (S.D.N.Y. Mar. 25, 2013).

AIU provided umbrella coverage to Foster Wheeler Corporation, a manufacturer of asbestos-containing equipment. AIU ceded a portion of its risk to TIG through several reinsurance certificates. When hundreds of thousands of lawsuits were filed against Foster Wheeler, coverage litigation ensued between the company and its numerous insurers. In 2001, Foster Wheeler filed a complaint against AIU and other excess carriers seeking declaratory relief as to the insurers' defense and indemnity obligations. At that time, AIU believed that its policies were well insulated from the asbestos claims. However, in October 2003, following a large settlement with an individual claimant, Foster Wheeler issued a demand letter to AIU. AIU reached a settlement with Foster Wheeler in 2006 but did not notify TIG of the claim or the settlement until January 2007. TIG reserved its rights under the reinsurance certificates, citing AIU's delay in providing notice.

The notice provisions in TIG's reinsurance certificates stated that "[p]rompt notice shall be given to the Reinsurer by the Company of any occurrence of accident which appears likely to involve this reinsurance." The notice clause also gave TIG the opportunity to associate with AIU in the defense of any claims involving the reinsurance. The court concluded that AIU violated the notice clause by waiting more than three years after receiving the demand letter to notify TIG. The central issue in dispute was whether TIG was required to establish prejudice as a result of the untimely notice in order to deny coverage on that basis.

AIU advocated application of New York law, which requires a showing of prejudice in this context. However, the court agreed with TIG that Illinois law governed the dispute. The court concluded that under Illinois law, prompt notice is a condition precedent to coverage and that a reinsurer need not establish prejudice in order to deny coverage based on late notice. Therefore, the court granted summary judgment in favor of TIG.

The ruling runs counter to the majority rule, which requires prejudice in the reinsurance context. The sole case relied upon by the *AIU* court was a 70-year old Seventh Circuit opinion based on late notice decisions in the direct insurance context. We will continue to monitor this case and the status of Illinois law on this issue.

Seventh Circuit Strictly Enforces Notice Requirement in Claims-Made Policy

Affirming an Indiana district court opinion, the Seventh Circuit ruled that a law firm's failure to give notice to its professional liability insurer of circumstances that might give rise to a claim resulted in a forfeiture of coverage under the policy. *Koransky, Bouwer & Poracky, P.C. v. The Bar Plan Mutual Insurance Co.*, 2013 WL 1296724 (7th Cir. Apr. 2, 2013).

The law firm represented a potential buyer of a drug store. Although the buyer and seller both executed the sales contract, the buyer's law firm misfiled the contract and failed to deliver it to the seller within the designated time period. As a result, the seller rescinded the sale offer and initiated litigation against the buyer seeking a declaration that no contract had been formed. The buyer then notified the law firm that he intended to file a malpractice suit against it. The law firm's professional liability insurer denied coverage on the basis that the law firm failed to give proper notice under the policy.

The claims-made policy required the law firm to notify the insurer within the one-year policy period of any act or omission of which the law firm becomes aware which "may give rise to a Claim." The court ruled that the law firm's duty to give notice arose when it realized that the misfiling of the contract resulted in a collapse of the sale and in litigation between the buyer and seller. Therefore, the law firm's failure to give notice during the policy period in which those events took place constituted a breach of the policy's notice provision. In denying coverage, the court rejected several arguments frequently asserted by policyholders seeking to avoid the strict notice requirements of a claims-made policy.

First, the court dismissed the law firm's contention that it had no duty to notify its insurer until an actual claim was filed. Citing to the policy language, the court ruled that the notice obligation was triggered by knowledge of facts that might give rise to a claim.

Second, the court rejected the law firm's argument that the notice obligation was not triggered because it had a reasonable belief that a malpractice claim would not ultimately be asserted against it. In particular, the law firm argued that the litigation between the buyer and seller did not give rise to its notice obligation because it "had no reason to think that the deal was truly doomed" in light of applicable contract law. The court stated that "whether a court would eventually rule in favor of [the law firm]'s former client is irrelevant. The question is whether [the law firm] had reason to believe that their acts or omissions *may* result in a claim for malpractice."

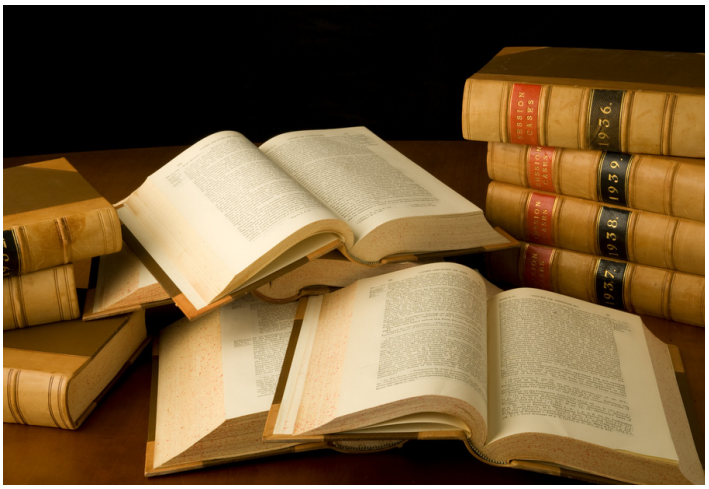
Third, the court rejected the notion that the notice requirement was unduly burdensome because it required the law firm to report every error, no matter how trivial. Although in some instances it may be difficult to determine when an act or omission "might reasonably be expected to be the basis of" a malpractice claim, the court found that "this case is not a close one."

Finally, the court ruled that prejudice to the insurer is irrelevant in the context of claims-made policies, under which notice is a condition precedent to coverage.

Duty to Defend Alert:

Court May Consider Extrinsic Evidence to Determine That Insurer Has No Duty to Defend, Says Eleventh Circuit

Although an insurer's duty to defend may often be determined by reference to allegations contained within the "four corners" of the underlying complaint, courts have sometimes permitted insurers to rely on facts or pleadings other than the complaint in denying a defense. In a recent decision, the Eleventh Circuit ruled that under Alabama law, the court may "look beyond the legal theories of the pleadings in the underlying



litigation" and examine the "operative facts of the case" in order to find that an insurer had no duty to defend. *American Safety Indemnity Co. v. T.H. Taylor, Inc.*, 2013 WL 978804 (11th Cir. Mar. 14, 2013).

Lien claimants brought suit against prospective homeowners and their general contractor stemming from an incomplete construction project. The homeowners filed a cross-claim against the contractor alleging fraud and intentional misrepresentation. The cross-claim was sent to arbitration and the homeowners then filed an "arbitration complaint" that did not identify any legal causes of actions and omitted all references to fraud. The contractor tendered defense of the arbitration to American Safety, its liability insurer. American Safety denied a defense and filed a declaratory judgment action seeking a ruling that it had no duty to defend. An Alabama district court granted American Safety's summary judgment motion, reasoning that in evaluating the insurer's duty to defend, it was appropriate to "extend[ ] the inquiry beyond the arbitration complaint and examin[e] the available evidence concerning the facts." The Eleventh Circuit affirmed.

The Eleventh Circuit reasoned that in light of the non-specific nature of the arbitration complaint, it was proper for the district court to consider the allegations in the lien claimants' complaint and in the homeowners' cross-claims. Based on those documents, the court concluded that the claims against the contractor sounded in fraud and were thus outside the scope of coverage. The court rejected the argument that any questions as to the nature of the allegations in the arbitration complaint should be resolved in favor of the insured. As the court noted, resolution of ambiguities in favor of coverage apply (if at all) only in the context of interpreting ambiguous policy provisions, not in evaluating an insurer's defense obligations.

Discovery Alert:

Third Circuit Rules That Insurer's Spoliation of Evidence Warrants Adverse Inference Jury Instruction

The Third Circuit ruled that a Pennsylvania district court did not abuse its discretion by issuing an adverse inference jury instruction based on the insurer's failure to preserve evidence. *Indemnity Insurance Co. of N. America v. Electrolux Home Products, Inc.*, 2013 WL 1303780 (3d Cir. Apr. 2, 2013) (unpublished opinion).

A school district sought coverage from its insurer, Indemnity, for damages resulting from a fire. Indemnity paid the claim and filed suit against Electrolux, the manufacturer of a refrigerator located in the school. Indemnity argued that a wiring malfunction in the refrigerator caused the fire, whereas Electrolux contended that the fire was caused by the spontaneous combustion of contents in a metal can located next to the refrigerator.

At trial, the court instructed the jury that they could draw an adverse inference based on Indemnity's failure to preserve the metal can and its contents. The court reasoned that because Indemnity's experts removed various items from the scene during its investigation and preserved some of those items, Indemnity should have known that the metal can and its contents would have been discoverable and would likely be destroyed if not preserved at that time.

On appeal, the Third Circuit ruled that Indemnity's

failure to preserve the metal can constituted spoliation because the can was within Indemnity's control and relevant to Electrolux's defense. Having determined that spoliation occurred, the Third Circuit also found that an adverse inference instruction was proper. In particular, the court concluded that an instruction permitting, but not requiring, the jury to infer that the metal can would have been unfavorable to Indemnity was appropriate.

JURISDICTIONAL ALERTS:

U.S. Supreme Court Rules That Plaintiffs Cannot Avoid Federal Jurisdiction by Stipulating to Damages of Less Than Statutory Minimum Under CAFA

The United States Supreme Court ruled that a class action plaintiff cannot escape federal jurisdiction under the Class Action Fairness Act ("CAFA") by agreeing to seek less than $5 million in damages, the minimum amount in controversy set forth in CAFA. *Standard Fire Insurance Co. v. Knowles*, 2013 WL 1104735 (U.S. Mar. 19, 2013).

CAFA gives federal district courts original jurisdiction over class actions which, among other things, involve a matter in controversy exceeding $5 million. 28 U.S.C. § 1332(d)(2), (d)(5). The question presented in *Knowles* was whether, prior to class certification, a named plaintiff could avoid federal jurisdiction under CAFA by stipulating that he and the class he seeks to represent will not seek damages exceeding $5 million. The court answered the question in the negative, explaining that the amount in controversy is determined by the cumulative value of all class members' claims. The court held that a stipulation executed by the named plaintiff does not override the actual value of the class members' claims because a named plaintiff cannot legally bind members of the proposed class prior to class certification.

Knowles represents a victory for class action defendants seeking federal jurisdiction under CAFA in high stakes litigation. The decision sends a clear message that CAFA's jurisdictional provisions will be strictly enforced in the face of strategic pleadings designed to avoid federal jurisdiction.

Where Insurer Agrees to Provide Defense, Declaratory Judgment Action Is Not Ripe for Adjudication, Says Illinois Appellate Court

An Illinois appellate court affirmed the dismissal of a declaratory judgment action relating to an insurer's defense and indemnification obligations, finding that there was no actual controversy given the insurer's agreement to defend the underlying action. *Byer Clinic & Chiropractic, Ltd. v. State Farm Fire & Casualty Co.*, 2013 WL 1189252 (Ill. App. Ct. Mar. 12, 2013).

A class action complaint alleging violations of the Telephone Consumer Protection Act ("TCPA") was filed against the policyholder and other parties. The class action plaintiff also filed a declaratory judgment action against State Farm, the policyholder's general liability insurer. In the declaratory judgment complaint, the class plaintiff sought a ruling regarding State Farm's

rights and obligations as to the TCPA claims. State Farm moved to dismiss the complaint, arguing among other things that there was no justiciable controversy because it had agreed to defend the TCPA action. The trial court agreed and dismissed the declaratory judgment action. The appellate court affirmed.

The appellate court held that because State Farm was providing a defense, there was no actual controversy regarding its duty to defend. In so ruling, the court rejected the notion that a controversy was created by virtue of the fact that the defense was being provided subject to a reservation of rights. The court also held that a determination of State Farm's duty to indemnify was not ripe for adjudication because there had been no findings as to the policyholder's liability in the underlying TCPA suit. Notably, the court declined to rule on a significant question which had not been properly preserved on appeal—namely, whether State Farm, having filed its own declaratory judgment action in another forum, was judicially estopped from arguing that the plaintiff's declaratory judgment action did not present an actual controversy.

TCPA-related coverage disputes are increasingly common and decisions have been mixed as to whether general liability policies provide coverage for such claims. *See* March 2010 Alert, October 2011 Alert. In light of *Byer*, policyholders being defended by their insurers in TCPA actions and other underlying suits may be unsuccessful in initiating coverage-based declaratory judgment actions in the forum of their choice.

Statutory Interpretation Alert:

Colorado Courts Disagree as to Whether "First-Party Claimant" Statute Applies to Third-Party Insurance

If insurance benefits have been unreasonably delayed or denied, Colorado statutory law permits a "first-party claimant" to bring an action to recover attorneys' fees and double damages. C.R.S. § 10-3-1116(1). "First-party claimant" is defined as an individual or entity "asserting an entitlement to benefits owed directly to or on behalf of an insured under an insurance policy." C.R.S. § 10-3-1115. Courts in Colorado are split as to whether the statute is limited to benefits sought under first-party policies or whether it also encompasses third-party liability policies.

In a recent opinion, a Colorado federal court concluded that the statute applied where the party seeking coverage was an additional insured under a third-party liability policy. *D.R. Horton, Inc.-Denver. v. Mountain States Mutual Casualty Co.*, 2013 WL 674032 (D. Colo. Feb. 25, 2013). The court reasoned that the additional insured was a "first-party claimant" within the meaning of the statute because it was seeking to recover its own defense costs. Although the court acknowledged the fundamental differences between third-party and first-party insurance, it held that the plain language of the statute encompassed a policyholder (or here, an additional named insured) of third-party insurance seeking to recover its own defense costs.

The court also addressed the proper method of allocating defense costs among multiple insurers under Colorado law. The court held that each insurer's duty to defend the policyholder is "joint and several" and that any pro rata apportionment "is a matter to be worked out among the insurers."

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