SIMPSON THACHER
INSURANCE LAW ALERT
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This Alert discusses recent decisions relating to an insurer's duty to settle, allocation of indemnity costs in the context of insurer bankruptcy, and application of a pollution exclusion to lead paint claims. We also summarize a decision enforcing an insurer's right to subrogation proceeds and two rulings addressing the standards for late notice defenses, among others. Please "click through" to view articles of interest.

- ***California Appellate Court Limits Insurer's Duty to Settle, Even Where Liability is Clear and Likely to Exceed Policy Limits***

  A California appellate court ruled that an insurer may not be liable for bad faith by failing to settle if the underlying plaintiff has not made a settlement demand or otherwise indicated an interest in settling, even if there is a significant risk of judgment that exceeds policy limits. *Reid v. Mercury Ins. Co.*, 162 Cal. Rptr. 3d 894 (Cal. App. Ct. 2013).

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- ***New Jersey Supreme Court Rules That State Statute Governing Insurer Insolvency Trumps Pro Rata Allocation for Continuous Property Damage***

  The New Jersey Supreme Court ruled that in a continuous property damage case spanning multiple policy periods, the policy limits of solvent insurers must be exhausted before statutory benefits may be obtained from the New Jersey Guaranty Association standing in the shoes of an insolvent carrier. *Farmers Mutual Fire Ins. Co. of Salem v. N.J. Property Liability Ins. Guar. Assoc.*, 74 A.3d 860 (N.J. 2013). *Click here for full article*

- ***Pennsylvania Supreme Court Sets Low Threshold for Showing of Prejudice in Late Notice Case***

  The Pennsylvania Supreme Court ruled that an insurer can establish prejudice as a result of late notice by demonstrating that it was unable to investigate a claim and uncover relevant facts. *Vanderhoff v. Harleysville Ins. Co.*, 2013 WL 5826958 (Pa. Oct. 30, 2013). *Click here for full article*

- ***Seventh Circuit Addresses Standards for Timely Notice and Prejudice Under Primary and Excess Liability Policies***

  Applying Indiana law, the Seventh Circuit ruled that a policyholder's notice to its primary and excess liability insurers was untimely, but that the question of whether the insurers had established prejudice presented an issue of fact. *National Union Fire Ins. Co. v. Mead Johnson & Co. LLC*, 2013 WL 5788652 (7th Cir. Oct. 29, 2013). *Click here for full article*

- ***New York Court Allows Insurer to Retain Settlement Proceeds from Subrogation Action Against Third-Party Tortfeasor***

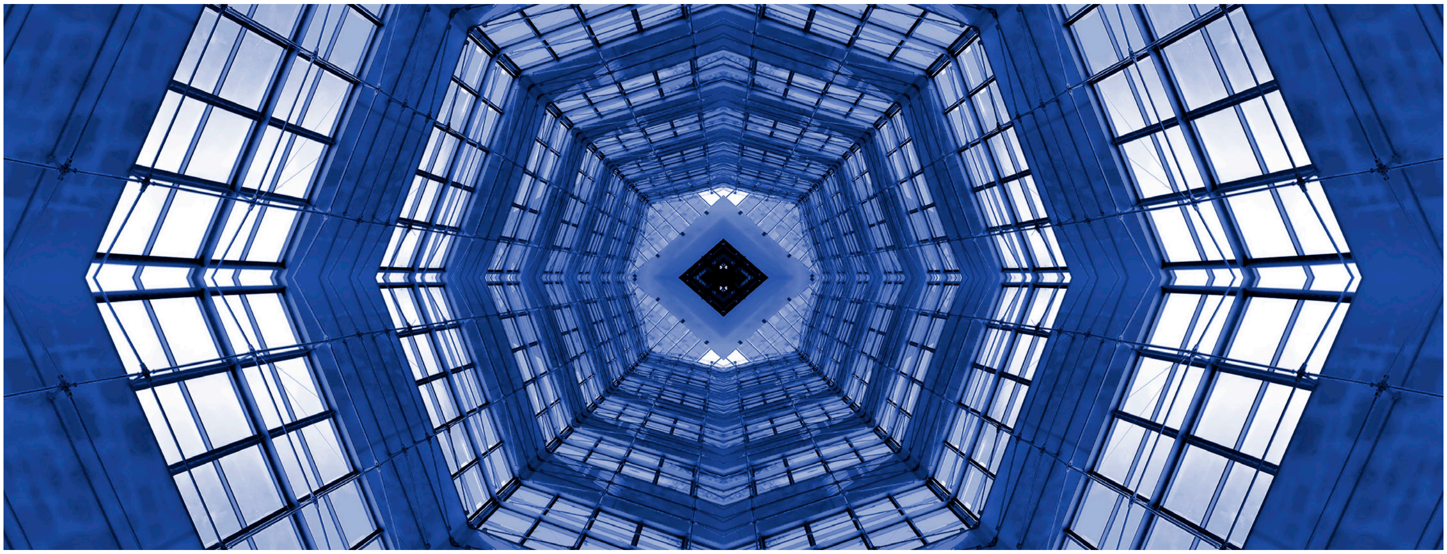
  A New York trial court dismissed a putative class action suit challenging an insurer's right to retain settlement proceeds from a subrogation action against a third-party tortfeasor. *Erlich v. American International Group, Inc.*, 2013 WL 5966053 (N.Y. Sup. Ct. New York Cnty. Nov. 7, 2013). *Click here for full article*

- ***Absolute Pollution Exclusion Bars Coverage for Lead Paint Claims, Says Delaware Court***

  Addressing a matter of first impression under Delaware law, a Delaware court ruled that an absolute pollution exclusion precluded general liability coverage for lead paint bodily injury claims. *Farm Family Casualty Co. v. Cumberland Ins. Co., Inc.*, 2013 WL 5496780 (Del. Super. Ct. Kent Cnty. Oct. 2, 2013). *Click here for full article*

- ***Insurer Has No Duty to Defend Suit Seeking Injunctive Relief Regardless of Whether Claimants Might Have Sustained Covered Damages***

  A California appellate court ruled that an insurer had no duty to defend a suit seeking only injunctive relief, regardless of whether the underlying complaint created the potential for monetary damages and/or implied the existence of such damages. *San Miguel Community Assoc. v. State Farm General Ins. Co.*, 163 Cal. Rptr. 3d 358 (Cal. Ct. App. 2013). *Click here for full article*



Bad Faith Alert:

California Appellate Court Limits Insurer's Duty to Settle, Even Where Liability is Clear and Likely to Exceed Policy Limits

A California appellate court ruled that an insurer may not be liable for bad faith by failing to settle if the underlying plaintiff has not made a settlement demand or otherwise indicated an interest in settling, even if there is a significant risk of judgment that exceeds policy limits. *Reid v. Mercury Ins. Co.*, No. 162 Cal. Rptr. 3d 894 (Cal. App. Ct. 2013).

The coverage dispute arose out of an automobile accident. An injured woman's son sued the other driver and obtained a $5.9 million judgment. The son then sued the driver's insurance company alleging bad faith refusal to settle. A California trial court granted the insurer's summary judgment motion and an appellate court affirmed. The appellate court held that:

> [A]n insurer's duty to settle is not precipitated solely by the likelihood of an excess judgment against the insured. In the absence of a settlement demand or any other manifestation the injured party is interested in settlement, when the insurer has done nothing to foreclose the possibility of settlement, we find there is no liability for bad faith failure to settle.

The court found that there was no settlement offer from the injured party or her son, and no evidence that the insurer knew or should have known that they were interested in settling. In addition, there was no evidence that the insurer actively refused to settle or otherwise rejected opportunities to settle. In this respect, the court held that a request for disclosure of policy limits, standing alone, could not be construed as an opportunity to settle.

Reid comports with other recent decisions addressing the standards for insurer bad faith based on failure to settle under California law. As discussed in our July/August and November 2012 Alerts, the Ninth Circuit declined to impose an affirmative duty to settle absent a settlement demand. In *Yan Fang Du v. Allstate Ins. Co.*, 2012 WL 2086584 (9th Cir. June 11, 2012), the Ninth Circuit held that insurers were obligated to work proactively toward a settlement when liability is clear, even if the underlying claimants have not made a settlement demand. However, the court retreated from that holding in an amended decision. The revised decision sidestepped the question of whether a duty to settle can be breached absent a settlement demand and instead resolved the dispute on the basis that the factual record did not support a bad faith jury instruction in the first place. *Yan Fang Du v. Allstate Ins. Co.*, 2012 WL 47486879 (9th Cir. Oct. 5, 2012).

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Allocation Alert:
New Jersey Supreme Court Rules That State Statute Governing Insurer Insolvency Trumps Pro Rata Allocation for Continuous Property Damage

The New Jersey Supreme Court ruled that in a continuous property damage case spanning multiple policy periods, the policy limits of solvent insurers must be exhausted before statutory benefits may be obtained from the New Jersey Guaranty Association standing in the shoes of an insolvent carrier. *Farmers Mutual Fire Ins. Co. of Salem v. N.J. Property Liability Ins. Guar. Assoc.*, 74 A.3d 860 (N.J. 2013).

Property owners were insured by successive one-year policies issued by Newark Insurance Company and Farmers Mutual. When the property owners discovered soil and groundwater contamination, they sought coverage from both insurers. It was undisputed that the contamination began during the periods insured by Newark and continued into the Farmers Mutual policy period. Newark became insolvent and the New Jersey Property-Liability Insurance Guaranty Association (NJPLIGA) took over the administration of its claims. Farmers Mutual paid all remediation costs (which fell below its policy limits) and then sought contribution from NJPLIGA pursuant to New Jersey's "time on the risk and degree of risk assumed" allocation scheme, as set forth in *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437 (1994). Farmers Mutual argued that NJPLIGA was responsible for Newark's share of liability, which the parties stipulated to be approximately eighty percent. A New Jersey trial court agreed with Farmers Mutual, and held that NJPLIGA was subject to *Owens-Illinois* allocation. An appellate court reversed, reasoning that state statutory law carved out an exception to *Owens-Illinois* and required exhaustion of all solvent carriers' policies before NJPLIGA's reimbursement obligations are triggered. The New Jersey Supreme Court affirmed.

New Jersey statutory law requires that "when a claim arises under policies issued by both a solvent and insolvent insurer, the claimant must first exhaust the policy of the solvent insurer." (Citing N.J. Stat. Ann. § 17:30A-12(b) (West 2013)). A 2004 amendment to this statute provided that in continuous indivisible injury or property damage cases, "exhaustion shall be deemed to have occurred only after a credit for the maximum limits under all other coverages, primary and excess, if applicable, issued in all other years has been applied." The court concluded that this amendment created an exception to *Owens-Illinois* allocation by requiring the exhaustion of solvent carriers' limits as a precondition to reimbursement by NJPLIGA. In so ruling, the court noted that the 2004 amendment conveyed the intention that NJPLIGA should be an insurer of "last resort" and operated to overrule prior case law that enforced *Owens-Illinois* allocation in the context of Guaranty Fund reimbursement. *See Sayre v. Ins. Co. of N. Am.*, 701 A.2d 1311 (N.J. App. Div. 1997).

Although *Farmers Mutual* is significant, policyholder attempts to extend its reach may be unsuccessful given that the decision was based primarily on statutory interpretation. The decision presumably leaves intact the following well-established allocation principles under New Jersey law: (1) a policyholder is not relieved of liability as a result of insurer insolvency, *see Benjamin Moore & Co. v. Aetna Casualty & Surety Co.*, 843 A.2d 1094 (N.J. 2004); (2) a policyholder that elects to be uninsured or underinsured for certain periods may be liable for indemnity during those periods; and (3) an insurer's pro rata responsibility may not exceed policy limits.

Notice Alerts

Pennsylvania Supreme Court Sets Low Threshold for Showing of Prejudice in Late Notice Case

The Pennsylvania Supreme Court ruled that an insurer can establish prejudice as a result of late notice by demonstrating that it was unable to investigate a claim and uncover relevant facts. *Vanderhoff v. Harleysville Ins. Co.*, 2013 WL 5826958 (Pa. Oct. 30, 2013).

An automobile insurer denied coverage on the basis that the policyholder violated a state statute requiring automobile accident participants to report the involvement of a "phantom vehicle" within a thirty-day period or "as soon as practicable." Here, the policyholder waited eight months before notifying his insurer of an alleged phantom vehicle. A trial court ruled in favor of the policyholder, finding that he had reported the phantom vehicle "as soon as practicable." The intermediate court reversed, finding that notice was untimely and that the insurer need not establish prejudice as a result of the delay. The Pennsylvania Supreme Court reversed and held that an insurer must demonstrate prejudice to deny coverage on the basis of late notice as a matter of statutory law. On remand, the trial court found that the insurer failed to establish prejudice. The intermediate appellate court reversed a second time, reasoning that the insurer was prejudiced by its inability to investigate the accident. The Pennsylvania Supreme Court affirmed.

The Pennsylvania Supreme Court ruled that "where an insured's delay results in an inability to thoroughly investigate the claim and thereby uncover relevant facts, prejudice is established." In adopting this standard, the court rejected the notion that prejudice requires proof of what the insurer would have discovered had timely notice been provided. The court explained that "[t]o demand such evidence would result in a Mobius strip whereby, to show prejudice, the insurer would have to show through concrete evidence the evidence it was unable to uncover due to the untimely notice."

Although *Vanderhoff* involved uninsured motorist coverage, the court's reasoning (and reliance on an environmental coverage case) suggests that the decision will apply with equal force to other insurance contexts. Under the standard set forth in *Vanderhoff*, prejudice must be decided on a "case-by-case basis wherein the court balances the extent and success of the insurer's investigation with the insured's reasons for the delay."

Seventh Circuit Addresses Standards for Timely Notice and Prejudice Under Primary and Excess Liability Policies

Applying Indiana law, the Seventh Circuit ruled that a policyholder's notice to its primary and excess liability insurers was untimely, but that the question of whether the insurers had established prejudice presented an issue of fact. *National Union Fire Ins. Co. v. Mead Johnson & Co. LLC*, 2013 WL 5788652 (7th Cir. Oct. 29, 2013).

Mead Johnson, a manufacturer of infant formula, was sued by a competitor for false advertising. The suit sought $500 million in damages. Mead Johnson did not provide notice of the suit to National Union, its general liability carrier, or to Lexington, its excess insurer, until after an adverse $13.5 million trial verdict. National

Union denied coverage, arguing that Mead Johnson failed to provide notice "as soon as practicable," as required by the policy. Lexington denied coverage on the same basis, as its policy required notice when a claim or suit was "reasonably likely" to trigger excess coverage (above National Union's $2 million policy limit). An Indiana federal district court granted the insurers' motions for summary judgment, holding that when notice is provided after a trial verdict, prejudice is presumed and coverage is forfeited. The Seventh Circuit reversed.

The Seventh Circuit agreed with the district court that notice to the insurers was untimely. As to National Union, the court rejected Mead Johnson's argument that notice was timely in light of a policy endorsement which provided that Mead Johnson would not be deemed to have knowledge of an occurrence until

the company's Director of Risk Management received notice of the occurrence. The court dismissed as incredible Mead Johnson's contention that its Director of Risk Management did not learn of the underlying suit until after the trial ended, noting that "[e]ven to a company the size of Mead Johnson, $500 million is a lot of money." As to Lexington, the court concluded that Mead Johnson should have known that the underlying lawsuit was "reasonably likely" to result in a judgment in excess of $2 million, particularly given the outcomes of prior litigation involving the same parties and issues.

However the Seventh Circuit parted ways with the district court on the issue of prejudice. The Seventh Circuit ruled that under Indiana law, late notice creates a presumption of prejudice that is always rebuttable —even when notice is not provided until after the conclusion of the underlying trial. But the court acknowledged the relationship between the length of a delay in providing notice and the policyholder's burden in rebutting the presumption of prejudice, explaining that "the later the notice the harder it is for the insured to rebut the presumption that the insurer was harmed by being deprived of the opportunity to control the defense." The court remanded the prejudice issue for further evidentiary proceedings.

Late notice aside, the Seventh Circuit also addressed the scope of advertising injury coverage under National Union's policy. The court ruled that consumer fraud claims do not constitute claims for "product disparagement," even if the claims arise out of the policyholder's alleged disparagement of a competitor's product,

National Union's policy defines advertising injury to include "oral or written publication, in any matter, of material that … disparages a person's or organization's goods, products or services." The court held that this provision did not encompass consumer fraud claims alleging that customers were induced to buy a more expensive product as a result of the policyholder's disparagement of a competitor's product. The court reasoned that disparagement is limited to a company's negative statements about a competitor's product, and does not include fraud claims by customers, even when those claims are based on the policyholder's disparaging statements. The court rejected the notion that the consumer fraud claims constituted covered advertising injury because they "can be traced to product disparagement." The court explained that coverage for claims "arising out of" product disparagement requires something more than a claim merely "having its origin in 'product disparagement.'" The decision serves as an important reminder that the phrase "arising out of" is not subject to "indefinite extension" in order to create coverage and that a policyholder may not "shoehorn one tort—product disparagement, which the insurance policy covers—into another—fraud, which isn't covered."

Subrogation Alert:

New York Court Allows Insurer to Retain Settlement Proceeds from Subrogation Action Against Third-Party Tortfeasor

A New York trial court dismissed a putative class action suit challenging an insurer's right to retain settlement proceeds from a subrogation action against a third-party tortfeasor. *Erlich v. American International Group, Inc.*, 2013 WL 5966053 (N.Y. Sup. Ct. New York Cnty. Nov. 7, 2013).

Policyholders sought coverage for property damage caused by a faulty water cooler under a homeowners' insurance policy issued by New Hampshire Insurance Co. ("NHIC"). NHIC paid the full amount claimed by the policyholders, less approximately $12,000, which represented the deductible amount and a "depreciation deduction," authorized by a policy endorsement. In connection with the payment, policyholders signed a subrogation receipt that allowed NHIC (pursuant to the policy's subrogation clause) to pursue recovery directly from the third-party tortfeasor. Subsequently, Everest Insurance Company, NHIC's reinsurer and assignee of NHIC's subrogation rights, brought a subrogation action against the manufacturer of the water cooler. The subrogation action ultimately settled. Thereafter, the policyholders sued NHIC and Everest, seeking reimbursement of the approximately $12,000 amount "held back" by NHIC. The policyholders argued that (1) they were entitled to a full reimbursement of their deductible and (2) an insurance company may not retain subrogation proceeds until the policyholder has been fully compensated for all of its uninsured losses. The court disagreed on both counts.

The court held that under New York law, "an insurer who has paid its insured the full amount due under a [policy], but less than the insured's loss, may proceed against the third-party tortfeasor responsible for the loss before the insured has been made whole by the tortfeasor." (*Citing Winkelmann v. Excelsior Ins. Co.*, 85 N.Y.2d 577 (1995)). The court clarified that an insurer need not wait for the policyholder to sue the third-party tortfeasor before commencing its own subrogation

suit. The court further noted that policyholders were not "mandatory parties" to the subrogation action. Importantly, the court rejected application of the "make whole" doctrine, under which a policyholder's right to compensation is given priority over an insurer's subrogation rights. The court explained that where, as here, the tortfeasor is not judgment proof, the policyholder must commence its own action against the tortfeasor to recover its uninsured losses rather than "piggyback" on its insurer's lawsuit. The court stated that the "policyholder cannot sit on its rights, allowing its claims against the tortfeasor to become time barred, and then sue its insurer for a portion of the subrogation settlement. That is fundamentally unfair, and contravenes the subrogation framework and public policy repeatedly articulated by the [New York] Court of Appeals."

Implicit in the court's ruling is the notion that a deductible amount is a contractually agreed-upon "uninsured loss" in the context of subrogation actions and the "make whole" doctrine. The Connecticut Supreme Court recently reached the same conclusion in *Fireman's Fund Ins. Co. v. TD Banknorth Ins. Agency, Inc.*, 72 A.3d 36 (Conn. 2013), concluding that the "make whole" doctrine does not apply to policy deductibles. *See* September 2013 Alert.

Pollution Exclusion Alert:

Absolute Pollution Exclusion Bars Coverage for Lead Paint Claims, Says Delaware Court

Addressing a matter of first impression under Delaware law, a Delaware court ruled that an absolute pollution exclusion precluded general liability coverage for lead paint bodily injury claims. *Farm Family Casualty Co. v. Cumberland Ins. Co., Inc.*, 2013 WL 5496780 (Del. Super. Ct. Kent Cnty. Oct. 2, 2013).

The pollution exclusion at issue barred coverage for bodily injury or property damage "which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." "Pollutant" is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." In finding that lead paint claims fell squarely within the exclusion, the court rejected several arguments commonly asserted by policyholders in this context:

That the term "pollutant" is ambiguous: The court held that both a common sense and dictionary-based meaning of "contaminant" indicates something that corrupts or harms another entity and that lead paint clearly constitutes a contaminant given its harmful qualities.

That a judicial split in authority is indicative of the pollution exclusion's ambiguity: The court held that disagreement among courts is not relevant to an ambiguity analysis. Rather, ambiguity must be determined by reference to the language of the policy itself.

That the pollution exclusion applies only to traditional environmental pollution: The court rejected the notion that the pollution exclusion was ambiguous when applied to non-traditional pollution contexts. The court explained that nothing in the policy limited the exclusion's application to traditional environmental pollution and that if the parties intended to so confine its scope, they could have included language to that effect. The court distinguished the language at issue with a pollution exclusion that contains "into or upon land, or the atmosphere" language, which arguably indicates an outdoor requirement.

That the exclusion is inapplicable because the lead paint was not "released": Although the underlying complaint did not indicate how the lead entered the claimant's system, the court held that a reasonable person would infer that the lead was released or escaped in some manner. The court emphasized that the underlying complaint need not allege a specific "method of travel" in order to implicate the "dispersal, seepage, migration, release or escape" language of the pollution exclusion.

That the presence of another policy exclusion relating to lead indicates that the pollution exclusion was not intended to encompass lead paint claims: Another exclusion in the policy, entitled "Exclusion—Lead Contamination," barred coverage for occurrences at the insured premises which result in the ingestion, inhalation or absorption of lead. The policyholder argued that this exclusion would be rendered redundant if the pollution exclusion were interpreted to encompass lead paint claims. The court rejected this assertion, finding that the two exclusions could plausibly apply in different scenarios. In particular, the court noted that the Lead-Contamination exclusion was limited in location (to injuries at the insured premises) but applied broadly to all lead-based injuries (including intact lead paint). In contrast, the pollution exclusion had no geographical limitation but contained a "method of travel" requirement that might not be met in certain intact lead paint cases.

Coverage Alert:

Insurer Has No Duty to Defend Suit Seeking Injunctive Relief Regardless of Whether Claimants Might Have Sustained Covered Damages

A California appellate court ruled that an insurer had no duty to defend a suit seeking only injunctive relief, regardless of whether the underlying complaint created the potential for monetary damages and/or implied the existence of such damages. *San Miguel Community Assoc. v. State Farm General Ins. Co.*, 163 Cal. Rptr. 3d 358 (Cal. Ct. App. 2013).

Plaintiffs sued San Miguel, a community association, seeking enforcement of certain parking restrictions. When the suit was sent to alternative dispute resolution, San Miguel tendered defense to State Farm. After investigating the claim, State Farm denied coverage on the basis that the underlying complaint did not seek the recovery of monetary damages as required by the policy. Plaintiffs ultimately filed an amended complaint that, in addition to declaratory and injunctive relief, sought compensatory damages. State Farm then reversed its decision and agreed to defend San Miguel under a reservation of rights. However, State Farm refused to compensate San Miguel for the defense costs incurred in the underlying case prior to the filing of the amended complaint. San Miguel sued State Farm, alleging breach of contract and bad faith. A trial court granted State Farm's summary judgment motion and the appellate court affirmed.

State Farm's policy provided a defense for "any claim or suit seeking damages payable under this policy." The court ruled that this provision eliminated any defense obligation for suits seeking injunctive or other non-monetary relief, regardless of whether compensatory damages were implied in the underlying allegations. In particular, the court rejected San Miguel's argument that State Farm had a duty to defend the underlying nuisance, breach of fiduciary duty, irreparable damage and punitive damages claims because they inherently required proof of actual damages, thus giving rise "to the implication of actual damages." The court stated that "it is irrelevant that the third party might have suffered harm that could give rise to a claim for damages covered under the insured's policy. What matters is whether the third party has *sought to recover* damages from the insured."

San Miguel sends a clear message that although an insurer's duty to defend is broad, an insurer is not required to "infer the existence of additional allegations not actually included within the underlying [ ] complaint, merely because it is aware those additional claims might have been plausibly included."

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