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Insurance Law Alert

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STB News Alerts

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Coverage Alerts:

Second Circuit Rules That Warranty Nullified Excess Insurer's Coverage Obligation To Investment Firm

The Second Circuit ruled that Axis Insurance Company has no obligation to cover losses and expenses arising out of a Securities and Exchange Commission ("SEC") investigation of Patriarch Partners, LLC, finding that coverage was foreclosed by a warranty signed by Patriarch's sole director and officer. *Patriarch Partners, LLC v. Axis Ins. Co.*, 2018 WL 6431024 (2d Cir. Dec. 6, 2018).

The coverage dispute arose out of an SEC "informal inquiry" of Patriarch that began in December 2009. Over the next few years, the SEC changed its description of the matter to an "informal investigation" and requested extensive information relating to the company's business practices. The SEC also issued an internal order authorizing subpoenas and indicating that the SEC had information that tended to show that Patriarch had acted in possible violation of federal securities law. Although Patriarch maintained that it did not see a copy of that order until 2012, it conceded that its outside counsel learned of it in June 2011.

During this time frame, Patriarch maintained a tower of insurance consisting of a primary policy plus two excess layers of coverage. In August 2011, Patriarch's broker recommended that Patriarch purchase a third layer of excess coverage and presented a quote from Axis. The quote was contingent upon Patriarch's execution of a warranty representing that "neither the undersigned nor any other director or officer of Patriarch is aware of any facts or circumstances that would reasonably be expected to result in a Claim under the Captioned Policy." Lynn Tilton, the sole director and officer of Patriarch, executed the warranty.

In March 2015, the SEC filed an administrative action against Patriarch. Patriarch sought defense and indemnity from Axis, which denied coverage on two bases: (1) that the SEC investigation was a "claim" first made before the Axis policy incepted and (2) that the warranty relieved Axis of its obligations because the SEC investigation constituted "facts and circumstances" of which Patriarch was aware that could reasonably have been expected to result in a claim.

A New York district court ruled in Axis's favor, finding that the SEC investigation was a "claim" that was pending prior to the policy's inception and coverage was thus barred by the "pending or prior claim" endorsement. The Second Circuit affirmed on different grounds. The Second Circuit held that coverage was foreclosed by the warranty because, at the time of its execution, Patriarch was aware of facts and circumstances that would reasonably be expected to result in a covered claim.

The Second Circuit rejected Patriarch's assertion that the warranty excluded coverage only as to facts and circumstances of which Tilton herself was personally aware, noting that the warranty referred to "Patriarch" rather than Tilton individually. Additionally, the court rejected Patriarch's contention that the warranty referred only to claims giving rise to losses in excess of $20 million, the attachment point of the Axis policy.

Texas Supreme Court Rules That Joint Venture Provision Does Not Cap Defense Costs In Deepwater Horizon Coverage Dispute

The Texas Supreme Court ruled that a Joint Venture Provision that limited coverage to twenty-five percent of excess policy limits did not encompass defense expenses, and Underwriters were obligated to pay defense expenses up to the full policy limits. *Anadarko Petroleum Corp. v. Houston Casualty Co.*, 2019 WL 321921 (Tex. Jan. 25, 2019).

Anadarko, a minority-interest owner in the Deepwater Horizon operation, sued

the Underwriters, seeking payment for defense costs that Anadarko incurred in civil and government actions. The operative policy included a Joint Venture Provision that provided:

> [A]s regards any liability of [Anadarko] which is insured under this Section III and which arises in any manner whatsoever out of the operation or existence of any joint venture . . . the liability of Underwriters under this Section III shall be limited to the product of (a) the percentage interest of [Anadarko] in said Joint Venture and (b) the total limit afforded [Anadarko] under this Section III.

Based on this provision, the Underwriters paid Anadarko $37.5 million, representing twenty-five percent of the $150 million excess-coverage limit. Anadarko sought additional payments, up to $150 million, for defense expenses. The Underwriters refused to pay, arguing that the Joint Venture Provision capped all excess coverage—including coverage for defense costs—at twenty-five percent.

A Texas trial court granted Anadarko's summary judgment motion, finding that the endorsement applied to both liability and defense obligations, but that a policy exception, which increases coverage to full policy limits when Anadarko is legally liable for more than its proportionate share in the joint venture, applied. An appellate court reversed and rendered judgment for the Underwriters. The appellate court held that the Joint Venture Provision limited both defense and indemnity to twenty-five percent of policy limits and that no exceptions applied. The Texas Supreme Court reversed.

The Texas Supreme Court held that the Joint Venture Provision limited the Underwriters' liability only for amounts Anadarko was required to pay in response to third-party claims and did not encompass sums that Anadarko paid as defense expenses. The court emphasized that the policy "consistently distinguishes between Anadarko's 'liabilities' and 'expenses'" and that in other insurance and legal contexts, the two categories of payments are substantively distinct. The court acknowledged that Anadarko's liabilities and defense expenses were both included in the "Ultimate Net Loss" definition, but concluded that the term "liability" in the Joint Venture Provision referred only to liability for damages imposed upon Anadarko by law, and did not include defense expenses.

New York Court Rules That Insurers Must Defend Talent Agency In Suit Brought By Hulk Hogan

A New York court ruled that a primary and umbrella insurer were obligated to defend a talent agency and an individual agent in a suit brought by wrestler Hulk Hogan that alleged breach of privacy and infliction of emotional distress. *Zurich American Ins. Co. v. Don Buchwald & Assocs., Inc.*, 2018 NY Slip Op. 33325(U) (N.Y. Sup. Ct. New York Cnty. Dec. 21, 2018).

After compromising video and audio recordings of Hogan were released to the public, Hogan sued website Gawker and radio personality Michael Calta. The suit also named as defendants Don Buchwald & Associates ("DBA"), the talent agency that represented Calta, as well as Tony Burton, Calta's personal agent at DBA. The initial complaint alleged breach of privacy and intentional infliction of emotional distress based on an alleged conspiracy to publish recordings that involved sexual and racist content. An amended complaint added negligence claims relating to DBA's hiring and supervision of Burton. DBA's primary and umbrella insurers refused to defend on several bases, including that the underlying suit did not allege a covered occurrence. The court disagreed and granted partial summary judgment in DBA's favor.

The primary insurer argued that the underlying suit did not allege a covered "occurrence" because it alleged only intentional conduct. The court rejected this assertion, holding that even if Burton's conduct was intentional, the resulting

damage may have been unexpected and unintended from the perspective of DBA, the policyholder. Further, the court explained that an intentional tort may be deemed “accidental” for coverage purposes if the elements of the tort can be established in the underlying action without proving intentional or knowing conduct. Here, because applicable Florida law permits Hogan to establish intentional infliction of emotional distress by demonstrating reckless conduct, the court held that the claim triggered the potential for coverage.

The court also ruled that the negligent retention claim against DBA alleged an occurrence even though the complaint alleged that Burton intended to harm Hogan. The court stated that in assessing whether a negligent retention claim alleges an occurrence, “the question for courts to answer is not whether the employee acted intentionally, but whether, from the standpoint of the employer, the employee’s acts were unexpected and unforeseen.”

As to the umbrella policy, the court ruled that the underlying suit potentially triggered coverage under the “personal and advertising injury” provision based on the invasion of privacy claim. The court rejected the insurer’s assertion that such coverage was unavailable because neither DBA nor Burton published the audio or video recordings themselves, noting that the policy contained no such requirement.

Number Of Occurrences Alerts:

In Asbestos Suit, Each Site Constitutes A Separate Occurrence And Completed Operations Cap Applies, Says Pennsylvania Court

A Pennsylvania district court ruled that each site at which the policyholder installed or removed asbestos-containing materials constituted a separate occurrence for policy coverage purposes and completed operations limits apply. *Ohio Valley Insulating Co., Inc. v. Maryland Casualty Co.*, 2018 WL 6812527 (W.D. Pa. Dec. 27, 2018).

The court rejected the insurers’ assertion that all underlying asbestos suits arose out of a single occurrence—namely, the policyholder’s use of asbestos-containing materials. Applying Pennsylvania’s cause-oriented approach (and noting that the same result would be reached under West Virginia law), the court reasoned that each site was a separate occurrence because claimants at each site were exposed to asbestos during the same time and were “subjected to continuous or repeated exposure to substantially the same general condition.” The court distinguished cases involving asbestos claims that arise from “a single, negligent practice that could be considered one cause such as distributing a uniformly defective product from a single manufacturer or selling a product containing asbestos from one location.”

Addressing a separate issue, the court also held that the policies’ aggregate limits for “completed operations” applied. The policyholder argued that the underlying suits fell solely within “operations” coverage. Rejecting this assertion, the court adopted the reasoning set forth in *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004), which found that “the completed-operations hazard . . . encompasses any bodily injury claim in which the claimant was injured by asbestos exposure attributable to an operation that the insured completed prior to the start of the policy period.”

Reversing Lower Court, Fifth Circuit Rules That Multiple Collisions Constitute A Single Accident For Policy Limit Purposes

The Fifth Circuit ruled that multiple car collisions constitute a single accident and that an insurer was thus obligated to pay only a single policy limit. *Evanston Ins. Co. v. Mid-Continent Casualty Co.*, 2018 WL 6037507 (5th Cir. Nov. 19, 2018).

Over a ten-minute period, a Mack truck collided with several cars and objects, resulting in severe injuries to and the death of numerous individuals. The parties settled all claims and the sole remaining issue before the court was whether a series of three collisions constituted a single accident or multiple accidents for the purpose of determining the policy limits available. The record established that the Mack truck hit a Honda Accord that was waiting in line at a toll plaza. After hitting the Accord, the truck continued traveling through the toll lane for approximately 66 feet before striking a Dodge Charger. The truck pushed the Charger until it crashed into a retaining wall, striking the toll booth in the process. The truck driver did not apply the brakes at any time during the incident.

Applying Texas law, the district court ruled that there were two separate accidents: the collision with the Accord and the collision with the Charger. The district court applied a cause-oriented approach, but held that under Texas law, an "overarching cause" of injuries (*i.e.*, the Mack truck driver's negligence) can never constitute a single occurrence. Thus, the district court looked to the "immediate causes" of the injuries, and reasoned that the each incident giving rise to liability was caused by a separate collision.

The Fifth Circuit reversed, finding only one accident. The Fifth Circuit clarified that an "overarching cause" of injuries does not give rise to a single occurrence when it is not the "proximate, uninterrupted, and continuing cause of all the injuries." For example, Texas courts have rejected single-accident arguments based on an "overarching cause" of negligent supervision in sexual abuse cases on the basis that "an overarching cause should be ignored where an intervening cause—like an intentional tort—breaks the chain of causation." Here, however, the Fifth Circuit concluded that the casual chain was not broken by any intervening acts (such as a pause in conduct or an indication that the truck driver had applied breaks or gained control of his vehicle) and that the truck driver's ongoing negligence was the single, proximate and uninterrupted cause of all collisions.

Arbitration Alert:

U.S. Supreme Court Rejects "Wholly Groundless" Exception To Contractual Agreement To Arbitrate

The United States Supreme Court ruled that the threshold question of whether a dispute is subject to arbitration is a matter for an arbitration panel, not a court, and that there is no "wholly groundless" exception to this rule. *Schein, Inc. v. Archer & White Sales, Inc.*, 2019 WL 122164 (U.S. Jan. 8, 2019).

In a contract dispute, Archer & White sued Schein, seeking monetary damages and injunctive relief. The contract required all disputes to be resolved through arbitration, with the exception of those seeking injunctive relief. When Schein moved to compel arbitration, Archer & White argued that the dispute was not subject to arbitration in light of the demand for injunctive relief. The central question was whether the gateway issue of arbitrability should be decided by a court or an arbitration panel. The federal district court ruled that where, as here, a court finds that an argument for arbitration is "wholly groundless," a court may resolve the threshold question of arbitrability. The Fifth Circuit affirmed.

The United States Supreme Court reversed, finding the "wholly groundless" exception

inconsistent with the Federal Arbitration Act ("FAA") and case precedent. The Court explained that the exception "confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability." The Supreme Court rejected Archer & White's assertion that the FAA implicitly permits a "front end" judicial review by allowing a "back end" judicial review of arbitration awards and the scope of an arbitration panel's powers. The Court remanded the matter for a determination of whether the contract at issue delegated the arbitrability question to an arbitrator, noting that courts should not assume that parties agreed to arbitrate arbitrability unless there is a "clear and unmistakable" intent to do so.

Computer Fraud Alert:

Vermont Supreme Court Rules That False Pretense Exclusion Does Not Bar Coverage For Fraudulent Wire Transfer

The Vermont Supreme Court ruled that a False Pretense Exclusion was ambiguous and would not be enforced to bar coverage for losses arising from a wire transfer initiated by a fraudulent email. *Rainforest Chocolate, LLC v. Sentinel Ins. Co., Ltd.*, 2018 WL 6817065 (Vt. Dec. 28, 2018).

A Rainforest employee received an email purportedly from his manager. The email directed him to wire approximately $20,000 to a specific bank account. After transferring the funds, the employee discovered that the email was fraudulent. Rainforest sought coverage for its loss under a business-owner policy. The insurer denied coverage, primarily relying on a False Pretense Exclusion that applied to the "voluntary parting" with property if induced to do so by fraud or false pretense. A Vermont trial court agreed with this interpretation and granted the insurer's summary judgment motion. The Vermont Supreme Court reversed, deeming the exclusion ambiguous.

The False Pretense Exclusion was preceded by introductory language stating that the insurer "will not pay for physical loss or physical damage caused by or resulting from: False Pretense." The Vermont Supreme Court held that this language was ambiguous as to whether or not transferred funds were "physical." The court noted that the "policy uses the two distinct phrases—'physical loss and physical damage' and 'loss and damage'—within different sections throughout the policy, sometimes switching between the two sentence to sentence," without defining or explaining the difference between the terms. The Vermont Supreme Court interpreted the exclusion in Rainforest's favor, holding that the loss of transferred funds was not physical in nature and thus that the False Pretense Exclusion did not apply.

The Court remanded the matter for a determination of whether the loss was otherwise covered by "Forgery" or "Money or Securities Theft" provisions. The court noted that there could be no coverage under the "Computer Fraud" provision, which applied only to "physical loss of or physical damage to money . . . resulting from computer fraud," based on the court's conclusion that the loss was not physical.

Damages Alert:

New York Court Erred In Dismissing Insured's Consequential Damages Claim, Says Appellate Court

Reversing a New York trial court decision, an appellate court held that a policyholder had adequately pled a claim for consequential damages arising from the insurer's alleged breach of contract and the duty of good faith and fair dealing. *D.K. Property, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2019 WL 237454 (N.Y. App. Div. 1st Dep't Jan. 17, 2019).

A building owner sued its liability insurer, alleging breach of contract and bad faith based on the insurer's intentional delay of payment of a property damage claim. The complaint alleged that the insurer made "unreasonable and increasingly burdensome information demands throughout the three year period since the property damage occurred" in order to "make the claim so expensive to pursue that plaintiff would abandon it altogether." The owner sought consequential damages that reflected

engineering costs, painting, repairs, monitoring and abatement costs and loss of rent, among other things. The trial court dismissed the consequential damages demand on the pleadings, and the appellate court reversed.

Under New York law, a policyholder may seek consequential damages resulting from an insurer's failure to provide coverage if such damages "were foreseen or should have been foreseen when the contract was made." The appellate court held that foreseeability should not be decided on a motion to dismiss because at that stage, "the inquiry is not whether plaintiff will be able to establish its claim, but whether plaintiff has stated a claim." The court held that the policyholder adequately pled a consequential damages claim because the complaint alleged that the damages were foreseeable based on the policyholder's contractual obligation to "take all reasonable steps to protect the covered property from further damage." In so ruling, the court noted that there is no heightened pleading standard for consequential damages.

Statute Of Limitations Alert:

Delaware Supreme Court Addresses Accrual Date For Statutory Bad Faith Claim

The Delaware Supreme Court rejected a policyholder's assertion that a statutory bad faith claim does not accrue until a coverage determination is made, finding instead that accrual occurs when the policyholder could have pled damages under the relevant statute. *Homeland Ins. Co. of N.Y. v. Corvel Corp.*, 2018 WL 6061261 (Del. Nov. 20, 2018).

CorVel, a national Preferred Provider Organization network operator, sued Homeland Insurance, alleging statutory bad faith pursuant to a Louisiana statute that provides that an insurer that knowingly misrepresents pertinent facts or policy provisions shall be liable for damages sustained by the insured. *See* La. R.S. 22:1973. The bad faith claim was based on Homeland's alleged misrepresentations in a declaratory judgment action filed against CorVel. A Delaware superior court found that CorVel had established bad faith under the relevant Louisiana statute and awarded it approximately $9 million in damages (the amount of CorVel's underlying settlement payment), together with $4.5 million in penalties. The Delaware Supreme Court reversed.

The Delaware Supreme Court ruled that the bad faith claim was barred by the applicable three-year statute of limitations under Delaware law. The statute, 10 Del. C. § 8106, requires a claim to be brought within three years "from the accruing of the cause of such action." The lower court held that the bad faith claim did not accrue until a court had made a coverage determination, which was within the three-year period. Rejecting this reasoning, the Delaware Supreme Court concluded that CorVel could have pled damages on the date upon which it settled the underlying claims, which was nearly four years before it alleged bad faith.

STB News Alerts:

In December 2018, Wolters Kluwer released the Nineteenth Edition of the *Handbook on Insurance Coverage Disputes*, co-authored by retired Simpson Thacher partner and now Justice Barry R. Ostrager and co-edited by Senior Counsel Elisa Alcabes and Karen Cestari. The Handbook continues to be one of the most comprehensive and cited reference works on insurance law. The new edition reports on numerous developments and emerging issues across a variety of substantive topics, including coverage issues arising from cyber breaches, data loss and computer fraud.

Mary Beth Forshaw was profiled in "Notable Women in Law" for 2019 by *Crain's New York*. The annual feature celebrates exceptionally-talented female attorneys in the New York City metropolitan area. The honorees were nominated by their peers and chosen by the publication's Editorial Board.

Lynn Neuner was selected by Euromoney's *Benchmark Litigation* as one of the "Top 100 Trial Lawyers in America." The list highlights elite trial attorneys in the U.S. selected based on client and peer review.

Simpson Thacher has been an international leader in the practice of insurance and reinsurance law for more than a quarter of a century. Our insurance litigation team practices worldwide.

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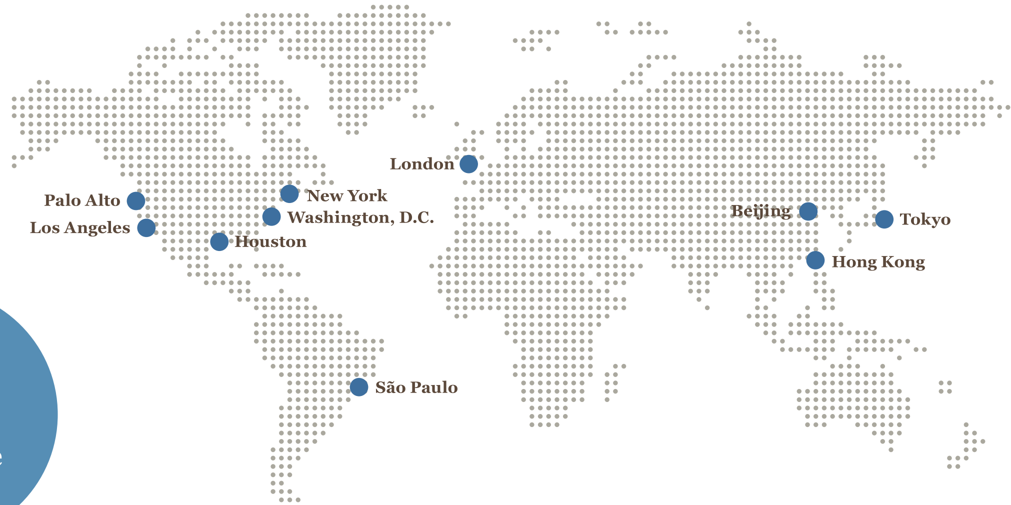

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