SIMPSON THACHER

INSURANCE LAW ALERT

MARCH 2014

This Alert discusses recent New York rulings relating to the timeliness of disclaimers, the enforceability of a suit limitation clause, insurance broker liability, and the scope of coverage for cyberattack claims and SEC settlements. In addition, we address decisions from other jurisdictions relating to interpretation of "other insurance" clauses, contingent business interruption coverage and CAFA jurisdiction. Finally, we discuss decisions that address the appropriate forum for determining the timeliness of an arbitration demand and the preclusive effect of a prior arbitration. Please "click through" to view articles of interest.

- ***Insurer's Non-Cooperation Disclaimer Was Timely***

  The New York Court of Appeals ruled that an insurer timely disclaimed coverage based on the policyholder's failure to cooperate, and thus had no duty to defend or indemnify. *Country-Wide Ins. Co. v. Preferred Trucking Svs. Corp.*, 2014 WL 590502 (N.Y. Feb. 18, 2014). *(click here for full article)*

- ***Suit Limitation Clause in Fire Policy is Unenforceable***

  The New York Court of Appeals ruled that a two-year suit limitation period was unenforceable in a case in which the damaged property could not reasonably be replaced in two years. *Executive Plaza, LLC v. Peerless Ins. Co.*, 2014 WL 551251 (N.Y. Feb. 13, 2014). *(click here for full article)*

- ***Broker May Be Liable for Insufficient Coverage Based on "Special Relationship" With Policyholder***

  The New York Court of Appeals reversed a summary judgment ruling in favor of a broker, finding that questions of fact existed as to whether a special relationship existed between the broker and the policyholder. *Voss v. Netherlands Ins. Co.*, 2014 WL 696528 (N.Y. Feb. 25, 2014). *(click here for full article)*

- ***Dishonest Acts Exclusion Does Not Bar Coverage for SEC Settlement Payments***

  A New York trial court ruled that a Dishonest Acts Exclusion did not bar coverage for settlement payments made by Bear Stearns to the Securities and Exchange Commission because the settlement did not constitute a final adjudication or judgment establishing guilt. *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 2014 WL 804129 (N.Y. Sup. Ct. New York Cnty. Feb. 28, 2014). *(click here for full article)*

- ***No General Liability Coverage for Cyberattack Claims***

  A New York trial court denied general liability coverage for a data breach, ruling that insurers had no duty to defend Sony Corporation in litigation arising from a cyberattack on its PlayStation Network. *Zurich American Ins. Co. v. Sony Corp. of America*, No. 651982/2011 (N.Y. Sup. Ct. New York Cnty. Feb. 21, 2014) (Transcript of Oral Ruling). *(click here for full article)*

- ***Hawaii Supreme Court Addresses Scope of Duty to Defend and "Other Insurance" Provisions***

  The Hawaii Supreme Court answered several unsettled questions of law relating to an insurer's duty to defend and interpretation of "other insurance" clauses. *Nautilus Ins. Co. v. Lexington Ins. Co.*, 2014 WL 560805 (Hawaii Feb. 13, 2014). *(click here for full article)*

- ***Fourth Circuit Denies Contingent Business Interruption Coverage Where Policyholder's Loss Not Caused by "Direct Supplier"***

  The Fourth Circuit ruled that a policyholder was not entitled to contingent business interruption coverage because the facility that caused the disruption to the policyholder's business was not a "direct supplier" to the policyholder. *Millennium Inorganic Chemicals Ltd. v. National Union Fire Ins. Co.*, 2014 WL 642993 (4th Cir. Feb. 20, 2014). *(click here for full article)*

- ***Tenth Circuit Outlines Prejudice Requirements in Late Notice Case***

  Reversing a Kansas district court decision granting an insurer's summary judgment motion on late notice, the Tenth Circuit held that even assuming notice was untimely, questions of fact existed as to whether the insurer suffered prejudice. *B.S.C. Holding, Inc. v. Lexington Ins. Co.*, 2014 WL 929194 (10th Cir. Mar. 11, 2014). *(click here for full article)*

- ***Eleventh Circuit Rules That CAFA Amount-in-Controversy Requirement Can Be Satisfied Where Plaintiff Seeks Only Declaratory Relief***

  The Eleventh Circuit ruled that a suit seeking only declaratory relief satisfied the Class Action Fairness Act's $5 million amount-in-controversy requirement. *South Florida Wellness, Inc. v. Allstate Ins. Co.*, 2014 WL 576111 (11th Cir. Feb. 14, 2014). *(click here for full article)*

- ***New York Appellate Court Rules That Arbitration Demand Timeliness is Issue for Court***

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New York Insurance Law Alert

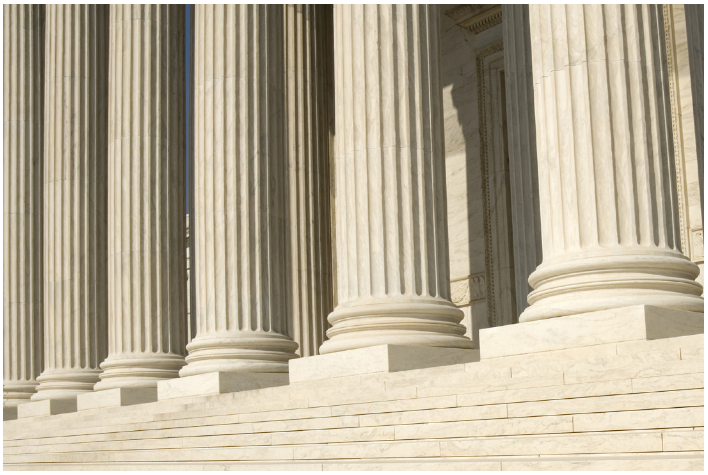
In recent weeks, New York's highest court issued a trio of coverage decisions relating to the timeliness of disclaimers, the enforceability of a suit limitation clause and the scope of broker liability arising out of a "special relationship" between a broker and policyholder. In addition, two New York trial courts issued rulings that may have important implications in future coverage litigation relating to cyberattack claims and SEC settlements.

New York Court of Appeals Roundup:

Insurer's Non-Cooperation Disclaimer Was Timely

The New York Court of Appeals ruled that an insurer timely disclaimed coverage based on the policyholder's failure to cooperate and thus had no duty to defend or indemnify. *Country-Wide Ins. Co. v. Preferred Trucking Svs. Corp.*, 2014 WL 590502 (N.Y. Feb. 18, 2014).

The coverage dispute arose out of an accident involving a truck. Following the accident, Country-Wide, the trucking company's insurer, unsuccessfully tried to contact the truck driver and the president of the trucking company. Thereafter, the trucking company notified Country-Wide of a lawsuit arising from the accident. Country-Wide reserved its right to disclaim coverage due to the company's failure to cooperate. Over the next year, Country-Wide continued its efforts to contact the driver and company president. Despite sporadic indications that the driver might cooperate in the investigation, he ultimately refused to attend his scheduled deposition. Country-Wide thereafter disclaimed coverage based on non-cooperation and



sought a declaration that it had no duty to indemnify a default judgment entered against the trucking company. The claimants moved for summary judgment, arguing that Country-Wide's disclaimer was untimely. A New York trial court agreed, ruling that Country-Wide was obligated to indemnify the trucking company up to policy limits. A New York appellate court affirmed. The New York Court of Appeals reversed.

Under New York statutory law, an insurer seeking to deny coverage for personal injury claims must issue a disclaimer "as soon as is reasonably possible." N.Y. Ins. Law § 3420[d][2]. Here, the court concluded that Country-Wide's disclaimer was timely because the question of whether the driver was willing to cooperate "remained opaque," and his failure to cooperate was not apparent until he expressly indicated that he did not care about attending his deposition. Because the disclaimer was issued shortly after this event, the court

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deemed it timely as a matter of law.

Country-Wide illustrates that the timeliness of disclaimers is a fact-specific inquiry, that disclaimers based on non-cooperation involve unique considerations, and that some delay in issuing the disclaimer may be acceptable or even necessary. As the court stated, "as long as [the insurer] was still seeking [ ] cooperation in good faith, it could not disclaim."

Suit Limitation Clause in Fire Policy is Unenforceable

The New York Court of Appeals deemed a two-year suit limitation period unenforceable in a case in which the damaged property could not reasonably be replaced in two years. *Executive Plaza, LLC v. Peerless Ins. Co.*, 2014 WL 551251 (N.Y. Feb. 13, 2014).

Peerless issued a fire policy to Executive that covered replacement costs for damaged property, but only after repairs have been completed. The policy also contained a suit limitation clause that required all coverage actions to be brought within two years of the date of damage. After a fire damaged its building, Executive notified Peerless of its intention to seek replacement costs. On the two-year anniversary of the fire, repairs to the building were still not complete. However, in order to comply with the suit limitation provision, Executive filed suit seeking a declaration that it was entitled to replacement costs. A New York federal district court dismissed the suit as premature because repairs were not complete. Approximately eight months later, repairs were completed and Executive again sought replacement costs. Peerless denied coverage, citing the suit limitation period expiration. In ensuing litigation, a New York federal district court dismissed Executive's claims, finding that the policy "unambiguously bars any and all suits commenced more than two years after the date of the damage or loss." On appeal, the Second Circuit certified to the New York Court of Appeals the question as to whether a policyholder is entitled to replacement costs where the property cannot be repaired within the time frame specified in the suit limitation clause. The New York Court of Appeals answered the question in the affirmative, holding that although the two-year period was not inherently unreasonable, it was unenforceable where, as here, the property could not reasonably be replaced within two years.

Suit limitation clauses have been routinely upheld as reasonable, even where they shorten the time to bring suit to a period shorter than the applicable statute of limitations. *Peerless* illustrates, however, that in

evaluating the reasonableness of suit limitation clauses, courts may evaluate the fairness of both the accrual date as well as the duration of the limitations period. This appears to be the first New York decision that holds that "an otherwise reasonable limitation period may be rendered unreasonable by an inappropriate accrual date."

Broker May Be Liable for Insufficient Coverage Based on "Special Relationship" With Policyholder

Under New York law, insurance brokers have a duty to procure the coverage requested by their clients, but generally are not obligated to advise clients as to the scope of the insurance coverage they should purchase. However, an exception exists where a policyholder establishes the existence of a "special relationship" with a broker. Under those circumstances, a broker may be liable for failing to advise a client to obtain sufficient coverage.

A special relationship may exist in the following scenarios: (1) the broker receives compensation for consultation apart from payment of premiums; (2) the insured relied on the expertise of the broker in interactions about coverage; or (3) an objectively-reasonable broker would understand from a course of dealing over an extended time period that the client was seeking and relying upon her advice. Although this inquiry is inherently fact-driven, New York courts have frequently dismissed special relationship allegations as a matter of law. In a recent decision, however, the New York Court of Appeals reversed a summary judgment ruling in favor of a broker, finding that questions of fact existed as to a special relationship. *Voss v. Netherlands Ins. Co.*, 2014 WL 804129 (N.Y. Feb. 25, 2014). In particular, the court reasoned that allegations that the policyholder and broker discussed business interruption coverage from the inception of their relationship, the broker requested sales figures and other data in calculating the policyholder's coverage needs, the policyholder questioned the amount of coverage obtained by the broker, the broker made assurances as to the adequacy of the business interruption coverage, and the broker pledged to review coverage needs annually and recommend adjustments sufficed to defeat the broker's summary judgment motion.

The court remanded the matter for factual resolution of whether a special relationship existed, emphasizing that "special relationships in the insurance brokerage context are the exception, not the norm."

New York Trial Court Roundup:

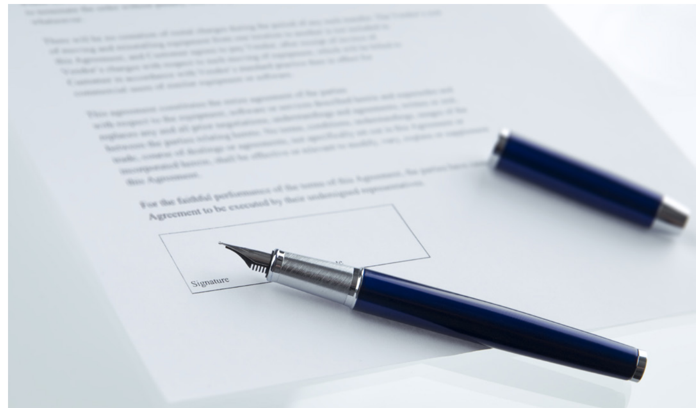
Dishonest Acts Exclusion Does Not Bar Coverage for SEC Settlement Payments

A New York trial court ruled that a Dishonest Acts Exclusion did not bar coverage for settlement payments made by Bear Stearns to the Securities and Exchange Commission because no final adjudication or judgment established guilt. *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 2014 WL 804129 (N.Y. Sup. Ct. New York Cnty. Feb. 28, 2014).

Following an investigation of its trading practices, Bear Stearns reached a monetary settlement with the SEC. In administrative orders filed in connection with the settlement, Bear Stearns neither admitted nor denied wrongful conduct. Thereafter, Bear Stearns sought coverage from its insurers. The insurers denied coverage on several bases, including a Dishonest Acts Exclusion.

The Dishonest Act Exclusion bars coverage for claims arising out of any "deliberate, dishonest, fraudulent or criminal act or omission," but only if a "judgment or other final adjudication" in the underlying case establishes such guilt. The court found that the exclusion did not apply because administrative orders are settlements, not judgments or other final adjudications of the underlying claims and thus cannot establish guilt. The court explained that factual findings in the administrative orders were entered solely for the purpose of settlement. The court stated: "The factual findings were neither admitted or denied … and were not the subject of hearings or rulings on the merits by a trier of fact." The court also discounted the findings because Bear Stearns reserved the right to take contrary positions in non-SEC proceedings.

This decision marks the second time in this matter that the court has rejected the insurers' attempt to disclaim coverage. As discussed in our June 2013 Alert, the insurers had previously argued



that the SEC settlement reflected uninsurable disgorgement payments. The New York Court of Appeals ruled that the insurers were not entitled to judgment on the pleadings on that issue, finding that questions of fact remained as to whether a portion of the settlement payment—explicitly labeled as "disgorgement"—represented actual disgorgement of Bear Stearns' own profits (as opposed to the profits of others).

No General Liability Coverage for Cyberattack Claims

A New York trial court denied general liability coverage for a data breach, ruling that insurers had no duty to defend Sony Corporation in litigation arising from a cyberattack on its PlayStation Network. *Zurich American Ins. Co. v. Sony Corp. of America*, No. 651982/2011 (N.Y. Sup. Ct. New York Cnty. Feb. 21, 2014) (Transcript of Oral Ruling).

The dispute arose from computer hackers' accessing of personal and financial information of Sony PlayStation customers. The parties disputed whether Sony's general liability insurers were obligated to defend the claims against Sony arising out of the cyberattack. The policies' personal and advertising injury provisions provided coverage for, among other things, "oral or written publication in any manner of the material that violates a person's right of privacy."

The court concluded that the insurers had no duty to defend the claims. The outcome-determinative issue appeared to be whether the disclosure was "affirmative conduct by the insured" rather than a third party. In particular, the court focused on the fact that that the invasion of privacy was committed by hackers rather than Sony. The court stated that "the question is … does this policy provide [Sony] coverage for [Sony] being the victim rather than being the perpetrator." The court answered the question in the negative, finding that for personal and advertising injury coverage to be triggered, the "acts [would have to] be conducted or perpetrated by the policyholder." The court rejected Sony's argument that because the policy provision did not specify that the publication had to be "by the policyholder," the court should not imply such a requirement.

As discussed in our January 2014 Alert, a Connecticut appellate court similarly denied general liability coverage for computer data loss claims. There, the court found that there was no requisite "publication" in the absence of evidence that personal information had been accessed or used by a third-party. Interestingly, the *Sony* court dismissed this "publication" argument, finding it irrelevant whether the hackers actually used or published the private data, stating that, "I look at it as a Pandora's box. Once it is opened it doesn't matter who does what with it. It is out there … . And whether or not it's actually used later on to get any benefit by the hackers, that in my mind is not the issue." The *Sony* ruling is likely to be appealed. We will update you on any developments in this and other cyber-related coverage cases.

Noteworthy Rulings From Other Jurisdictions

Coverage Alert:

Hawaii Supreme Court Addresses Scope of Duty to Defend and "Other Insurance" Provisions

In a recent decision, the Hawaii Supreme Court answered several unsettled questions of law relating to an insurer's duty to defend and "other insurance" clauses. *Nautilus Ins. Co. v. Lexington Ins. Co.*, 2014 WL 560805 (Hawaii Feb. 13, 2014).

Homeowners sued a real estate developer and subcontractor for construction-related damages. The subcontractor's general liability policy, issued by Nautilus, listed the developer as an additional insured. Nautilus funded the defense for both parties. Lexington, the developer's general liability insurer, refused to defend on the ground that its policy was excess to Nautilus' policy pursuant to both policies'

"other insurance" clauses. In the underlying suit, the developer was found solely liable. Lexington agreed to indemnify the judgment, but continued to assert that it had no duty to contribute to the defense. Nautilus sued Lexington, seeking contribution of defense costs. A Hawaii federal district court ruled in favor of Lexington, holding that it was entitled to look beyond the underlying complaint and its own policy—specifically to the "other insurance" clause in Nautilus' policy—in order to deny coverage. Nautilus appealed to the Ninth Circuit, which certified four questions to the Hawaii Supreme Court.

May an insurer look to another insurer's policy in order to disclaim the duty to defend, where the complaint in the underlying suit alleges facts within coverage? The Hawaii Supreme Court answered this question in the negative, holding that Lexington was not entitled to consider Nautilus' policy (in particular, its "other insurance" clause) in denying a defense. The court stated: "If a primary insurer is tendered a defense, and believes that it is actually an excess insurer or otherwise has no duty to defend by operation of its 'other insurance' clause, then that primary insurer must still defend in the action."

Is an "other insurance" clause enforceable if it purports to release an otherwise primary insurer of the duty to defend if the insurer becomes excess as to liability? The Hawaii Supreme Court answered this question with a conditional yes, holding that an "other insurance" clause that makes a primary insurer excess is enforceable, but only in the context of a contribution action between insurers for recovery of defense costs.

Whether "the irreconcilability of 'other insurance' provisions in otherwise primary insurance policies should be determined before or after the operation of the 'other insurance' provisions is determined"? The Hawaii Supreme Court ruled that whether the "other insurance" provisions are relevant must first be determined based on the underlying complaint and the scope of coverage under the policies, and only then should the court address whether "other insurance" provisions are irreconcilable or "mutually repugnant." The court explained that by determining whether an "other insurance" clause is triggered first, a court may be able to avoid the irreconcilability issue altogether.

Does an excess insurer, or an otherwise primary insurer that becomes excess by operation of an "other insurance" clause, have a duty to defend? The court ruled that a primary insurer that becomes excess by virtue of an "other insurance" clause must defend from the time of tender if there is a possibility of coverage under the policy. The court reasoned that because an insurer may not rely on the interaction of "other insurance" clauses to deny a defense (as per the first certified question), the "duty to defend will arise as if they are the primary insurers, inasmuch as they have not yet been deemed an 'excess insurer' by operation of the 'other insurance' provision."

Nautilus leaves intact the following basic principles of insurance coverage: (1) an insurer may rely on facts extrinsic to the underlying complaint to deny a defense if it can establish that those facts are undisputed in the underlying lawsuit; (2) when two policies contain identical excess "other insurance" clauses or clauses that are irreconcilable, they typically "cancel each other out" and both policies are deemed primary; and (3) despite the absence of contractual privity, a defending insurer may seek equitable contribution of defense costs from a non-defending insurer.

Business Interruption Alert:

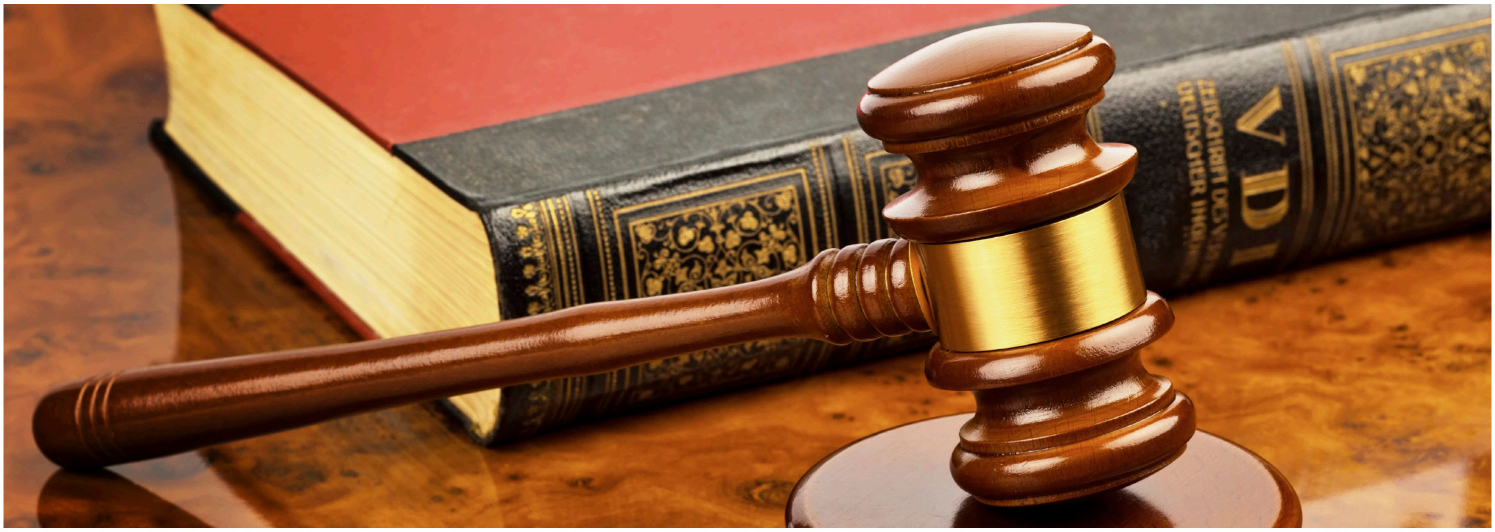
Fourth Circuit Denies Contingent Business Interruption Coverage Where Policyholder's Loss Not Caused by "Direct Supplier"

Reversing a Maryland federal district court decision, the Fourth Circuit ruled that a policyholder was not entitled to contingent business interruption coverage because the facility that caused the business disruption was not a "direct supplier" to the policyholder. *Millennium Inorganic Chemicals Ltd. v. National Union Fire Ins. Co.*, 2014 WL 642993 (4th Cir. Feb. 20, 2014).

Millennium, a manufacturer of paint pigment, relied on natural gas in its operations. Millennium purchased its gas from Alinta, a retail gas supplier. Alinta obtained the gas it offered for sale from several natural gas producers, including Apache. Apache would extract the natural gas from a well and process it; it would then inject the gas into a gas pipeline, at which point custody, title and risk passed from Apache to Alinta; once in the pipeline, Apache's gas comingled with gas from other producers; and finally, title to the gas passed to Millennium at the time of delivery to Millennium's facility.

Apache temporarily ceased gas production due to an explosion at its facility. As a result, Millennium was forced to shut down its manufacturing operations for several months. Millennium sought contingent business interruption coverage for the losses sustained in connection with the shutdown. The insurers denied coverage on the basis that Apache was not a "direct supplier" to Millennium, as required by the contingent business interruption provision. In ensuing coverage litigation, a Maryland district court ruled in Millennium's favor finding that the term "direct" was ambiguous and thus must be interpreted in favor of coverage. The Fourth Circuit reversed.

The policies provided coverage for business interruption loss caused by damage or destruction to "contributing properties." The policy specified that only a "direct supplier of materials to the Insured's locations" could be a "contributing property." The Fourth Circuit ruled that these provisions were unambiguous and required a direct, uninterrupted relationship between Millennium and Apache. Since it was undisputed that Millennium had no legal or physical relationship with Apache, and dealt exclusively with Alinta, the court held that no coverage was available. Furthermore, any putative relationship between Apache and Millennium was interrupted by the "intervening step" of inserting gas into the pipeline, at which point Apache relinquished all control over the gas. Therefore, the court concluded, "[u]nder any view of the relevant facts, Apache can [ ] be



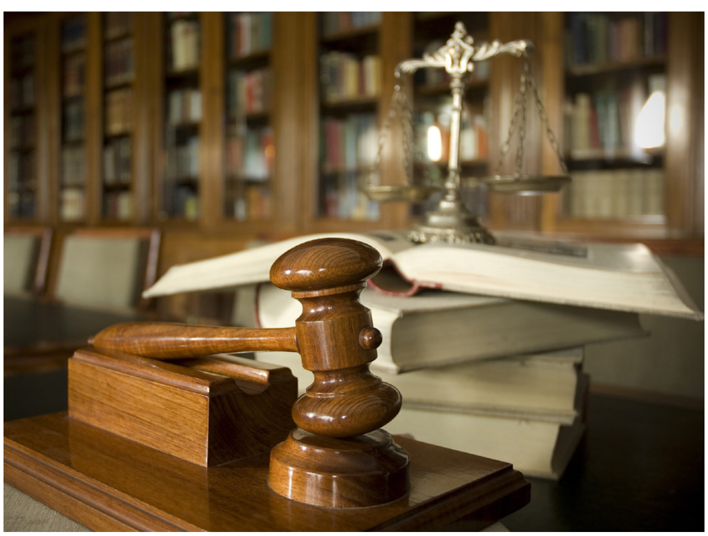
only an indirect contributing property to Millennium, coverage of which is not included in the terms of the Policies."

Few courts have addressed the scope of contingent business interruption coverage. *Millennium* provides strong support for insurers advocating a strict reading of the term "direct supplier" in this context.

Late Notice Alert:
Tenth Circuit Outlines Prejudice Requirements in Late Notice Case

Our June 2013 Alert discussed a Kansas district court decision granting an insurer's motion for summary judgment on a late notice defense. This month, the Tenth Circuit reversed the ruling, holding that even assuming notice was untimely, questions of fact existed as to whether the insurer suffered prejudice. *B.S.C. Holding, Inc. v. Lexington Ins. Co.*, 2014 WL 929194 (10th Cir. Mar. 11, 2014).

A salt mine company sought coverage from Lexington for investigative and remedial measures. Lexington denied coverage based on untimely notice. A Kansas district court granted Lexington's summary judgment motion, finding that the mine company's notice was untimely as a matter of law



and that Lexington was prejudiced by the delay. The Tenth Circuit reversed, holding that even if notice was untimely, summary judgment was inappropriate because Lexington failed to establish actual prejudice. Under Kansas law, an insurer can establish prejudice by presenting evidence that it lost the opportunity to investigate the claims, to negotiate settlements, or to defend the policyholder. The court held that general allegations relating to the dimming of witnesses' memories and the inability to investigate prior to remediation were insufficient to establish prejudice as a matter of law. Similarly, the court held that in order to establish prejudice to the underwriting process, an insurer must submit evidence as to what it would have done differently had it been provided with timely notice. The court remanded the matter for a factual determination as to prejudice.

Jurisdictional Alert:
Eleventh Circuit Rules That CAFA Amount-in-Controversy Requirement Can Be Satisfied Where Plaintiff Seeks Only Declaratory Relief

Previous Alerts have discussed decisions rejecting attempts by class plaintiffs to circumvent the Class Action Fairness Act to avoid federal court jurisdiction. *See* April 2013 Alert, November 2010 Alert. In a recent decision, the Eleventh Circuit continued this trend, holding that a suit seeking only declaratory relief satisfied CAFA's $5 million amount-in-controversy requirement. *South Florida Wellness, Inc. v. Allstate Ins. Co.*, 2014 WL 576111 (11th Cir. Feb. 14, 2014).

A healthcare provider filed a putative class action in state court against a health insurer, alleging that it had failed to provide adequate notice that it intended to limit payments to 80% of a state statutory fee schedule. The complaint sought a declaration that the form language used in the policy did not clearly express the payment limitations, as required by Florida law. The insurer removed the case to federal court pursuant to CAFA. The provider moved to remand the case back to state court, arguing that because only declaratory relief was sought, the amount in controversy requirement for federal jurisdiction was not satisfied. The district court granted the motion, finding that although a declaration in the plaintiff class's favor would entitle class members to seek payments from the insurer, the value of the declaratory relief was too speculative to satisfy the amount-in-controversy requirement. The Eleventh Circuit reversed.

The Eleventh Circuit ruled that the insurer had met its burden of establishing an amount in controversy exceeding $5 million. In particular, the court cited to an uncontested affidavit which demonstrated that if the insurer had failed to give proper notice of its reimbursement schedule, the insufficiency of its payments would exceed $68 million. The court rejected the argument that the value of the declaratory relief was speculative because several contingencies had to be met before the plaintiff class could recover monetary damages (*e.g.*, claimants must establish that treatment in question was related to an accident, medically necessary and billed at a reasonable rate). The court explained that estimating the amount in controversy

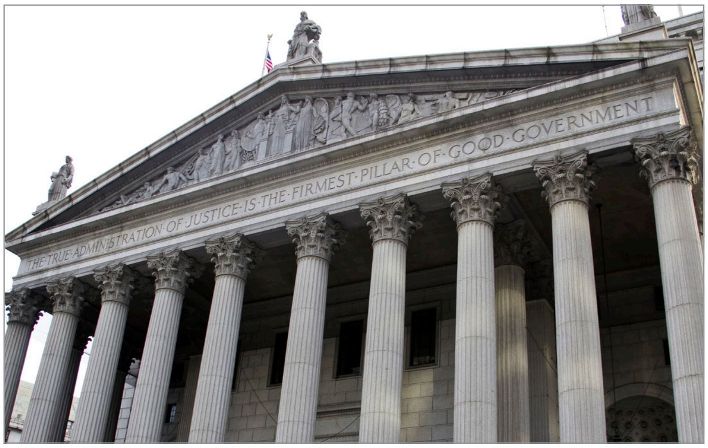
"does not demand decimal-point precision" and "is not to be defeated by unrealistic assumptions that run counter to common sense." The court further observed that the larger the estimated amount at stake, "the easier it is to be confident that collection contingencies should not count for much."

The decision serves as a reminder that the pertinent question for CAFA's amount-in-controversy requirement is how much will be "put at issue during the litigation" rather than "how much the plaintiffs are ultimately likely to recover." In addition, it provides support for insurers and other class action defendants seeking CAFA federal jurisdiction in cases where only injunctive relief is sought. However, as the court noted, the holding applies to cases in which monetary values are calculable, and would likely not extend to matters in which plaintiffs seek injunctive relief based on speculative events. *See Leonard v. Enterprise Rent a Car*, 279 F.3d 967 (11th Cir. 2002) (injunction to stop rental company from selling insurance to customers had no monetary value for CAFA amount-in-controversy purposes because class members were free to refuse insurance and because assigning monetary value involved speculation as to how many future customers might purchase insurance absent an injunction).

Arbitration Alerts:

New York Appellate Court Rules That Arbitration Demand Timeliness is Issue for Court

A New York appellate court ruled that the timeliness of a demand for arbitration is to be determined by a court rather than an arbitration panel. *In re ROM Reinsurance Mgmt. Co., Inc.*, 2014 WL 928345 (N.Y. App. Div. 1st Dep't Mar. 11, 2014). In this reinsurance dispute, the arbitration clause provided that "the arbitration laws of New York State shall govern" the dispute. Reversing a trial court decision, the appellate court held that this choice of law provision sufficiently expressed the parties' intention to have New York law govern enforcement of the contract, including the threshold issue of timeliness. Under New York law, the question of whether a demand for arbitration is timely is decided by a court.



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The First Circuit ruled that the preclusive effect of an earlier arbitration must be decided by an arbitration panel rather than a court of law, even where that arbitration has been confirmed by a federal court. *Employers Ins. Co. of Wausau v. OneBeacon American Ins. Co.*, 2014 WL 715821 (1st Cir. Feb. 26, 2014).

OneBeacon had a Multiple Line Excess Cover program, under which it annually entered into reinsurance agreements with various reinsurers. In 2007, OneBeacon demanded arbitration with Swiss Re in connection with a dispute over a treaty from this program. The arbitration panel ruled in favor of Swiss Re. Thereafter, OneBeacon sought arbitration with Employers Insurance Co. of Wausau under similar reinsurance agreements. Wausau filed suit in Massachusetts federal court, seeking a declaration that the prior Swiss Re arbitration award had preclusive effect over OneBeacon's claims against Wausau. Wausau argued that because federal courts have exclusive authority to determine the preclusive effect of federal judgments, it necessarily follows that an arbitration panel lacks the authority to rule on the preclusive effect of a prior arbitration award once it has been confirmed by a federal court. The court disagreed. The court explained that federal court confirmation of an arbitration award rarely considers the merits of the award and generally serves only as a mechanism for enforcement. Therefore, the court reasoned, substantive matters relating to the preclusive effect of an award (whether issues raised in the two actions are the same, whether the issue was actually litigated in the earlier action, among other things) are typically "outside of the purview of the court order confirming the arbitration" and are to be decided by the arbitration panel.

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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“They understand our business very well
and send updates on the law when it changes.”

—Chambers 2013

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