

Insurance Law Alert

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Oklahoma Supreme Court Finds Earth Movement Exclusion Ambiguous, While Mississippi Supreme Court Enforces Its Terms

The Supreme Court of Oklahoma deemed earth movement and water exclusions ambiguous based largely on the absence of verbiage relating to man-made causes, whereas the Mississippi Supreme Court ruled that a different earth movement exclusion was enforceable. *Oklahoma Schools Risk Mgmt. Trust v. McAlester Public Schools*, 2019 WL 350385 (Okla. Jan. 29, 2019); *Mississippi Farm Bureau Casualty Ins. Co. v. Smith*, 2019 WL 1072117 (Miss. Mar. 7, 2019). ([Click here for full article](#))

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Late Notice And Resulting Prejudice Warrant Dismissal Of Suit, Says Fourth Circuit

The Fourth Circuit ruled that an insurer has no indemnity obligation because the policyholder failed to provide timely notice of the underlying claims, resulting in substantial prejudice to the insurer. *Founders Ins. Co. v. Richard Ruth’s Bar & Grill LLC*, 2019 WL 852137 (4th Cir. Feb. 21, 2019). ([Click here for full article](#))

California Court Rules That Policyholder’s Late Notice Forfeits D&O Coverage For Whistleblower Action

A California federal district court ruled that an insured was not entitled to coverage for a whistleblower action or Department of Justice subpoena under consecutive D&O policies because it failed to comply with a condition precedent notice requirement. *PAMC, Ltd v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2019 WL 666726 (C.D. Cal. Feb. 12, 2019). ([Click here for full article](#))

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First Circuit Rules That Untimely ERISA Appeal Is Not Excused By Substantial Compliance Doctrine Or Notice-Prejudice Rule

The First Circuit ruled that an ERISA plan participant failed to timely appeal a termination of benefits and that neither the substantial compliance doctrine nor the notice prejudice rule applied. *Fortier v. Hartford Life and Accident Ins. Co.*, 916 F.3d 74 (1st Cir. 2019). ([Click here for full article](#))

New York Court Dismisses Suit Based On Breach Of Notice Provisions, Finding No Reasonable Excuse For Delay

A New York federal district court dismissed a policyholder's suit against its liability insurer, finding that the policyholder breached the notice provisions and that there was no valid reason for the delay. *K.B.K. Huntington Corp. v. Hanover Ins. Co.*, 2019 WL 1230408 (E.D.N.Y. Mar. 14, 2019). ([Click here for full article](#))

Georgia Supreme Court Rules That Insurer Did Not Breach Duty To Settle

The Supreme Court of Georgia ruled that an insurer did not act unreasonably in failing to accept a settlement offer before it was withdrawn because the offer did not include a deadline for acceptance. *First Acceptance Ins. Co. of Georgia v. Hughes*, 2019 WL 1103831 (Ga. Mar. 11, 2019). ([Click here for full article](#))

Second Circuit Rules That Email Hyperlink Did Not Provide Adequate Notice Of Arbitration Clause

The Second Circuit denied a motion to compel arbitration, ruling that the arbitration clause was not part of the operative contract because an email hyperlink did not provide sufficient notice of the clause. *Starke v. SquareTrade, Inc.*, 913 F.3d 279 (2d Cir. 2019). ([Click here for full article](#))

Ninth Circuit Rules That Removal Statute Clock Begins When Insurer, Not Designated Agent, Receives Pleading

The Ninth Circuit ruled that the thirty-day clock for statutory removal begins when the insurer receives notice of a pleading, not when an insurer's designated agent receives such notice. *Anderson v. State Farm Mutual Auto. Ins. Co.*, 2019 WL 1086998 (9th Cir. Mar. 8, 2019). ([Click here for full article](#))

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Duty To Defend Alert:

Wisconsin Supreme Court Rules That Complaint Alleges Potentially Covered Advertising Injury, Triggering Duty To Defend

The Wisconsin Supreme Court ruled that a liability insurer was obligated to defend an insured against various federal and common law claims based on the improper distribution of medical supplies, finding that such claims were potentially covered under the “personal and advertising injury” provision. *West Bend Mutual Ins. Co. v. Ixthus Medical Supply, Inc.*, 923 N.W.2d 550 (Wis. 2019).

Abbott Laboratories sued Ixthus, a medical supply company, along with more than 100 other defendants, for allegedly distributing in the United States blood glucose strips that were intended only for international markets. The complaint alleged trademark infringement, Lanham Act violations, and deceptive business practices, among other claims. West Bend refused to defend, arguing that there was no coverage under the personal and advertising injury provision of its policy, and that two exclusions barred coverage. A Wisconsin trial court ruled in West Bend’s favor, finding that the claims fell within the initial grant of coverage, but that the knowing violation exclusion barred coverage. An appellate court reversed, ruling that the exclusion did not eliminate West Bend’s duty to defend because several underlying claims did not require a showing of intentional conduct. The Wisconsin Supreme Court affirmed.

The Wisconsin Supreme Court rejected West Bend’s assertion that “Ixthus was not really an ‘advertising’ defendant—but instead a ‘distributing’ defendant who did not advertise or sell products directly to end users.” The court explained that the underlying complaint sufficiently alleged a covered advertising injury as to Ixthus because it alleged that “Defendants” engaged in advertising activities that resulted in financial harm to Abbott.

In addition, the court held that the knowing violation exclusion did not eliminate West Bend’s duty to defend because certain of the underlying claims (*e.g.*, trademark

dilution, deceptive business practices) could be established without proving intentional conduct or a “knowing violation” of Abbott’s rights. The court applied the same reasoning to the criminal acts exclusion and noted that state law was unsettled as to whether the exclusion requires a policyholder to be convicted of a crime or merely charged. Ultimately, the court held that resolution of that issue was unnecessary because at least some underlying claims were not dependent upon criminal conduct.

Property Damage Alerts:

Oklahoma Supreme Court Finds Earth Movement Exclusion Ambiguous, While Mississippi Supreme Court Enforces Its Terms

The Supreme Court of Oklahoma deemed earth movement and water exclusions ambiguous based largely on the absence of verbiage relating to man-made causes. *Oklahoma Schools Risk Mgmt. Trust v. McAlester Public Schools*, 2019 WL 350385 (Okla. Jan. 29, 2019).

A school sustained property damage resulting from the rupture of an underground water pipe. In turn, an insurance cooperative sought a declaration of no coverage based on exclusions relating to earth movement and water damage. A trial court granted the insurer’s summary judgment motion, and an appellate court affirmed. The appellate court found that the property damage was caused by two excluded risks: water and earth movement.

The Oklahoma Supreme Court reversed, deeming the exclusionary language ambiguous. The court noted that the earth movement exclusion listed several naturally occurring events, such as earthquakes and landslides, but did not include “unnatural events,” such as pipe ruptures. With respect to the water exclusion, the court noted that the language did not address natural vs. man-made causes. Further, the court emphasized that unlike other policy exclusions, the two at issue did not include the phrase “however caused.” The court stated: “[g]enerally when

an insurer creates specificity in one clause of a policy and then omits it in a similar context, the omission is considered purposeful and should be given meaning.” Finally, the court relied on cases in other jurisdictions that have deemed earth movement exclusions ambiguous in the absence of references to man-made or universal causation.

In a case that involved a different earth movement exclusion, the Mississippi Supreme Court ruled that the exclusion applied to any earth movement, regardless of cause. In *Mississippi Farm Bureau Casualty Ins. Co. v. Smith*, 2019 WL 1072117 (Miss. Mar. 7, 2019), the earth movement exclusion expressly applied “regardless of any other cause or event contributing concurrently or in any sequence to the loss,” including earth movement “caused by or resulting from human or animal forces or any act of nature.” Deeming this language unambiguous, the Mississippi Supreme Court reversed the trial court’s decision and granted the insurer’s summary judgment motion.



Finding Collapse Provision Ambiguous, First Circuit Rules That Policy Covers Collapse Of Ceiling

The First Circuit ruled that a collapse provision that covered damage caused by “decay” was ambiguous and must be interpreted in the policyholder’s favor. *Easthampton Congregational Church v. Church Mutual Ins. Co.*, 2019 WL 851191 (1st Cir. Feb. 22, 2019).

A church sought coverage for damage caused by a ceiling collapse. The insurer’s inspector concluded that the collapse was caused by “withdrawal” of nails used to secure ceiling materials. More specifically, the inspector

opined that over time, the nails’ connection to the ceiling joists progressively weakened, resulting in the eventual collapse. In ensuing litigation between the church and its insurer, a Massachusetts federal district court granted the church’s summary judgment motion. The district court ruled that the damage was at least partially caused by “hidden decay,” which was covered under an “Additional Coverage-Collapse” provision. The First Circuit affirmed, but on different grounds. It ruled that “decay” was ambiguous as to whether it includes only organic rot, or whether it also encompasses progressive decline of construction materials. Interpreting the provision in favor of coverage, the First Circuit affirmed judgment in favor of the church.

Notice Alerts:

Late Notice And Resulting Prejudice Warrant Dismissal Of Suit, Says Fourth Circuit

The Fourth Circuit ruled that an insurer has no indemnity obligation because the policyholder failed to provide timely notice of the underlying claims, resulting in substantial prejudice to the insurer. *Founders Ins. Co. v. Richard Ruth’s Bar & Grill LLC*, 2019 WL 852137 (4th Cir. Feb. 21, 2019).

The coverage dispute arose out of a September 2012 bar fight that left a patron in a permanent quasi-vegetative state. In November 2012, the injured patron’s attorney sent a notice of representation to the bar, which the bar forwarded to its insurer. In December 2012, the patron sued the bar. In February 2013, a state court entered a default judgment. In May 2013, the bar’s insurer received copies of the underlying summons and complaint. The insurer retained counsel to defend the bar and unsuccessfully sought to set aside the default judgment. A final judgment of \$5 million was entered against the bar.

A South Carolina federal district court ruled that the insurer had no duty to indemnify because the bar failed to provide timely notice of the underlying suit. The district court further held that this breach substantially prejudiced the insurer. The Fourth Circuit affirmed.

The policy required the bar to provide notice of any claim or suit “as soon as practicable” and to “immediately send [the insurer] copies of any demands, notices, summons or legal papers.” The Fourth Circuit held that the bar unequivocally breached these provisions, rejecting the contention that it complied with the notice requirement by forwarding the injured patron’s letter of representation. The injured patron, as assignee of the bar’s insurance rights, argued that the letter of representation put the insurer “on notice of a potential claim.” The court disagreed, stating that “[e]ven where an insurer has actual knowledge of a potential claim or occurrence triggering coverage under the policy, the insured is not relieved of his contractual obligation to provide the legal papers to the insurer unless the insurer waives that policy provision.” Finally, the Fourth Circuit held that the insurer was substantially prejudiced by the breach of the notice provision because it was denied the opportunity to investigate the case, defend the suit, or negotiate a settlement.

California Court Rules That Policyholder’s Late Notice Forfeits D&O Coverage For Whistleblower Action

A California federal district court ruled that an insured was not entitled to coverage for a whistleblower action or Department of Justice (“DOJ”) subpoena under consecutive D&O policies because it failed to comply with a condition precedent notice requirement. *PAMC, Ltd v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2019 WL 666726 (C.D. Cal. Feb. 12, 2019).

National Union issued several consecutive one-year D&O policies to PAMC. The policies require notice of a claim to be provided during the policy period or within ninety days after the policy period ends. Additionally, the policy limits coverage to claims “first made against the insureds during the policy period” and states that such notice is a “condition precedent” to coverage. Based on these provisions, National Union denied coverage for a whistleblower action and DOJ subpoena. National Union argued that the applicable policy was the one in effect from February 2015 through March 2016 because the subpoena was served in June 2015 and because PAMC allegedly learned of the

whistleblower action in March 2016. National Union argued that PAMC’s notice in 2017 was therefore untimely. The court agreed and dismissed PAMC’s coverage action.

Emphasizing that notice provisions in claims-made-and-reported policies are strictly enforced under California law, the court rejected several arguments asserted by PAMC. First, as to PAMC’s argument that the policy “allow[ed] for the possibility” of coverage notwithstanding a failure to comply with the notice provisions because the Declarations page stated that coverage is “generally” limited to claims first made and reported during the policy period, the court explained that “use of the word ‘generally’ . . . does not negate the reporting requirements otherwise plainly and conspicuously included in the [P]olicy.”

Second, the court rejected PAMC’s contention that the consecutive policy periods should be treated as one continuous policy period. The court explained that successive policy renewals have “no relevance to Plaintiff’s reporting requirements under the 2015-2016 Policy.”

Third, the court rejected PAMC’s assertion that notice of the subpoena was timely because it was “not legally able” to disclose its existence until January 2017, when the DOJ indicated that its investigation was complete. The cover letter that accompanied the subpoena stated that “this Office requests that you not disclose the existence of or compliance with the subpoena . . . until the Office notifies you that the investigation has been completed.” The court held that the cover letter did not prohibit PAMC from disclosing the subpoena to third parties and that, in any event, PAMC could have requested permission to notify its insurer of the subpoena.

Finally, the court dismissed the contention that even if notice was untimely, it should be excused under the notice-prejudice rule, noting that “California courts have consistently declined to extend the notice-prejudice rule to claims-made policies” and that the factual record did not, in any event, present any equitable justification for excusing a violation of a condition precedent to coverage.

First Circuit Rules That Untimely ERISA Appeal Is Not Excused By Substantial Compliance Doctrine Or Notice-Prejudice Rule

The First Circuit dismissed a disability benefits suit against Hartford, finding that the plan participant failed to timely appeal a termination of benefits. The court rejected the participant's argument that any untimeliness should be excused by ERISA's substantial compliance doctrine or New Hampshire's notice-prejudice rule. *Fortier v. Hartford Life and Accident Ins. Co.*, 916 F.3d 74 (1st Cir. 2019).

Hartford notified Theresa Fortier that her long-term disability benefits would expire because she had not demonstrated eligibility for a continuation of those benefits. Hartford also informed Fortier that any appeal must be filed within 180 days of her receipt of notice. Fortier filed an appeal approximately two months after this deadline expired. When Hartford refused to consider her appeal, Fortier sued under ERISA, seeking benefit reinstatement. A New Hampshire federal district court ruled in Hartford's favor, finding that Fortier had not timely appealed and thus had not exhausted her administrative remedies. The First Circuit affirmed.

The First Circuit rejected Fortier's assertion that the 180-day time frame started at the date of termination of benefits rather than the date of notice. The court emphasized that the relevant ERISA provision states that claimants have 180 days "following receipt of a notification of an adverse benefit determination within which to appeal."

The court also ruled that Fortier's untimely appeal was not excused by the "substantial compliance" doctrine that applies in limited contexts. The court explained that this doctrine is intended to foster prompt review of benefits denials, not to excuse a claimant's failure to meet exhaustion requirements.

Finally, the court rejected application of New Hampshire's notice-prejudice rule to Fortier's delay, noting that to do so would create inconsistency in the ERISA framework and likely result in increased costs and delays. As the court noted, its holding is consistent with the Seventh and Ninth Circuits' rejections of the application of a common law notice-prejudice rule to ERISA appeals.



New York Court Dismisses Suit Based On Breach Of Notice Provisions, Finding No Reasonable Excuse For Delay

A New York federal district court dismissed a policyholder's suit against its liability insurer, finding that the policyholder breached the notice provisions and that there was no valid reason for the delay. *K.B.K. Huntington Corp. v. Hanover Ins. Co.*, 2019 WL 1230408 (E.D.N.Y. Mar. 14, 2019).

In October 2003, the Department of Environmental Conservation ("DEC") issued a Notice of Claim to the policyholder, a dry cleaning business, about the potential existence of hazardous waste conditions. In March 2012, the DEC issued a Record of Decision identifying the policyholder as a potentially responsible party ("PRP") for the contamination. In May 2016, the policyholder sent a notice of a claim to its insurer. The insurer denied coverage based on late notice. Thereafter the policyholder brought suit seeking injunctive and declaratory relief.

A New York district court dismissed the action, finding that the policyholder breached policy provisions requiring notice of an occurrence "as soon as practicable" and notice of any claim "immediately." The court ruled that an "occurrence" happened in October 2002, when the policyholder received a Notice of Claim from the DEC and that a "claim" was made, at the very latest, in March 2012, when a Record of Decision was issued. Although the Second Circuit has not expressly held that receipt of a PRP letter constitutes a claim, the court noted the "litany of lower court cases" treating such letters as claims.

The court further held that the length of delay—four years as to notice of claim and thirteen years as to notice of occurrence—was unreasonable and that there was no

valid basis for excusing such delay. The policyholder argued that the untimely notice should be excused based on its lack of knowledge of the policy's existence and the poor health of the dry cleaning business's owner. Rejecting these arguments, the court noted that the policyholder did not begin looking for an insurance policy for more than ten years after learning of potential liability and therefore failed to "exercise the minimal diligence necessary" to discover the policy sooner. The court further explained that while a medical emergency might justify a delay in certain cases, "a person who chooses to continue operating a business over a long period of time, despite affliction from health issues, cannot use their situation as a shield against the basic responsibilities arising in the ordinary course of business."

Settlement Alert:

Georgia Supreme Court Rules That Insurer Did Not Breach Duty To Settle

The Supreme Court of Georgia ruled that an insurer did not act unreasonably in failing to accept a settlement offer before it was withdrawn because the offer did not include a deadline for acceptance. *First Acceptance Ins. Co. of Georgia v. Hughes*, 2019 WL 1103831 (Ga. Mar. 11, 2019).

The coverage dispute arose out of a car accident that resulted in the death of Ronald Jackson. Jackson's automobile insurer was advised that several other individuals were seriously injured by the accident, including Julie An and her daughter. First Acceptance retained counsel and notified all injured parties that it hoped to "reach a global settlement." Thereafter, An's counsel sent two letters to First Acceptance. The letters expressed interest in attending a global settlement conference or settling for policy limits. First Acceptance inadvertently misfiled those letters. Forty-one days after sending the letters, An revoked the settlement offer and sued Jackson's estate. Thereafter, First Acceptance offered to settle An's claims for the \$50,000 policy limit, which she rejected. A trial court later awarded An and her daughter \$5.3 million. Jackson's estate

administrator sued First Acceptance, alleging negligence and bad faith failure to settle.

A Georgia trial court granted First Acceptance's summary judgment motion. The Court of Appeals reversed on the failure-to-settle claim, finding there were issues of fact as to whether An's settlement offer included a thirty-day deadline for responding, and whether First Acceptance breached its duty to settle by failing to respond within thirty days. The Georgia Supreme Court reversed.

Addressing a preliminary matter, the Georgia Supreme Court held that an insurer's duty to settle arises only when an injured party presents a valid offer to settle within policy limits, not when an insurer knows or reasonably should know that a settlement is possible. Turning to the factual record, the court concluded that First Acceptance did not act negligently or in bad faith in failing to accept An's settlement offer. The court ruled as a matter of law that the settlement offer was not expressly subject to a time limit for acceptance. Although one of the letters requested insurance information within thirty days, it also stated that any settlement would be conditioned upon receipt of that information. The court therefore held that First Acceptance was not put on notice that its failure to accept the offer within a specific time frame would constitute a refusal. Further, the court held that First Acceptance could not have reasonably known that it needed to respond within 41 days or risk exposure to a judgment in excess of policy limits, particularly given that An expressed willingness to attend settlement conferences in the offer letters.

Arbitration Alert:

Second Circuit Rules That Email Hyperlink Did Not Provide Adequate Notice Of Arbitration Clause

The Second Circuit denied a motion to compel arbitration, ruling that the arbitration clause was not part of the operative contract because an email hyperlink did not provide sufficient notice of the clause. *Starke v. SquareTrade, Inc.*, 913 F.3d 279 (2d Cir. 2019).

Adam Starke purchased a protection plan from SquareTrade for a product he purchased online. In a putative class action, Starke alleged that SquareTrade violated consumer protection laws. SquareTrade moved to compel arbitration, which a New York district court denied. The court ruled that Starke did not have reasonable notice of or manifest his assent to the arbitration clause. The Second Circuit affirmed.

Under New York law, a party to a contract is bound by its terms, even if he does not have actual notice of certain contract terms, if he is on inquiry notice and assents to the terms through conduct that a reasonable person would understand to constitute assent. New York courts look to whether a term is obvious and called to the party's attention.

The Second Circuit concluded that Starke did not have reasonable notice of the arbitration provision, which was included in a "Terms & Conditions" document provided via hyperlink in an email sent to Starke. The court noted that Starke had received several confirmation emails from Amazon and SquareTrade, but none put him on notice that a "Service Contract" would come in a hyperlink. Further, the court emphasized that the email containing the hyperlink was cluttered with text displayed in multiple colors, fonts, and sizes and that the hyperlink itself was in the smallest font at the very bottom of the email. Finally, the court noted that the email did not direct Starke to click on the link or inform him that the link contained contract terms to which he would be deemed to agree.

The court emphasized the fact-specific nature of its holding, stating:

we in no way hold that the terms of a contract may not be provided by a hyperlinked document. So long as the purchaser's attention is adequately directed to a conspicuous hyperlink that is clearly identified as containing contractual terms to which the consumer manifests assent by completing the transaction . . . a hyperlink can be an effective device for specifying contract terms.

Jurisdiction Alert:

Ninth Circuit Rules That Removal Statute Clock Begins When Insurer, Not Designated Agent, Receives Pleading

Addressing a matter of first impression, the Ninth Circuit ruled that the thirty-day clock for statutory removal begins when the insurer receives notice of a pleading, not when an insurer's designated agent receives such notice. *Anderson v. State Farm Mutual Auto. Ins. Co.*, 2019 WL 1086998 (9th Cir. Mar. 8, 2019).

Federal statutory law requires notice of removal to be filed "within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading." 28 U.S.C. § 1446(b)(1). In this coverage dispute, the policyholders argued that the thirty-day clock began when the insurer's designated in-state agent received notice of the pleadings. In contrast, the insurer contended that receipt by the insurer starts the removal clock. The Ninth Circuit agreed with the insurer, noting that allowing delivery to a designated agent to begin the removal clock would thwart the goals of uniformity and consistency. The court stated: "if delivery to a statutorily designated agent began the removal clock, the effective time a defendant had to remove would depend not only on differences in state law, but also on the efficiency of state agencies in each instance." As the court noted, the Fourth Circuit has similarly held that notice to an in-state agent does not begin the removal clock. *See Elliott v. Am. States Ins. Co.*, 883 F.3d 384 (4th Cir. 2018).

STB News Alert

Simpson Thacher's Insurance Litigation Practice was named the National Practice Group of the Year at Euromoney's *Benchmark Litigation* 2019 Awards Dinner. This is the seventh consecutive year the Firm has received the Insurance Firm of the Year Award. In addition, Mary Beth Forshaw was shortlisted for the Insurance Lawyer of the Year, which she won in 2016.

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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