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The Wisconsin Supreme Court ruled that a fire that lasted three days and damaged multiple properties constituted a single occurrence under a general liability policy, subject to a single per-occurrence limit. *Secura Ins. v. Lyme St. Croix Forest Co., LLC*, 2018 WI 103 (Oct. 30, 2018). (Click here for full article)

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Fourth Circuit Rules That Claims Arising Out Of Two Bridge Collapses Are "Related" And Subject To Single Claim Limit

The Fourth Circuit ruled that an insurer was obligated to pay only a single claim limit under a liability policy with respect to multiple claims arising from two bridge collapses because claims arising out of the collapses were "related claims." *Stewart Engineering, Inc. v. Continental Cas. Co.*, 2018 WL 5832805 (4th Cir. Nov. 7, 2018). (Click here for full article)

Second Circuit Vacates Ruling In Insurer's Favor In Hurricane Sandy Property Damage Case

The Second Circuit ruled that a New York federal district court erred in granting summary judgment to an insurer in a coverage dispute arising out of property damage caused by storm surges during Hurricane Sandy. *Madelaine Chocolate Novelties, Inc. v. Great Northern Ins. Co.*, 2018 WL 5276274 (2d Cir. Oct. 23, 2018). (Click here for full article)

California Appellate Court Rules That Revocation Of Permit To Use Property As Nightclub Constitutes Property Damage

A California appellate court ruled that a policyholder's inability to use property as a nightclub constituted covered property damage. *Thee Sombrero, Inc. v. Scottsdale Ins. Co.*, No. E067505 (Cal. Ct. App. Oct. 25, 2018). (Click here for full article)

Citing Ambiguities In Policy Application, Eighth Circuit Upholds Bad Faith Award Against Property Insurer

The Eighth Circuit affirmed a district court decision holding that a property insurer acted in bad faith by refusing to pay claims, rejecting the insurer's assertion that the insurance contract was void based on misrepresentations in the policy application. *Hayes v. Metropolitan Prop. & Cas. Ins. Co.*, 2018 WL 5852740 (8th Cir. Nov. 9, 2018). (Click here for full article)

Minnesota Supreme Court Rules That Statutory Law Prohibiting Subrogation Actions Against Insureds Is Not Limited To Named Insureds

The Minnesota Supreme Court ruled that a state statute that prohibits an insurer from filing a subrogation action against its insured applies to any party covered by the insurance policy. *Depositors Ins. Co. v. Dollansky*, No. A17-0631 (Minn. Nov. 14, 2018).
(Click here for full article)

Finding That Panel Exceeded Its Authority, New York Appellate Court Vacates Arbitration Award

A New York appellate court vacated an arbitration award in an insurance dispute on the basis that the arbitration panel exceeded its authority when it reconsidered a final liability award it had previously rendered. *American Internat'l Specialty Lines Ins. Co. v. Allied Capital Corp.*, 2018 WL 5285241 (N.Y. App. Div. 1st Dep't Oct. 25, 2018). (Click here for full article)

Ninth Circuit Asks Washington Supreme Court To Decide Whether Authorized Agent Can Bind Insurer To Additional Insured Coverage Where Certificate Disclaims Its Ability To Expand Coverage

The Ninth Circuit asked the Washington Supreme Court to address whether the rule that an insurer is bound by an authorized agent's representations overrides the rule that certificates of insurance do not change the scope of coverage under a policy, where the certificate expressly echoes the latter rule. *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, 2018 WL 5905058 (9th Cir. Nov. 9, 2018). (Click here for full article)

Policy Limits Alerts:

Wisconsin Supreme Court Rules That All Fire-Related Property Damage Arose From A Single Occurrence

Reversing an appellate court decision, the Wisconsin Supreme Court ruled that a fire that lasted three days and damaged multiple properties constituted a single occurrence under a general liability policy, subject to a single per-occurrence limit. *Secura Ins. v. Lyme St. Croix Forest Co., LLC*, 2018 WI 103 (Oct. 30, 2018).

The coverage dispute arose out of a forest fire that lasted three days and burned over 7,000 acres of land belonging to numerous individuals and businesses. The fire allegedly began in logging equipment owned by Duerr Logging. Secura Insurance, Duerr's general liability insurer, sought a declaration that the fire was a single occurrence subject to the policy's $500,000 per-occurrence limit. A Wisconsin circuit court rejected Secura's argument, holding that "each 'seepage' of the fire onto another's property constitute[d] a separate occurrence" and thus that the policy's $2 million aggregate limit applied. An intermediate court of appeals affirmed, finding that there was a separate occurrence each time the fire spread to a new piece of real property. The Wisconsin Supreme Court reversed.

Applying a cause theory under which there is one occurrence when "a single, uninterrupted cause results in all of the injuries and damage," the Wisconsin Supreme Court concluded that all of the fire-related damage arose from a single occurrence. The court explained that the fire burned continuously for three uninterrupted days and was caused by a single precipitating event. Additionally, the court noted that in focusing on the number of real properties damaged, the appellate and circuit court mistakenly applied an effects-oriented analysis, which has been rejected under Wisconsin law.

An Indiana appellate court also recently applied a cause-based approach to find one occurrence subject to a single per-occurrence policy limit. *Auto-Owners Ins. Co. v. Long*, 2018 WL 5575178 (Ind. App. Ct. Oct. 30, 2018). Reversing a trial court decision, the appellate court ruled that bodily injuries caused by exposure to toxic fumes emanating from a postal package arose from a single occurrence. The appellate court reasoned that although the policyholder committed two wrongdoings (failing to properly package and label the box in accordance with postal regulations), the injuries arose from "one proximate, uninterrupted, and continuing cause."

Fourth Circuit Rules That Claims Arising Out Of Two Bridge Collapses Are "Related" And Subject To Single Claim Limit

As discussed in our March 2018 Alert, a North Carolina federal district court ruled that an insurer was obligated to pay only a single claim limit under a liability policy with respect to multiple claims arising from two bridge collapses because claims arising out of the collapses were "related claims." *Stewart Engineering, Inc. v. Continental Cas. Co.*, 2018 WL 1403612 (E.D.N.C. Mar. 20, 2018). This month, the Fourth Circuit affirmed the ruling. *Stewart Engineering, Inc. v. Continental Cas. Co.*, 2018 WL 5832805 (4th Cir. Nov. 7, 2018).

Stewart was the structural engineer designer for two pedestrian bridges. During construction, both bridges collapsed, killing one worker and injuring several others. When suits were filed against Stewart, it sought defense and indemnity from Continental up to the aggregate policy limit of $5 million. Continental argued that its obligation was limited to the $3 million per-claim limit. The district court agreed and granted Continental's summary judgment motion.

Affirming the district court, the Fourth Circuit ruled that claims arising out of both bridge collapses constituted "related claims," defined by the policy as "all claims . . . arising out of . . . a single wrongful act; [or] . . . multiple wrongful acts that are logically or causally

connected by any common fact, situation, event, transaction, advice, or decision." The Fourth Circuit explained that even though the two collapses caused different injuries, they arose out of wrongful acts that were logically and causally connected. In particular, the court emphasized that claims arising out of both bridge collapses were connected by the following common facts: a single contract for Stewart's design services for both bridges; the same engineer and project manager supervised both bridges; and "crucially, the same design flaw caused the collapse of both bridges."

Property Damage Alerts:

Second Circuit Vacates Ruling In Insurer's Favor In Hurricane Sandy Property Damage Case

The Second Circuit ruled that a New York federal district court erred in granting summary judgment to an insurer in a coverage dispute arising out of property damage caused by storm surges during Hurricane Sandy. *Madelaine Chocolate Novelties, Inc. v. Great Northern Ins. Co.*, 2018 WL 5276274 (2d Cir. Oct. 23, 2018).

Madelaine Chocolate suffered property damage caused by storm surges—a phenomenon produced when water is pushed towards the shore by the force of winds. The company sought approximately $40 million for property damage and $13.5 million for lost income and extra expenses under an all risk policy issued by Great Northern. The insurer refused to pay most of the claimed amount on the basis that storm surges were excluded from coverage. A New York district court granted Great Northern's summary judgment motion, finding that coverage was unambiguously excluded under a flood exclusion.

Vacating the decision, the Second Circuit held that the trial court erred in relying on cases that involved different policy language. In particular, the Second Circuit emphasized that the policy here contained a Windstorm Endorsement, which operated to provide coverage for windstorm-related losses. The Windstorm Endorsement included an anti-concurrent causation clause which stated that windstorm means wind "regardless of any other cause or event that directly or indirectly: contributes concurrently to; or contributed in any sequence to, the loss of damage . . . ." The Second Circuit remanded the matter, instructing the district court to assess whether the anti-concurrent causation clause conflicts with or creates an ambiguity with respect to the flood exclusion.

California Appellate Court Rules That Revocation Of Permit To Use Property As Nightclub Constitutes Property Damage

Reversing a trial court decision, a California appellate court ruled that a policyholder's inability to use property as a nightclub constituted covered property damage. *Thee Sombrero, Inc. v. Scottsdale Ins. Co.*, No. E067505 (Cal. Ct. App. Oct. 25, 2018).

Sombrero, a commercial property owner, obtained a conditional use permit to operate its premises as a nightclub. Sombrero hired Crime Enforcement Services ("CES") to provide security at the club. After a fatal shooting at the club, the conditional use permit was revoked and replaced with a modified permit that allowed the property to be used only as a banquet hall. Sombrero sued CES, alleging that CES's negligence caused the shooting that resulted in the revocation of

the permit, which in turn caused a diminution in property value and loss of income. After a default judgment was entered against CES, Sombrero sued Scottsdale, CES's liability insurer. A California trial court ruled in favor of Scottsdale, holding that Sombrero's claim was for economic loss, not covered "property damage." The appellate court reversed.

The policy defined property damage as "[p]hysical injury to tangible property" or "[l]oss of use of tangible property that is not physically injured." The appellate court concluded that the revocation of the permit constituted a loss of use of property because without the permit, Sombrero could not use the property as a nightclub. The court stated that "the reasonable expectations of the insured would be that 'loss of use' means the loss of *any* significant use of the premises, not the total loss of all uses" (emphasis in original). Additionally, the appellate court ruled that the trial court erred in finding only economic loss, explaining that diminution in property value was not the loss itself, but rather was a proper measure of damages for the loss of use of property as a nightclub.

Bad Faith Alert:

Citing Ambiguities In Policy Application, Eighth Circuit Upholds Bad Faith Award Against Property Insurer

The Eighth Circuit affirmed a district court decision holding that a property insurer acted in bad faith by refusing to pay claims, rejecting the insurer's assertion that the insurance contract was void based on misrepresentations in the policy application. *Hayes v. Metropolitan Prop. & Cas. Ins. Co.*, 2018 WL 5852740 (8th Cir. Nov. 9, 2018).

Hayes sought coverage under a homeowner's policy for fire-related damage. Metropolitan denied the claim, asserting that the policy was void because Hayes made material misrepresentations in his insurance application. In particular, Metropolitan argued that Hayes indicated on the application that his property was not used for business or rental purposes, when in fact, Hayes used his garage in connection with his plumbing business and rented the upper levels of his residence to a tenant and her two children.

Hayes sued Metropolitan for breach of contract and bad faith. The contract claim was dismissed as time-barred, and the bad faith claim proceeded to a bench trial. A Nebraska district court ruled in Hayes' favor, finding that the application was ambiguous and therefore that Metropolitan could not establish that Hayes knowingly provided false information with the intent to deceive. Finding no basis for rescission, the district court concluded that Hayes had met his burden of establishing Metropolitan's bad faith refusal to pay. The Eighth Circuit affirmed.

The Eighth Circuit rejected Metropolitan's assertion that Hayes lacked standing and the court had no jurisdiction to hear the bad faith claim because the contract was rescinded at the time of trial. The court also held that rescission was improper because Metropolitan failed to establish deception and reliance, requisite elements of misrepresentation. In addition, the Eighth Circuit agreed with the district court's finding that the application was "not a model of clarity" with respect to the issues of rental or business usage because those questions were answered with pre-printed "x" notations rather than manually filled out by Hayes himself.

Finally, the court upheld the district court's bad faith ruling, finding that Hayes met his burden of demonstrating that Metropolitan had no reasonable basis for denying his

claim and acted with reckless disregard of that fact. In so ruling, the court emphasized that Metropolitan learned of Hayes' use of the garage for business purposes and of the rental tenants shortly after the fire, but did not seek to rescind the policy on those bases until eighteen months later. The court also noted that a finding of reckless disregard was supported by the fact that Metropolitan tried to secure a release of the bad faith claim in exchange for paying off Hayes' mortgage.

Subrogation Alert:

Minnesota Supreme Court Rules That Statutory Law Prohibiting Subrogation Actions Against Insureds Is Not Limited To Named Insureds

The Minnesota Supreme Court ruled that a state statute that prohibits an insurer from filing a subrogation action against its insured applies to any party covered by the insurance policy. *Depositors Ins. Co. v. Dollansky*, No. A17-0631 (Minn. Nov. 14, 2018).

Dollansky rented a motor home from Karavan Trailers, Inc. The rental agreement provided that Dollanksy was responsible for all damage to the motor home and required him to obtain an extension of his personal automobile insurance for the motor home. When a fire caused damage to the motor home, Karavan submitted a claim for the full amount of damage to Dollanksy's automobile insurer. The insurer paid the deductible but denied coverage for the remainder of the claim. Thereafter, Karavan submitted a claim to its own insurer, Depositors Insurance Company, which paid the full amount of damages.

Depositors then sued Dollansky, alleging that it was subrogated to the rights of Karavan.

A Minnesota federal district court granted Dollansky's summary judgment motion, citing Minnesota statutory law which prohibits an insurance company from "proceed[ing] against its insured in a subrogation action where the loss was caused by the nonintentional acts of the insured." Minn. Stat. § 60A.41(a) (2016). An intermediate appellate court affirmed, rejecting Depositors' assertion that Dollansky was not an insured within the meaning of the statute because he was not a named insured on Karavan's policy. The Minnesota Supreme Court granted review and affirmed.

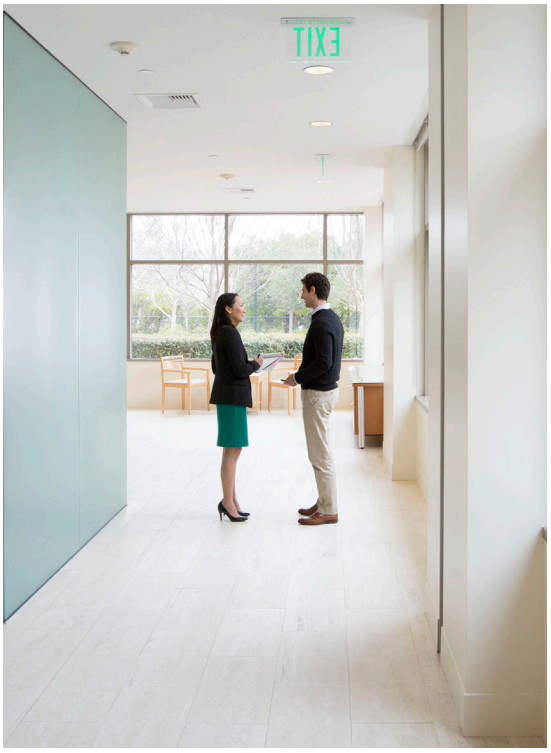
The Minnesota Supreme Court rejected Depositors' contention that the statute applied only to named insureds, noting the absence of the term "named insured" in the applicable provision. However, the Minnesota Supreme Court found that the statute was ambiguous because "insured" could mean "any party covered by some part of the insurance policy," or alternatively, could mean "any party who is covered by the specific section of the insurance policy that applies to the particular loss at issue." Relying on legislative history and public policy considerations, the court concluded that the term "insured" in § 60A.41(a) is intended to "broadly protect the rights of insureds against subrogation" and thus includes any person who has coverage under the insurance policy. Applying this standard, the court concluded that Dollansky was an insured under Karavan's policy because he had permission to use the motor home and the policy defined "insured" to include "[a]nyone else while using with your permission a covered 'auto' you own."

The court acknowledged that its ruling conflicted with the rental agreement, which assigned responsibility for any damage to Dollansky, but reasoned that the statutory language warranted that result. Finally, the court noted that rather than seeking subrogation against Dollansky, Depositors could have brought an action against Dollanksy's insurer seeking reimbursement or could have filed a declaratory judgment action seeking a ruling on the priority of the two policies.

Arbitration Alert:

Finding That Panel Exceeded Its Authority, New York Appellate Court Vacates Arbitration Award

A New York appellate court vacated an arbitration award in an insurance dispute on the basis that the arbitration panel exceeded its authority when it reconsidered a final liability award it had previously rendered. *American Internat'l Specialty Lines Ins. Co. v. Allied Capital Corp.*, 2018 WL 5285241 (N.Y. App. Div. 1st Dep't Oct. 25, 2018).



Allied sought defense and indemnity from American International Specialty Lines Insurance Company ("AISLIC") for an underlying False Claims Act suit that it had settled for approximately $10 million. When AISLIC denied coverage, Allied filed for arbitration. During arbitration, the parties agreed that the panel would issue an immediate determination as to AISLIC's liability under the policies and that a separate evidentiary hearing would be held as to the amount of defenses costs, if any, to which Allied was entitled. The panel issued a partial final award which held that the underlying claims against Allied were covered under the policy and that Allied was entitled to defense and indemnity, but that the $10 million settlement payment was not a covered "loss." The panel ordered a separate hearing to address defense costs.

Thereafter, the panel issued a "corrected" partial final award. The "corrected" partial final award was based on the panel's view that it could reconsider the original award because it was not final since issues associated with defense costs were outstanding. The corrected partial final award changed course from the original partial final award by holding that the underlying settlement was a covered loss under AISLIC's policy. Thereafter, the panel issued a final award granting Allied more than $11 million in damages and interest. A New York trial court denied AISLIC's motion to vacate the corrected partial award and final award. The appellate court reversed.

The appellate court ruled that the arbitration panel exceeded its authority when it reconsidered the partial final award. The court explained that under the common law doctrine of *functus officio*, an arbitrator may not entertain an application to change a final award, except to correct a deficiency of form or miscalculation. The appellate court emphasized that the parties had expressly agreed that the panel was "to make an immediate, final determination" as to liability and that any subsequent hearing on defense costs would be separately addressed. Thus, once the panel made a determination as to liability, and expressly labeled it a "partial final award," "its authority over such issue was ended." Additionally, the court emphasized that it was not bound by the panel's statements in the corrected award that the original partial final award was not final because the parties had not bifurcated the proceedings. The court stated that "[b]y that logic, an arbitrator could avoid exceeding his or her authority when reconsidering a partial final award as along as the arbitrator stated that the parties did not bifurcate the proceedings or that the arbitrator did not intend for the award to be final as to a particular issue."

Coverage Alert:

Ninth Circuit Asks Washington Supreme Court To Decide Whether Authorized Agent Can Bind Insurer To Additional Insured Coverage Where Certificate Disclaims Its Ability To Expand Coverage

The Ninth Circuit asked the Washington Supreme Court to address whether the rule that an insurer is bound by an authorized agent's representations overrides the rule that certificates of insurance do not change the scope of coverage under a policy, where the certificate expressly echoes the latter rule. *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, 2018 WL 5905058 (9th Cir. Nov. 9, 2018).

The dispute centered on whether T-Mobile was entitled to coverage for property damage as an additional insured under a policy issued by Selective Insurance to an antenna contractor. An agreement between T-Mobile and the contractor required the contractor to maintain insurance that listed T-Mobile as an additional insured. Selective's authorized agent issued a certificate of insurance to T-Mobile which stated that T-Mobile "is included as an additional insured" under the policy. However, the certificate also stated that the certificate is for informational purposes only, "confers no rights upon the certificate holder," and does not extend or alter coverage under the policy. The certificate further warned that if the certificate holder is an additional insured, the policy must be endorsed and that statements on the certificate do not confer rights in lieu of such endorsements.

When T-Mobile sought coverage as an additional insured under the contractor's general liability policy, Selective refused to defend, arguing that T-Mobile was not named as an additional insured in the policy. In ensuing litigation, a district court ruled in Selective's favor, finding that the certificate could not confer coverage on T-Mobile. On appeal, the Ninth Circuit found that this case implicated two competing principles of law: (1) that an insurance company is bound by the representations of its authorized agents; and (2) that a certificate of insurance cannot be used to extend or alter the coverage provisions of a policy. Noting that the Washington Supreme Court has not addressed how these two principles can be reconciled on the record presented, the court certified the following question:

> Under Washington law, is an insurer bound by representations made by its authorized agent in a certificate of insurance with respect to a party's status as an additional insured under a policy issued by the insurer, when the certificate includes language disclaiming its authority and ability to expand coverage?

We will keep you posted on any developments in this matter.

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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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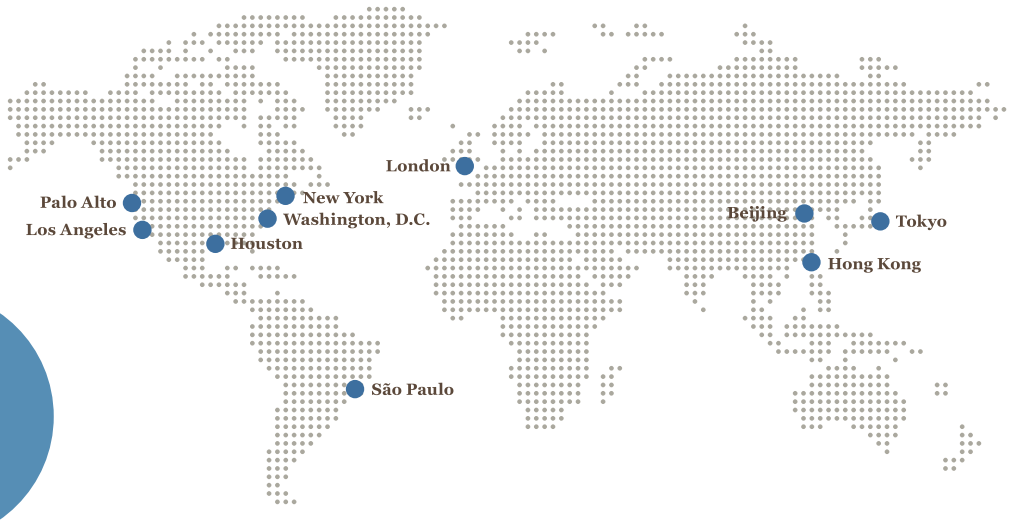

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