Simpson Thacher

Insurance Law Alert

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The Second Circuit ruled that reinsurance certificates were expense-supplemental, requiring the reinsurer to pay expenses in addition to the stated limit of liability and that the reinsurer was not bound by the cedent's reasonable good faith settlement decisions pursuant to the follow the settlements doctrine. *Utica Mutual Ins. Co. v. Clearwater Ins. Co.*, 2018 WL 4568306 (2d Cir. Sept. 25, 2018). (Click here for full article)

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Second Circuit Rules That Insurer Owes No Coverage For Collapse Arising From Concrete Cracking

The Second Circuit ruled that a property insurer had no duty to cover losses arising in connection with the cracking of concrete walls in the policyholders' residence. *Kim v. State Farm Fire & Cas. Ins. Co.*, 2018 WL 4847195 (2d Cir. Oct. 5, 2018). (Click here for full article)

Ohio Supreme Court Rules That Contractor's Liability Policy Does Not Cover Property Damage Caused By Subcontractor's Faulty Work

The Ohio Supreme Court ruled that a general contractor's liability policy does not cover claims arising out of a subcontractor's faulty work because such claims did not arise from a covered "occurrence." *Ohio Northern Univ. v. Charles Construction Svs.*, 2018 WL 4926159 (Oct. 9, 2018). (Click here for full article)

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A California federal district court ruled that an insurer breached its duty to defend class action suits against Yahoo alleging inappropriate scanning of user emails. *Yahoo! Inc. v. National Union Fire Ins. Co of Pittsburgh, PA*, 2018 WL 4962033 (N.D. Cal. Oct. 12, 2018). (Click here for full article)

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The Eleventh Circuit dismissed class action suits against mortgage service providers relating to force-placed insurance, finding that the claims were barred by the filed-rate doctrine. *Patel v. Specialized Loan Servicing, LLC*, 2018 WL 4559091 (11th Cir. Sept. 24, 2018). (Click here for full article)

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The Third Circuit ruled that a district court did not abuse its discretion in denying an attorneys' fee award in a policyholder's successful statutory bad faith action where the fee petition was severely deficient. *Clemens v. N.Y. Cent. Mut. Fire Ins. Co.*, 903 F.3d 396 (3d Cir. 2018). (Click here for full article)

Simpson Thacher News Alert

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Reinsurance Alert:

Second Circuit Vacates District Court Rulings On Reinsurance Limits And Follow The Settlements

In a dispute relating to the scope of coverage under several facultative reinsurance policies issued by Clearwater Insurance Company, a New York district court previously made two significant rulings: (1) Clearwater need not pay expenses beyond the limits of liability in the reinsurance contracts (*see* November 2014 Alert); and (2) Clearwater is obligated to indemnify Utica's reasonable and good faith settlement of the underlying asbestos claims pursuant to the follow the settlements doctrine (*see* February 2016 Alert). Last month, the Second Circuit vacated those rulings. *Utica Mutual Ins. Co. v. Clearwater Ins. Co.*, 2018 WL 4568306 (2d Cir. Sept. 25, 2018).

Utica issued primary and umbrella policies to Goulds Pumps, a defendant in thousands of asbestos-related suits. Utica and Goulds reached a settlement regarding Utica's liability under certain policies that lacked aggregate limits. Thereafter, Utica sued Clearwater, seeking indemnification pursuant to various reinsurance contracts. The parties disputed whether the liability limits in the reinsurance certificates were inclusive of expenses and whether Clearwater was obligated to "follow the settlements" with respect to Utica's reasonable and good faith agreements with Goulds.

The Second Circuit ruled that the reinsurance certificates were expense-supplemental and thus required Clearwater to reimburse Utica for expenses in addition to the stated limits of liability. The court noted that there is no presumption under New York law that a per-occurrence liability limit in a reinsurance contract caps all obligations of the reinsurer. *See Global Reinsurance Corp. of Am. v. Century Indem. Co.*, 30 N.Y.3d 508 (2017) (discussed in our December 2017 Alert). Here, the reinsurance certificates expressly "followed the form" of the underlying liability, and the court stated that Utica's umbrella policies "plainly require Utica to reimburse Goulds for 'expenses . . . in addition to the applicable limit of liability.'" The court therefore concluded that Clearwater's certificates must likewise be expense-supplemental. The court distinguished New York cases involving policy language that expressly provides that reinsurance limits were "subject to" the amount of liability. Here, the court noted that pursuant to the follow the form clause, Clearwater's liability is dependent on Utica's underlying liability.

Addressing the follow the settlements issue, the Second Circuit ruled that Clearwater was not bound by Utica's reasonable, good faith settlement decisions. The court held that neither the reinsurance certificates nor certain contracts through which Clearwater participated as part of a pool of reinsurers imposed a follow the settlements obligation. The court held that a provision stating that the certificate "shall follow the ceding Company's liability in accordance with the terms and conditions of the policy reinsured hereunder except with respect to those terms and/or conditions as may be inconsistent" was a follow form clause and did not impose a follow the settlements obligation. Further, the court refused to find such an obligation implicit in all reinsurance contracts as a matter of law. The court therefore concluded that Clearwater's indemnity obligations must be based on Utica's proven liability under its umbrella policies. The court remanded the matter for such a determination.

This month, the Pennsylvania Supreme Court declined to review an appellate court decision similarly holding that facultative reinsurance certificates provide coverage for defense expenses in excess of the liability cap set forth in the reinsurance agreement. *Century Indem. Co. v. OneBeacon Ins. Co.*, No. 68 EM 2018 (Pa. Oct. 15, 2018). There, the "Reinsurance Accepted' provision stated that "the liability of the Reinsurer . . . shall follow that of the Company and except as otherwise specifically provided herein, shall be subject in all respects to all the terms and conditions of the Company's policy." OneBeacon had argued that this language provided a cap for both indemnity and

defense costs under *Bellefonte Reinsurance Co. v. Aetna Cas. & Sur. Co.*, 903 F.2d 910 (2d Cir. 1990). The appellate court disagreed, explaining that the *Bellefonte* provision stated that the reinsurance was "subject to the terms, conditions and amount of liability set forth herein," whereas here, the "subject to" clause referred only to the general conditions, not the reinsurance limit. The court also noted that its ruling was supported by the follow form provision because the underlying policies provided coverage for expenses in addition to limits. *Century Indem. Co. v. OneBeacon Ins. Co.*, 173 A.3d 784 (Pa. Super. Ct. 2017) (discussed in our November 2017 Alert).

Construction Defect Alerts:

Second Circuit Rules That Insurer Owes No Coverage For Collapse Arising From Concrete Cracking

The Second Circuit ruled that a property insurer had no duty to cover losses arising in connection with the cracking of concrete walls in the policyholders' residence. *Kim v. State Farm Fire & Cas. Ins. Co.*, 2018 WL 4847195 (2d Cir. Oct. 5, 2018).

The homeowners sought coverage under their property policy for losses stemming from cracks in the concrete foundation of their home. Engineers who inspected the home opined that the cracks would lead to further damage and eventually result in collapse. State Farm denied coverage on several bases, including a provision that excludes coverage for damage "directly and immediately" caused by "settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundation, walls, floors, roofs or ceilings."

In the ensuing litigation, a Connecticut district court ruled in State Farm's favor. The Second Circuit affirmed.

The Second Circuit ruled that the provision applied because any collapse would be caused "directly and immediately" from the concrete cracks. The court rejected the homeowners' assertion that the exclusion did not apply because a collapse would be gradual rather than immediate, noting that the exclusion expressly applies "regardless of whether the loss occurs suddenly or gradually." The court also rejected the homeowners' contention that the exclusion was ambiguous because it referred both to "immediate" and "gradually." The court explained that in this context, the only reasonable interpretation of "immediate" is the absence of any other intervening cause.

The court also held that there was no coverage under an ensuing loss provision, which provides coverage "for any resulting loss from [the listed exclusions] unless the resulting loss is itself is a Loss Not Insured by this Section." The court held that even assuming that a collapse was a resulting loss under the policy, it was excluded as a "Loss Not Insured by this Section" for the reasons set forth above.

Ohio Supreme Court Rules That Contractor's Liability Policy Does Not Cover Property Damage Caused By Subcontractor's Faulty Work

The Ohio Supreme Court ruled that a general contractor's liability policy does not cover claims arising out of subcontractor's faulty work because such claims did not arise from a covered "occurrence." *Ohio Northern Univ. v. Charles Construction Svs.,* 2018 WL 4926159 (Oct. 9, 2018).

A general contractor was sued after it was discovered that defective work performed by a subcontractor resulted in extensive water damage. The contractor sought coverage from its general liability insurer, which defended under a reservation of rights. The insurer later filed suit seeking a declaration that defective workmanship claims were not claims for property damage "caused by an occurrence." The trial court ruled in the insurer's favor, citing *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St.3d 476 (2012), which held that damage caused by a contractor's own faulty workmanship does not give rise to a covered occurrence. An

intermediate appellate court reversed, finding that *Agri* applied only to claims involving the contractor's own work and that the policy was ambiguous as to whether it encompassed claims based on a subcontractor's faulty work.

The Ohio Supreme Court reversed, holding that *Agri* applied with equal force to claims based on a subcontractor's workmanship. The court further held that even though the damage was discovered after the construction work was completed, coverage was not restored by a Products Completed Operations Hazard exception or a subcontractor exception to a "Your Work" exclusion because there was no covered occurrence in the first place. The court noted that courts in other jurisdictions have deemed subcontractor claims to be covered by a completed operations or subcontractor exception, but emphasized that its decision was based on "the plain and ordinary meaning of the language used in the CGL policy" rather than "any trend in the law."

Data Breach Alerts:

Florida Court Rules That Insurer Has No Duty To Defend Data Breach Claims

A Florida federal district court ruled that a general liability insurer has no duty to defend data breach claims, finding that coverage for breach of privacy allegations applied only where the publication of personal information was done by the policyholder itself, and did not extend to acts undertaken by third-party hackers. *St. Paul Fire & Marine Ins. Co. v. Rosen Millennium, Inc.*, 2018 WL 4732718 (M.D. Fla. Sept. 28, 2018).

A hotel hired Millennium to provide data security services. When the hotel learned of a potential credit card breach, it informed Millennium that it believed that Millennium's negligence caused the breach. Millennium submitted a notice of claim to St. Paul, which then sought a declaration that it had no duty to defend any claim made by the hotel against Millennium. The court granted in part St. Paul's summary judgment motion, finding that the insurer had no duty to defend under the policy's "personal injury" provision.

The personal injury coverage included "[m]aking known to any person or organization covered material that violates a person's right of privacy." The parties did not dispute that the credit card information released in the data breach constituted covered personal information. However, St. Paul's argued that the "making known" requirement was not met. The court agreed, finding no coverage because the alleged privacy violation did not result from Millennium's own conduct, but rather from the actions of third-party hackers. The court relied on *Innovak Int'l, Inc. v. Hanover Ins. Co.*, 280 F. Supp.3d 1340 (M.D. Fla. 2017) (discussed in our December 2017 Alert), in which the court held that coverage under a personal injury provision required the insured to be the publisher of the private information. As discussed in our March 2014 Alert, a New York court reached the same conclusion in *Zurich American Insurance Co. v. Sony Corp. of America*, No. 651982/2011 (N.Y. Sup. Ct. New York City. Feb. 21, 2014), holding that a similar personal injury policy provision did not encompass hacking claims where the publication was committed by hackers rather than the insured itself.

California Court Rules That Insurer Breached Duty To Defend Email Scanning Claims Against Yahoo

A California federal district court ruled that an insurer breached its duty to defend class action suits against Yahoo alleging inappropriate scanning of user emails. *Yahoo! Inc. v. National Union Fire Ins. Co of Pittsburgh, PA*, 2018 WL 4962033 (N.D. Cal. Oct. 12, 2018).

Three class action suits were filed against Yahoo relating to its alleged practice of scanning the content of emails sent to and from its users. The complaints alleged that Yahoo intercepted and reviewed emails without users' knowledge. Yahoo tendered defense of the suits to National Union, which initially denied coverage then agreed approximately two years later to defend one of the suits under a reservation of rights. By that time, the other two suits had been dismissed. Yahoo, having spent more than $4 million to defend and settle, sued National Union for breach of contract and bad faith. Ruling on the parties' cross-motions for summary judgment, the court issued the following rulings:

National Union Breached Its Duty to Defend

The court held that the underlying allegations gave rise to a duty to defend under the policy's "personal injury" provision, which covers "[o]ral or written publication, in any manner, of material that violates a person's right of privacy." Although the suits did not specifically allege publication of the emails to a third-party, the court deemed it "reasonably inferable" that the material was revealed to third parties based on an allegation in one underlying complaint that Yahoo profited financially from reading the emails. Although a second underlying complaint did not include similar allegations, the court stated that "National Union offers no reason why the pleading could not have been amended to include them."

The court further held that National Union's duty to defend was not negated by a criminal acts exclusion, notwithstanding that two of the underlying complaints alleged only violations of a state penal code relating to privacy violations. The court reasoned that "the form of the claim is not controlling" and that a duty to defend arose in light of the possibility of a claim for civil damages based on allegations of financial profit. With respect to the third underlying suit (which National Union ultimately agreed to defend), the court held that the insurer breached its duty by failing to provide an immediate defense upon tender.

A Breach of the Duty to Defend Does Not Prevent National Union From Enforcing Its Contractual Rights

The court ruled that the breach of the duty to defend did not eviscerate National Union's right to enforce a Deductible Coverage Endorsement, under which Yahoo agreed to reimburse National Union for certain expenses and payments. The court reasoned that prohibiting National Union from seeking reimbursement would enrich Yahoo beyond what it contracted for in the insurance policy.

National Union's Duty to Indemnity Is Limited

The court also ruled that National Union had no indemnity obligation with respect to the two dismissed class actions because Yahoo made no payments in connection with the suits. As to the third class action, the court concluded that a portion of Yahoo's settlement payment constituted covered "damages" under the policy. In particular, the court held that Yahoo's payment of attorneys' fees to underlying plaintiffs' counsel fell within the scope of "damages," because such statutory fees were "sums that the insured became legally obligated to pay as damages" because of "personal injury." However, the court held that "service award" payments to class representatives were not insured "damages" because they were "recompense for the inconveniences of litigation."

Issues of Fact Exist as to Whether National Union Breached the Covenant of Good Faith and Fair Dealing

Yahoo argued that National Union acted in bad faith by denying coverage based on exclusions that had been deleted from operative policies and by relying on incomplete copies of policies. Although those facts were undisputed, the court concluded that a reasonable jury could deem such actions mistaken decisions rather than bad faith failure to investigate.

Coverage Alert:

Illinois Court Rules That Ten Underlying Suits Against Policyholder Constitute A Single Claim

An Illinois federal district court ruled that ten underlying suits against a policyholder constitute a single "claim" under a professional liability policy, subject to a single per-claim policy limit. *Lloyd's Syndicate 3624 v. Biological Res. Ctr. of Illinois, LLC*, 2018 WL 4489589 (N.D. Ill. Sept. 19, 2018).

Biological Resource Center of Illinois ("BRCI"), a non-transplant anatomical donation business, was sued in ten actions alleging the mishandling and/or sale of

human remains. Hiscox, BRCI's professional liability insurer, brought a declaratory judgment action seeking a ruling that the policy's $2 million per-claim limit applied to all underlying cases. The court agreed and granted Hiscox's motion for partial judgment on the pleadings.

The policy provided that "[a]ll claims based upon or arising out of any and all continuous, repeated or related Wrongful Acts or Accidents . . . shall be considered a single Claim." The court agreed with Hiscox that all claims in the underlying suits should be treated as a single claim because they all originated from BRCI's allegedly negligent acts and breaches of duty. In so ruling, the court reasoned that "related" covered a broad range of connections, both causal and logical. Thus, although the underlying suits differed in their precise wording, they were related in their common allegations as to false representations and breaches of duty. The court rejected BRCI's assertion that the underlying suits could not be a single claim because each complaint involved different anatomical donations, operative documents, and circumstances. Additionally, the court held that different theories of liability in the underlying suits did not negate "relatedness," stating that "BRCI cites no authority to support the notion that underlying complaints must assert the exact same legal theories of liability to be considered a single 'Claim.'"

Settlement Alert:

Ninth Circuit Rules That Policyholder Forfeits Coverage With Breach Of No Voluntary Payments Provision

The Ninth Circuit ruled that a policyholder relinquished its right to coverage under a liability policy by settling claims without the insurer's consent. *Amco Ins. Co. v. Morfe*, 2018 WL 4520952 (9th Cir. Sept. 20, 2018).

The policyholder sought defense and indemnity from his insurer for tort claims asserted against him. After tender of the defense but before the insurer rendered a coverage decision, the policyholder reached a settlement without the insurer's consent. The insurer sought a declaration that it had no duty to defend or indemnify the claims. A California federal district court granted the insurer's partial summary judgment motion, and the Ninth Circuit affirmed.

The Ninth Circuit ruled that the policyholder's breach of the policy's no voluntary payments provision resulted in a forfeiture of coverage. The policyholder argued that an exception to the no voluntary payments provision was warranted because: (1) the insurer abandoned the policyholder by failing to respond to the tender of defense; (2) the policyholder executed the settlement under duress; and (3) the insurer breached its duty to provide an immediate defense. The court rejected these assertions, finding that an abandonment exception applies only when an insurer denies coverage altogether and refuses to provide a defense. The court also noted a lack of factual support for the duress argument. Finally, the court held that the insurer's failure to defend for twelve weeks following the policyholder's tender did not constitute a breach of the duty to provide an immediate defense.

Filed Rate Alert:

Eleventh Circuit Rules That Force-Placed Insurance Claims Are Barred By Filed-Rate Doctrine

The Eleventh Circuit dismissed class action suits against mortgage service providers relating to force-placed insurance, finding that the claims were barred by the filed-rate doctrine. *Patel v. Specialized Loan Servicing, LLC*, 2018 WL 4559091 (11th Cir. Sept. 24, 2018).

Homeowners alleged that their service providers breached loan contracts and the implied covenant of good faith and fair dealing by charging inflated premiums for force-placed insurance. In particular, the complaints alleged that the mortgage service companies received kickbacks from the insurance company that issued the force-placed insurance after the homeowners' prior insurance coverage had elapsed. A Florida district court dismissed the actions on the basis of the filed-rate doctrine, which precludes judicial challenges to rates that are filed with and approved by a government regulatory agency. The Eleventh Circuit affirmed.

The Eleventh Circuit reasoned that the underlying claims directly challenged the reasonableness of the premiums of the force-placed insurance. Because the premiums were based upon rates filed with Florida state regulators, the court held that the filed-rate doctrine squarely applied. The court emphasized that allegations of a fraudulent kickback scheme did not alter this result because there is no fraud exception to the filed-rate doctrine. The court cited *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256 (2d Cir. 2015) (discussed in our September 2015 Alert), which similarly held that fraud claims based on lender-placed insurance rates were barred by the filed-rate doctrine, even where the rates were imposed by an intermediary rather than by the insurance companies that obtained regulatory approval for those rates.

As discussed in our May 2011 and October 2010 Alerts, other courts have similarly enforced the filed-rate doctrine to bar fraud claims against insurance companies, although application of the doctrine varies by jurisdiction.

Attorneys' Fee Alert:

Third Circuit Rules That District Court Properly Denied Fee Award In Bad Faith Action

The Third Circuit ruled that a district court did not abuse its discretion in denying an attorneys' fee award in a policyholder's successful statutory bad faith action where the fee petition was severely deficient. *Clemens v. N.Y. Cent. Mut. Fire Ins. Co.*, 903 F.3d 396 (3d Cir. 2018).

In an action against an automobile insurer, a jury awarded the policyholder $100,000 in punitive damages under Pennsylvania's bad faith statute, 42 Pa. Cons. Stat. § 8371. Thereafter, the policyholder petitioned for over $900,000 in attorneys' fees. A Pennsylvania district court, employing the lodestar approach, determined that the fee should be reduced by 87% and then denied the petition in its entirety. The Third Circuit affirmed.

Ruling on this matter of first impression, the Third Circuit adopted the view endorsed by other circuits – that where a fee-shifting statute gives a district court discretion to award attorneys' fees, such discretion includes the ability to deny a request altogether if an "outrageously excessive" amount is requested. The Third Circuit upheld application of this standard because counsel failed to keep contemporaneous time records, time records were reconstructed after the fact, the entries submitted were vague and in some instances, excessive, and the fee petition failed to establish that the hourly rates were reasonable in light of prevailing community rates.

Simpson Thacher News Alert

The *New York Law Journal* named Simpson Thacher its 2018 Litigation Department of the Year in the category of Insurance. In connection with the award, the publication profiled the Firm's numerous successes in significant insurance and reinsurance matters over the past year.

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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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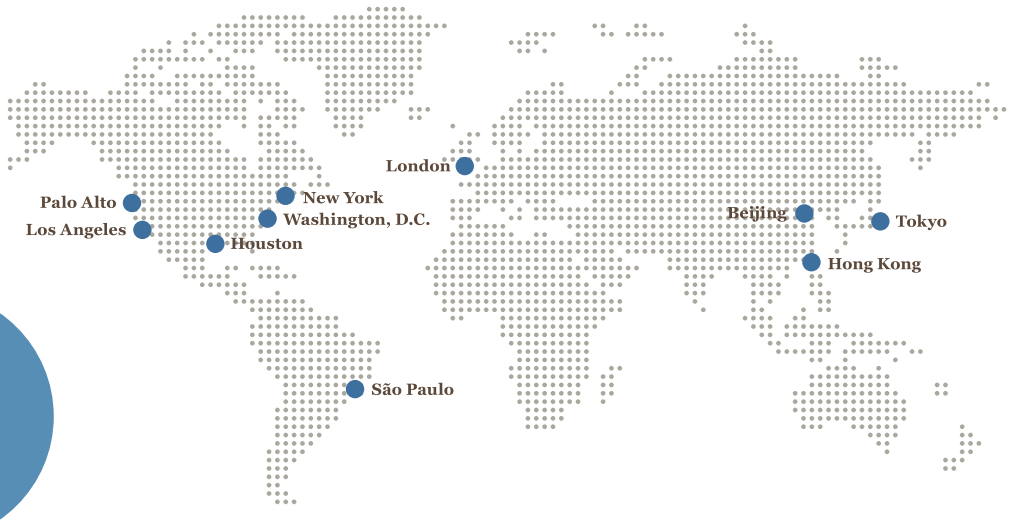

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