Simpson Thacher

Insurance Law Alert

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Illinois Court Rules That Insurer Must Indemnify Underlying Opioid Settlement Payment

An Illinois federal district court ruled that a liability insurer was required to indemnify a $3.5 million settlement payment made by a pharmaceutical company in an underlying suit arising out of opioid distribution. *Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co.*, 2019 WL 4727039 (C.D. Ill. Sept. 26, 2019). (Click here for full article)

Sixth Circuit Rules That Dishonesty Exclusion Does Not Bar Coverage For Conspiracy, Defamation And Unfair Practices Claims Against Insured

The Sixth Circuit ruled that a dishonesty exclusion did not preclude coverage for claims alleging civil conspiracy, unfair competition, defamation, disparagement and violation of the Ohio Deceptive Trade Practices Act. *Evanston Insurance Co. v. Certified Steel Stud Assoc., Inc.*, 2019 WL 4674072 (6th Cir. Sept. 25, 2019). (Click here for full article)

Washington Supreme Court Rules That Agent's Statement In Certificate Binds Insurer To Additional Insured Coverage, Notwithstanding Disclaimer That Certificate Cannot Expand Coverage

The Washington Supreme Court ruled that an insurer is bound by representations made by its authorized agent with respect to a party's additional insured status, even where the insurance certificate expressly stated that it does not expand coverage beyond the terms of the policy. *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, 2019 WL 5076647 (Wash. Oct. 10, 2019). (Click here for full article)

Seventh Circuit Rules That Breach Of Contract Exclusion Renders Coverage Illusory, Remands For Reformation Of Policy

The Seventh Circuit ruled that a breach of contract exclusion rendered errors and omissions coverage illusory and remanded the matter for reformation of the contract so as to meet the reasonable expectations of the insured. *Crum & Forster Specialty Ins. Co. v. DVO, Inc.*, 2019 WL 4594229 (7th Cir. Sept. 23, 2019). (Click here for full article)

"[Simpson Thacher] is one of the preeminent and most sophisticated coverage litigation firms."

– *Chambers USA* 2019 (quoting a client)

Insurer That Prevailed In Suit Brought By Plaintiff's Assignee Can Still Be Sued By Plaintiff, Says Michigan Court

A Michigan federal district court ruled that an injured party was not barred from suing an insurer by the doctrines of *res judicata* or collateral estoppel, notwithstanding that the insurer had prevailed in a suit brought by the assignee of the injured party. *Massengale v. State Farm Mutual Auto. Ins. Co.*, 2019 WL 4640307 (E.D. Mich. Sept. 24, 2019). (Click here for full article)

If Insured Demonstrates Prejudice, Insurer May Be Estopped From Denying Coverage Even Where Policy Does Not Cover Claim, Says Florida Appellate Court

A Florida appellate court ruled that an insured's affirmative defense of estoppel could give rise to coverage notwithstanding that the underlying claims alleged non-covered intentional acts. *Hurchalla v. Homeowners Choice Prop. & Cas. Ins. Co., Inc.*, 2019 WL 5198731 (Dist. Ct. App. Fla. Oct. 16, 2019). (Click here for full article)

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Allocation Alert:

Connecticut Supreme Court Affirms Unavailability Exception To Pro Rata Allocation

Connecticut's highest court has ruled that a manufacturer of asbestos-containing products is not responsible for payment of claims during years in which it was unable to buy insurance. *R.T. Vanderbilt Co., Inc. v. Hartford Accident and Indemnity Co.*, 2019 WL 4926802 (Conn. Oct. 4, 2019).

The coverage dispute arose from thousands of personal injury lawsuits against Vanderbilt. The company and approximately thirty of its insurers sought declarations regarding their respective obligations as to the underlying claims. As discussed in our March 2017 Alert, a Connecticut appellate court issued the following rulings in this matter: (1) a continuous trigger governs asbestos-related claims; (2) Connecticut recognizes an unavailability exception to pro rata allocation, under which a policyholder is not responsible for uninsured periods if insurance was not available in the marketplace during that time; (3) a standard pollution exclusion is ambiguous as to whether it applies only to traditional environmental contamination or "more broadly to circumstances such as the release of asbestos dust and similar toxic industrial products within a building when used as intended"; and (4) occupational disease exclusions are not limited to claims brought by a policyholder's own employees, but rather bar claims brought by complainants who developed occupational disease while using the policyholder's products in the course of working for another employer.

The Connecticut Supreme Court affirmed the trigger, allocation and pollution exclusion rulings based on the "thorough and well-reasoned opinion" of the appellate court. As to the occupational disease exclusion, the Connecticut Supreme Court emphasized that the exclusion did not contain language expressly limiting its application to Vanderbilt's employees, whereas other exclusions did include such verbiage. The court rejected Vanderbilt's assertion that under principles of workers' compensation law, "occupational disease" is a "term of art that is tied to the employee-employer relationship" such that "no specific reference to employees needed to be added to the exclusion." The court explained: "to read the exclusions as urged by Vanderbilt would require us to add otherwise nonexistent language specifically limiting their application to Vanderbilt's employees, which is contrary to how we interpret . . . insurance policies."

Coverage Alerts:

Illinois Court Rules That Insurer Must Indemnify Underlying Opioid Settlement Payment

An Illinois federal district court ruled that a liability insurer was required to indemnify a $3.5 million settlement payment made by a pharmaceutical company in an underlying suit arising out of opioid distribution. *Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co.*, 2019 WL 4727039 (C.D. Ill. Sept. 26, 2019).

The Attorney General of West Virginia sued H.D. Smith, a pharmaceutical distributor, alleging negligence, public nuisance and violations of various state statutes based on the company's allegedly improper sales of opioids to pill mills and other entities. The complaint sought damages and injunctive relief. Cincinnati denied coverage under general liability and umbrella policies issued to Smith. In a prior ruling in this matter, the Seventh Circuit ruled that Cincinnati had a duty to defend Smith, finding that the underlying suit alleged damages because of bodily injury. Smith filed two motions to dismiss the underlying suit, which were both denied. Thereafter, Smith settled the case for $3.5 million.

Cincinnati refused to indemnify the settlement, arguing that the settlement payment was (1) not made "in reasonable anticipation of liability for covered claims," and (2) unreasonable. The court rejected both assertions. First, the court held that Smith faced a potential for significant liability in the underlying suit, noting that all other defendants had settled, that many of Smith's defenses had been rejected by West Virginia courts, and that it faced "a lengthy and costly trial in an unfavorable jurisdiction." Second, the court held that the settlement encompassed covered claims. Although some of the underlying relief sought (injunctive relief, fines and statutory penalties) was outside the scope of coverage, the court emphasized that the suit also alleged covered negligence claims and sought monetary relief "because of bodily injury."

Finally, the court ruled that the settlement amount was reasonable based on a "commonsense consideration of the totality of facts bearing on the liability and damage aspect of plaintiff's claim, as well as the risks of going to trial." Although Smith's settlement payment was higher that most of its co-defendants' payments, Smith was allegedly responsible for more aggregate sales of opioids during the relevant time period.

The court declined to allocate the settlement between covered and non-covered claims, finding no basis to do so, and noting that the "primary focus" of the underlying litigation was potentially covered claims. The court also declined to rule as a matter of law on Smith's claim for attorneys' fees based on Cincinnati's allegedly "vexatious and unreasonable" delay in payment, finding the factual record insufficiently developed on this issue.

Sixth Circuit Rules That Dishonesty Exclusion Does Not Bar Coverage For Conspiracy, Defamation And Unfair Practices Claims Against Insured

Reversing an Ohio district court, the Sixth Circuit ruled that a dishonesty exclusion did not preclude coverage for claims alleging civil conspiracy, unfair competition, defamation, disparagement and violation of the Ohio Deceptive Trade Practices Act ("ODTPA"). *Evanston Insurance Co. v. Certified Steel Stud Assoc., Inc.*, 2019 WL 4674072 (6th Cir. Sept. 25, 2019).

ClarkDietrich, a steel product manufacturer, sued CSSA, a trade association comprised of ClarkDietrich's competitors. The suit alleged unfair competition, defamation, disparagement, violation of the ODTPA and civil conspiracy. A jury returned a verdict against CSSA on all counts. Evanston, CSSA's insurer, sought a declaration that it had no duty to indemnify CSSA. Evanston argued that a dishonesty exclusion barred coverage and that the claims were uninsurable as a matter of law, among other things.

The district court ruled in Evanston's favor. The court held that the dishonesty act exclusion, which excludes coverage for "any claim based upon or arising out of any dishonest, deliberately fraudulent or criminal act . . . committed by or at the direction of the Insured," barred coverage. The court reasoned that because that the jury found that CSSA committed unlawful acts in furtherance of a conspiracy, "the jury necessarily found that 'CSSA's publication was intentionally false' and involved a dishonest act."

The Sixth Circuit reversed, finding that the unlawful acts did not necessarily involve dishonesty. The court reasoned that the jury did not have to find that CSSA acted dishonestly when it violated ODTPA or defamed and disparaged ClarkDietrich because intent is not a required element of ODTPA violations, and the jury "could have held CSSA liable for defamation and disparagement by concluding that CSSA entertained serious doubts as to the truth of its statements."

The Sixth Circuit also ruled that the civil conspiracy verdict did not necessarily implicate the dishonesty exclusion. The court

acknowledged that the conspiracy claim required a finding of intent, but reasoned that the intent could have related to the intent to publish statements that happened to be false, rather than an intent to make false statements. The court stated: "A finding that CSSA intentionally published statements that happened to be false is not equivalent to a finding that CSSA acted dishonestly."

Finally, the court rejected Evanston's argument that the claims, based on intentional conduct, were uninsurable as a matter of law. Although Ohio law prohibits liability insurance from covering damages caused by intentional acts, that prohibition applies to acts "undertaken with intent to injure." The court concluded that the evidence did not support a finding that CSSA acted with intent to injure when it committed the unlawful acts at issue.

Washington Supreme Court Rules That Agent's Statement In Certificate Binds Insurer To Additional Insured Coverage, Notwithstanding Disclaimer That Certificate Cannot Expand Coverage

The Washington Supreme Court ruled that an insurer is bound by representations made by its authorized agent with respect to a party's additional insured status, even where the insurance certificate expressly stated that it does not expand coverage beyond the terms of the policy. *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, 2019 WL 5076647 (Wash. Oct. 10, 2019).

The dispute centered on whether T-Mobile was entitled to additional insured coverage for property damage 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. A Washington district court ruled in Selective's favor, finding that the certificate could not confer coverage as to T-Mobile. As discussed in our November 2018 Alert, the parties appealed, and the Ninth Circuit certified the following question to the Washington Supreme Court:

> 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?

The Washington Supreme Court answered the question in the affirmative. It explained that an insurance company is bound by the representations of its agents, and that T-Mobile's reliance on those representations was reasonable. The court further held that the certificate's disclaimers were ineffective because they were "general boilerplate," whereas the additional insured statements were specifically written into the certificate.

Notably, the court deemed it irrelevant that the representation was made in a certificate, which, under Washington law, is not a binding insurance policy. As the court explained, the case turns on whether an agent's representation (whether "via letter, email, certificate of insurance or something else") is binding on an insurer, not whether a certificate itself can confer policy rights.

Policy Construction Alert:

Seventh Circuit Rules That Breach Of Contract Exclusion Renders Coverage Illusory, Remands For Reformation Of Policy

The Seventh Circuit ruled that a breach of contract exclusion rendered errors and omissions coverage illusory and remanded the matter for reformation of the contract so as to meet the reasonable expectations of the insured. *Crum & Forster Specialty Ins. Co. v. DVO, Inc.*, 2019 WL 4594229 (7th Cir. Sept. 23, 2019).

DVO, a mechanical designer and builder, was sued for breach of contract based on its alleged failure to fulfill its mechanical and structural design duties. Crum & Forster initially agreed to defend DVO under a reservation of rights, but later denied coverage. The parties agreed that the policy's errors and omissions provision, which covers a failure to render professional services, encompassed the allegations against DVO. The parties also agreed that an endorsement that excludes coverage for claims "based upon or arising out of" breach of contract barred coverage for the underlying claims. The sole issue in dispute was whether the exclusionary language rendered coverage illusory.

A Wisconsin federal district court ruled that coverage was not illusory. It reasoned that while the exclusion barred professional claims brought by a party to the underlying contract, it would not exclude coverage for tort claims brought by third-parties based on DVO's duty of care as a designer and builder. The Seventh Circuit reversed.

The Seventh Circuit explained that under Wisconsin law, "arising out of" is broadly construed to include "any conduct that has at least some causal relationship between the injury and the event not covered, which sweeps in third-party claims as well when so related." Given the breadth of the exclusion and the "overlap between claims of professional malpractice and breach of contract," the court concluded that the exclusion rendered errors and omissions coverage illusory. Additionally, the court held that contract reformation must reflect the insured's reasonable expectations of coverage. The Seventh Circuit remanded the matter to the district court, noting that a possible outcome would be the elimination of the endorsement as to errors and omissions coverage, while allowing it to remain in effect as to other coverages.

Estoppel Alerts:

Insurer That Prevailed In Suit Brought By Plaintiff's Assignee Can Still Be Sued By Plaintiff, Says Michigan Court

A Michigan federal district court ruled that an injured party was not barred from suing an insurer by the doctrines of *res judicata* or collateral estoppel, notwithstanding that the insurer had prevailed in a suit brought by the assignee of the injured party. *Massengale v. State Farm Mutual Auto. Ins. Co.*, 2019 WL 4640307 (E.D. Mich. Sept. 24, 2019).

After allegedly sustaining injuries in a car accident, Massengale sought treatment from Spine Rehab. She assigned Spine Rehab her rights to collect no fault personal injury protection ("PIP") benefits for the treatments she received. Thereafter, Spine Rehab sued State Farm seeking payment for its chiropractic services. That action resulted in a finding of "no cause of action" in State Farm's favor. On the verdict form, the jury answered "no" to the question "Did [ ] Massengale sustain an accidental bodily injury?" Following the verdict, State Farm moved to dismiss a pending lawsuit initiated by Massengale. State Farm argued that Massengale's claims were barred by *res judicata* and collateral estoppel.

The court denied State Farm's summary judgment motion, ruling that the judgment against Spine Rebab did not have preclusive effect in Massengale's action. Under Michigan law, *res judicata* bars a subsequent action when (1) the first action was decided on the merits; (2) both actions involve the same parties or their privies; and (3) the matter in the second case was or could have been resolved in the first action.

The central issue before the court was whether Spine Rehab and Massengale were in privity. State Farm argued that the assignee relationship established "a clear substantial identity of interests, and a working functional relationship in which Massengale's interests were presented and protected by Spine Rehab," thereby satisfying the "privity" prong. The court disagreed, holding that an assignor/assignee relationship, standing alone, does not suffice to establish privity for *res judicata* purposes.

Further, the court explained that because Massengale assigned only a small portion of her benefits to Spine Rehab (her PIP benefits), there was no "substantial identity of interests" between them. More specifically, the court reasoned that at trial, Spine Rehab needed only to demonstrate a particular injury necessitating its chiropractic services in order to collect PIP benefits; it did not offer evidence relating to any other alleged injuries. Finally, the court noted that although State Farm may have fully litigated Massengale's medical history in defending the Spine Rehab suit, the proper inquiry is whether Massengale, as a non-party to that action, had a "full and fair opportunity to litigate" in the first action. The court held that she did not. Applying the same reasoning, the court ruled that collateral estoppel did not bar Massengale's suit against State Farm.

If Insured Demonstrates Prejudice, Insurer May Be Estopped From Denying Coverage Even Where Policy Does Not Cover Claim, Says Florida Appellate Court

A Florida appellate court ruled that an insured's affirmative defense of estoppel could give rise to coverage notwithstanding that the underlying claims alleged non-covered intentional acts. *Hurchalla v. Homeowners Choice Prop. & Cas. Ins. Co., Inc.*, 2019 WL 5198731 (Dist. Ct. App. Fla. Oct. 16, 2019).

An underlying suit against the insured alleged tortious interference with contract. The insurer initially defended under a reservation of rights, but subsequently sought a declaration that the policy did not cover the underlying "intentional acts." In her answer, the insured raised affirmative defenses of estoppel, waiver and laches, among other things. The underlying suit ultimately resulted in a substantial verdict against the insured. Thereafter, the insurer moved for summary judgment, arguing that the underlying verdict established intentional conduct, which was excluded by the policy. The insurer's summary judgment motion did not address the insured's affirmative defenses. A Florida trial court granted the insurer's summary judgment motion.

The appellate court reversed, finding that the trial court erred in dismissing the case without addressing the insured's affirmative defenses. The appellate court explained that under Florida precedent, an insurer may be estopped from denying coverage, even where the policy does not cover the underlying claim, if the insured has been prejudiced by the insurer's assumption of the defense. Therefore, the court explained, the insured's affirmative defense of estoppel, which was legally sufficient and had not been negated, should not have been dismissed. The court remanded the matter for a determination as to the sufficiency of the insured's affirmative defenses.

STB News Alerts

Mary Beth Forshaw spoke at the 2019 ARIAS U.S. Fall Conference on October 4 in New York. Her panel, "Bench and Jury Trials, ARIAS and Other Arbitral Forums – What We Can Learn from Each Other," discussed differing considerations in trying cases before judges, juries and arbitrators, among other topics.

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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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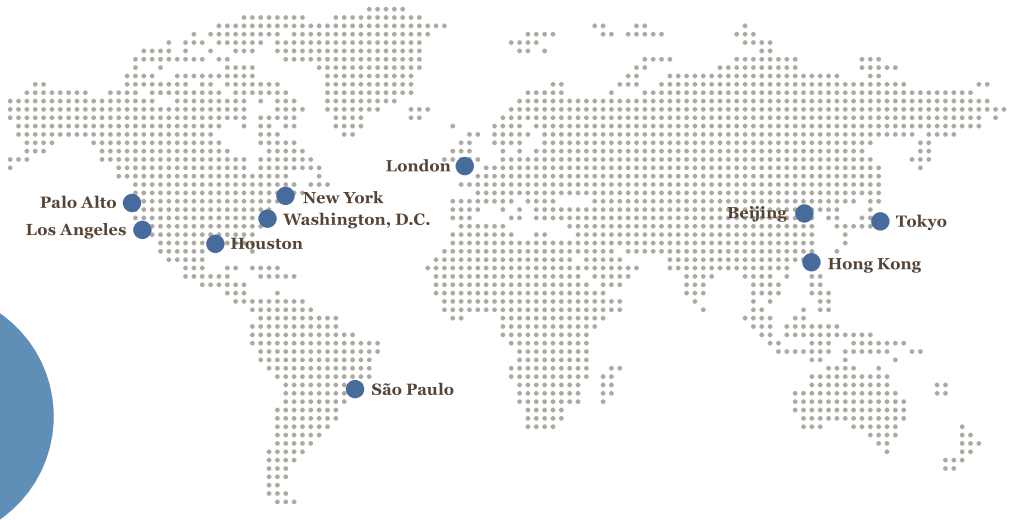

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