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Insurance Law Alert

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"I square off against them often, and they never fail to impress me with their subject matter expertise and litigation talent."

–Benchmark Litigation 2016, quoting a practice area peer

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The Texas Supreme Court ruled that loss-of-use damages are allowed in total destruction property cases, and are not limited to partial destruction cases. *J&D Towing, LLC v. Am. Alt. Ins. Corp.*, 2016 WL 91201 (Tex. Jan. 8, 2016). (click here for full article)

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The Supreme Court of Arkansas ruled that state law prohibits including the depreciation of labor costs in calculating the actual cash value of a covered loss even where a policy provision expressly allows for such depreciation. *Shelter Mut. Ins. Co. v. Goodner*, 2015 WL 8482788 (Ark. Dec. 10, 2015). (click here for full article)

Eighth Circuit Enforces Policies' Anti-Stacking Provisions

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Montana Supreme Court Rules That General Aggregate Limits Provision in Excess Policy Is Ambiguous

The Montana Supreme Court ruled that a general aggregate limit provision is ambiguous and therefore should be construed as providing an additional $4 million in coverage. *Westchester Surplus Lines Ins. Co. v. Keller Transp., Inc.*, 2016 WL 154989 (Mont. Jan. 12, 2016). (click here for full article)

Fourth Circuit Rules That "Interrelated Wrongful Acts" Provision Bars Coverage

The Fourth Circuit ruled that a liability insurer had no duty to defend or indemnify an underlying lawsuit because, based on the policy's "interrelated wrongful acts" provision, the original claim against the policyholder was made prior to the inception of the policy. *W.C. & A.N. Miller Dev. Co. v. Cont'l Cas. Co.*, 2015 WL 9487938 (4th Cir. Dec. 30, 2015). (click here for full article)

Statutory Violation Exclusion Does Not Bar Coverage For Claims Alleging Violation of Genetic Privacy Act, Says Texas Court

A Texas federal district court ruled that an insurer was obligated to defend and indemnify a suit alleging a violation of the Alaska Genetic Privacy Act notwithstanding a statutory violation exclusion in the applicable policies. *Evanston Ins. Co. v. Gene By Gene, Ltd.*, 2016 WL 102294 (S.D. Tex. Jan. 6, 2016). (click here for full article)

Disclaimer Alert:

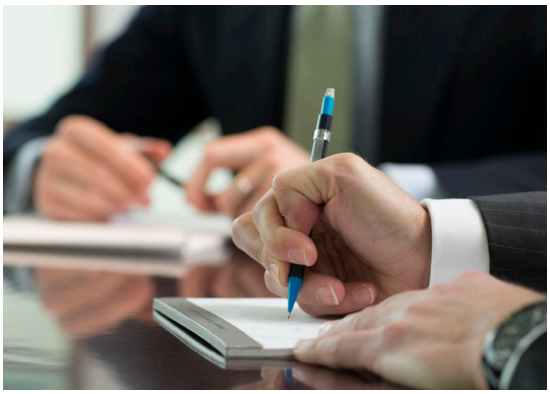
Insurer's Untimely Disclaimer Does Not Preclude Denial of Coverage, Says New York Appellate Court

A New York appellate court ruled that an insurer's untimely disclaimer did not preclude it from denying coverage where the denial was based on "a lack of coverage in the first instance" rather than a policy exclusion. *Black Bull Contracting, LLC v. Indian Harbor Ins. Co.*, 2016 WL 39829 (N.Y. App. Div. 1st Dep't Jan. 5, 2016).

Indian Harbor insured Black Bull Contracting under a general liability policy. When Black Bull was sued in a personal injury action, it tendered defense of the suit to Indian Harbor. More than two months after receiving the notice of claim, Indian Harbor disclaimed coverage on the basis that the underlying claims were not within the scope of policy coverage. Black Bull sued, seeking a declaration that Indian Harbor was obligated to defend and indemnify the personal injury suit. A New York trial court disagreed and dismissed the complaint. The appellate court affirmed.

The appellate court noted that Indian Harbor's disclaimers would have been untimely as a matter of law "had they been subject to the timeliness requirement of Insurance Law §3420(d)(2)." The court explained that Section 3420 precludes an insurer who issues an untimely disclaimer from denying coverage based on a policy exclusion. Where, as here, the disclaimer is based on "a lack of coverage in the first instance," untimeliness does not preclude a coverage denial. As the court explained, requiring payment of a claim under such circumstances "would create coverage where it never existed."

Black Bull clarifies that Insurance Law §3420 should be read less expansively than policyholders often suggest. The provision does not bar insurers from asserting that claims do not fall within a policy's coverage grant, even when disclaimers are not timely issued.



Defense Alert:

Insurer Entitled to Recoup Defense Costs Pursuant to Restitution Doctrine, Says Ohio Appellate Court

An Ohio appellate court ruled that an insurer was entitled to recoup defense costs following a ruling that it had no duty to defend the underlying suit. *Chiquita Brands Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2015 WL 9594035 (Ohio App. Ct. Dec. 30, 2015).

Numerous tort claims were filed against Chiquita based on its alleged funding of Colombian terrorist groups. National Union refused to defend the claims until it was ordered to do so by an Ohio trial court. With each defense cost payment, National Union reserved its right to seek reimbursement of the payments upon resolution of outstanding coverage issues. Ultimately, an Ohio appellate court found that National Union had no duty to defend because the underlying suits did not allege covered "occurrences" in the territories defined by the policies. Thereafter, National Union sought reimbursement of the defense payments. An Ohio trial court ruled in the insurer's favor, concluding that it was entitled to recoup payments based on an implied-in-fact contractual right to reimbursement. The appellate court affirmed the judgment of the trial court.

The appellate court ruled that National Union was entitled to recover the defense costs under the principle of restitution. Although the policies were silent as to reimbursement of defense costs upon a judicial determination that there was no duty to defend, the court explained that restitution was appropriate as "a means to enforce adherence to a

contract through ordering repayment of a sum to which the recipient was never entitled under the contract's terms." Separately, the appellate court rejected reimbursement based on an implied-in-fact theory, explaining that Chiquita's "acceptance of defense-cost payments was clearly premised on its position that the payments were due under the terms of the policies, and not on an 'acceptance' of the terms contained in National Union's accompanying letters."

The court emphasized that its holding was "a narrow one," based on the following particular facts of this case: that Chiquita demanded a defense; that National Union did not provide a defense until after it was required to do so by a court, and that it did so under a reservation of rights including the right to seek reimbursement; and that an appellate court subsequently determined that a duty to defend never existed.

Excess Coverage Alert:

Illinois Appellate Court Rules That Municipality Must Exhaust Publicly-Funded Self-Insurance Before Accessing Umbrella Coverage

An Illinois appellate court ruled that umbrella coverage was excess to pooled self-insurance and therefore that umbrella coverage did not apply until underlying self-insurance limits had been exhausted. *Ill. Mun. League Risk Mgmt. Assoc. v. State Farm Fire & Cas. Co.*, 2015 WL 9393506 (Ill. App. Ct. Dec. 22, 2015).

The Village of Lynwood belongs to the Illinois Municipal League Risk Management Association, a municipal risk-pooling organization. When a car owned by the municipality and driven by a municipal employee was involved in an accident, the Association defended and ultimately settled the suit. Thereafter, the Association, as subrogee for the municipality and employee, sued State Farm, seeking coverage under an umbrella policy issued to the employee. State Farm refused to contribute, citing an "other insurance" clause that made its coverage "excess over all other insurance and self-insurance." An Illinois trial court ruled in favor of State Farm, finding that the Association was obligated to provide indemnity up to its contract limit of $8 million. Because the underlying suit was settled for approximately $5.8 million, the court concluded that State Farm had no duty to contribute to the settlement. The appellate court affirmed.

The appellate court ruled that although the Association's contract was not technically an insurance policy (it was an arrangement of publicly-funded pooled self-insurance among municipalities), it nonetheless qualified as underlying "insurance" for the purposes of enforcing the "other insurance" clause in State Farm's umbrella policy. In so ruling, the court rejected the argument that self-insurance should be limited to privately-funded risk pools. The court stated, "We see no grounds to limit the reach of the other insurance clause in the manner the Association suggests. We construe the umbrella policy to provide insurance coverage only when the loss exceeded available limits of insurance and self-insurance, including pooled self-insurance."

Pollution Exclusion Alert:

Vermont Supreme Court Rules That Pollution Exclusion Is Not Limited To Traditional Environmental Contamination

Our April 2015 Alert reported on a Vermont Supreme Court decision holding that an absolute pollution exclusion bars coverage for injuries caused by spray foam insulation fumes. *Cincinnati Specialty Underwriters Ins. Co. v. Energy Wise Homes, Inc.*, 2015 WL 1524206 (Vt. Apr. 3, 2015). There, the Vermont Supreme Court rejected the trial court's holding that the exclusion applies only to traditional environmental hazards. However, the Vermont Supreme Court expressly limited its ruling to the particular surplus lines policy at issue, noting that the exclusionary language was broader than standard form pollution exclusions and that Vermont regulations required in-state general liability insurers to provide pollution coverage in most cases. Last month, the Vermont

Supreme Court squarely addressed the issue left open in *Cincinnati* – namely, whether a standard form pollution exclusion bars coverage for claims arising out of pesticide spray inside a home. The court held that it did.

In *Whitney v. Vt. Mut. Ins. Co.*, 2015 WL 8540432 (Vt. Dec. 11, 2015), the Vermont Supreme Court reversed a lower court decision on interlocutory appeal and held that a standard form pollution exclusion in a homeowner's policy unambiguously applies to claims arising from interior residential pesticide application. The court explicitly rejected the argument that pollution exclusions should be "presumed, as a class, to be ambiguous or to be limited in their application to traditional environmental pollution." Rather, under the "plain, ordinary and popular meaning," the exclusion applies to the spraying of toxic chemicals inside a home.

In another ruling issued last month, the Fifth Circuit reached the same conclusion, holding that under Texas law, a pollution exclusion bars coverage for personal injury claims based on the installation of foam spray insulation inside a home. *Evanston Ins. Co. v. Lapolla Indus., Inc.*, 2015 WL 9460301 (5th Cir. Dec. 23, 2015).

Property Insurance Alerts:

Texas Supreme Court Rules That Loss-of-Use Damages Are Permitted in Total Destruction Property Cases

Clarifying unsettled Texas law, the Texas Supreme Court ruled that loss-of-use damages are allowed in total destruction property cases, and are not limited to partial destruction cases. *J&D Towing, LLC v. Am. Alt. Ins. Corp.*, 2016 WL 91201 (Tex. Jan. 8, 2016).

The coverage dispute arose out of a car accident, which resulted in the total destruction of a tow truck. The tow truck company settled with the insurer of the other driver for the loss of the truck, and then sought loss-of-use damages from American Alternative Insurance Company under an underinsured-motorist policy. American denied the claim on the ground that Texas law does not permit recovery of loss-of-use damages in total destruction cases. In ensuing litigation, a jury awarded the towing company loss-of-use damages. American appealed, arguing that the trial court erred in allowing the loss-of-use damages issue to be submitted to a jury. The appellate court agreed and reversed the trial court, ruling that Texas law allows recovery of loss-of-use damages only in partial destruction property cases. The Texas Supreme Court reversed.

The Texas Supreme Court ruled that "the owner of personal property that has been totally destroyed may recover loss-of-use damages in addition to the fair market value of the property immediately before the injury." The court reasoned that the distinction between partial destruction cases and total destruction cases "is not only illogical but is also against the great weight of jurisdictions that have eliminated that archaic distinction." In addition, the court held that loss-of-use damages "*must* be available in total destruction cases pursuant to the principle of full and fair compensation."

Significantly, the court cautioned that loss-of-use damages must be "foreseeable and directly traceable to the tortious act" rather than speculative. "Although mathematical exactness is not required, the evidence offered must rise above the level of pure conjecture. Moreover, the damages may not be awarded for an unreasonably long period of lost use."

Arkansas Supreme Court Rules That "Actual Cash Value" Provision Violates State Law

In a plurality decision, the Supreme Court of Arkansas ruled that state law prohibits including the depreciation of labor costs in calculating the actual cash value of a covered loss even where a policy provision expressly allows for such depreciation. *Shelter Mut. Ins. Co. v. Goodner*, 2015 WL 8482788 (Ark. Dec. 10, 2015).

The property policy at issue provided that, in the event of a covered loss, the insurer would pay the actual cash value of damaged property. Actual cash value is defined as "total restoration cost less depreciation." The policy defines depreciation as "the amount by which any part of the covered property

. . . has decreased in value since it was new," and explicitly provides that "[w]hen calculating depreciation, we will include the depreciation of the materials, [and] the labor . . . ." In accordance with this provision, the insurer issued payment to the homeowners that reflected total restoration costs, less the policy deductible and a deduction for the depreciation of material and labor costs. The homeowners filed suit seeking a declaration that the depreciation clause violated public policy. A trial court agreed and granted the homeowners' summary judgment motion. The Supreme Court affirmed.

In finding the policy provision unenforceable as against state law, the court relied solely on a prior decision in which the term "actual cash value" was undefined and thus deemed ambiguous. *Adams v. Cameron Mut. Ins. Co.*, 430 S.W.3d 675 (Ark. 2013). Notwithstanding this significant distinction, the *Shelter Mutual* court ruled that *Adams* was controlling state law that prohibited the depreciation of labor costs in calculating actual cash value.

As the dissent noted, the plurality's reliance on *Adams* is curious because there, the court answered a certified question that addressed whether labor cost depreciation could be included in actual cash value calculation *when the term is undefined* and therefore deemed ambiguous, which was not the case here. The dissent also took issue with the trial court's conclusion that allowing for the depreciation of labor costs violated public policy, noting that "there is no statute on the depreciation of labor" nor any interference with public welfare that would warrant "the unprecedented step of creating public policy in the absence of legislation."

Aggregate Limits Alerts:

Eighth Circuit Enforces Policies' Anti-Stacking Provisions

The Eighth Circuit ruled that anti-stacking provisions in two insurance policies were unambiguous and should be enforced as written. *Gohagan v. Cincinnati Ins. Co.*, 2016 WL 66944 (8th Cir. Jan. 6, 2016).

Cincinnati Insurance issued a general liability policy and a business owners policy to Thomas Campbell. Each policy had a $1,000,000 per-occurrence limit. Both policies contained anti-stacking clauses that provided that "the aggregate maximum limit of insurance" under all policies "shall not exceed the highest available limit of insurance" under any one policy. Campbell sought coverage under both polices after settling an underlying personal injury dispute. Cincinnati contributed $1,000,000 under the general liability policy, but argued that the business owners policy did not cover the underlying claims, and that in any event, under both policies' anti-stacking provisions, coverage was limited to a single $1,000,000 per-occurrence limit. A Missouri federal district court agreed and ruled in favor of Cincinnati. The Eighth Circuit affirmed.

The Eighth Circuit concluded that this language unambiguously limited coverage for the underlying settlement to a single policy-limit. The court rejected the argument that the provisions were ambiguous because they did not define the phrase "aggregate maximum limit." Similarly, the court rejected the argument that the policies' "other insurance" clauses created ambiguity as to the stacking issue, explaining that other insurance provisions apply only where coverage is provided by policies issued by more than one insurer, which was not the case here.

Montana Supreme Court Rules That General Aggregate Limits Provision in Excess Policy Is Ambiguous

The Montana Supreme Court ruled that a general aggregate limit provision is ambiguous and therefore should be construed as providing an additional $4 million in coverage. *Westchester Surplus Lines Ins.*

Co. v. Keller Transp., Inc., 2016 WL 154989 (Mont. Jan. 12, 2016).

The coverage dispute arose out of a highway accident that resulted in a gasoline spill. The policyholders were insured under a commercial transportation policy issued by Carolina Casualty. The policy provided two distinct coverages: commercial automobile and commercial general liability. Each was subject to a $1 million per occurrence/accident limit, and the general liability coverage was additionally subject to a $2 million "general aggregate." The policyholders were also insured under an excess policy issued by Westchester, which followed form to the Carolina policy except where otherwise stated. The Westchester policy limited coverage to $4 million per occurrence with a $4 million "general aggregate" limit. The term "general aggregate" was undefined.

After the accident, Carolina Casualty made payments that exhausted the $1 million automobile coverage limit. Thereafter, Westchester undertook defense of the matter until it had paid $4 million in clean-up and litigation costs, at which time it referred the matter back to Carolina Casualty. Carolina Casualty sought a declaration as to the insurers' defense and indemnity obligations. A Montana trial court ruled, among other things, that the policyholders were entitled to an additional $4 million under Westchester's excess policy. The trial court reasoned that "general aggregate" was ambiguous and could be read as establishing an aggregate limit for excess payments for each type of coverage in the underlying policy (auto and general liability), rather than an aggregate limit for the entire policy. The Montana Supreme Court affirmed.

The Montana Supreme Court ruled that under the factual circumstances presented, the general aggregate limit provision was ambiguous. The court explained that "the fundamental interpretational problem is caused by Westchester's failure to define the term 'general aggregate' in a policy that provides excess coverage for an underlying policy with more than one coverage and more than one stated limit." In this respect, the court suggested that ambiguity would not be found where the term was defined or where the underlying policy provided only a single type of coverage.

Coverage Alerts:

Fourth Circuit Rules That "Interrelated Wrongful Acts" Provision Bars Coverage

The Fourth Circuit ruled that a liability insurer had no duty to defend or indemnify an underlying lawsuit because, based on the policy's "interrelated wrongful acts" provision, the original claim against the policyholder was made prior to the inception of the policy. *W.C. & A.N. Miller Dev. Co. v. Cont'l Cas. Co.*, 2015 WL 9487938 (4th Cir. Dec. 30, 2015).

In 2006, several entities and employees affiliated with Miller Development were sued over a contract dispute. In 2010, Miller obtained liability insurance from Continental Casualty. Shortly thereafter, Miller was sued in a fraudulent conveyance action, seeking recovery on the judgment entered in the 2006 lawsuit. Miller tendered the suit to Continental, which refused to defend based on an "interrelated wrongful acts" provision. A Maryland federal district court agreed, finding that the 2010 lawsuit alleged interrelated wrongful conduct with the allegations in the 2006 lawsuit and thus that a "claim" was originally made prior to the inception of the 2010 policy. The Fourth Circuit affirmed.

The policy provided that "[m]ore than one Claim involving the same Wrongful Act or Interrelated Wrongful Acts shall be considered as one Claim which shall be deemed made on . . . the date on which the earliest such Claim was first made." The policy further specified that "interrelated wrongful acts" are any acts which are "logically or causally connected by reason of any common fact, circumstance, situation, transaction or event." Noting the "expansive" definition of "interrelated wrongful acts," the court concluded that the conduct alleged in the 2006 and 2010 lawsuits shared a "common nexus of fact." In particular, the court noted that both suits arose out of the same land development project, the same operative contract, common circumstances and "a multitude of common facts." The court therefore held that the claims alleged interrelated wrongful acts that must be deemed "first made" in 2006, outside the scope of Continental's policy period.

Statutory Violation Exclusion Does Not Bar Coverage For Claims Alleging Violation of Genetic Privacy Act, Says Texas Court

Courts routinely enforce statutory violation exclusions to bar coverage for underlying claims alleging violations of state or federal statutes. Moreover, as reported in previous Alerts, courts have also applied statutory violation exclusions to bar coverage for non-statutory claims if those claims arise out of statutory violations. See December and January 2015 Alerts; April and May 2014 Alerts. However, in a recent decision, a Texas federal district court departed from this trend, ruling that an insurer was obligated to defend and indemnify a suit alleging a violation of the Alaska Genetic Privacy Act notwithstanding a statutory violation exclusion in the applicable policies. *Evanston Ins. Co. v. Gene By Gene, Ltd.*, 2016 WL 102294 (S.D. Tex. Jan. 6, 2016).

A class action suit against Gene by Gene, a genealogy website, alleged that the company violated the Alaska Genetic Privacy Act by improperly publishing clients' DNA results without their consent. Evanston Insurance refused to defend the suit based on an exclusion entitled "Electronic Data and Distribution of Material in Violation of Statutes," which precludes coverage for a claim based upon or arising out of any violation of (a) the Telephone Consumer Protection Act, (b) CAN-SPAM, or "(c) any other statute, law, rule, ordinance or regulation that prohibits or limits the sending, transmitting, communication or distribution of information or other material." Evanston argued that the underlying claim fell squarely within section (c) of the exclusion because the Alaska Genetic Privacy Act prohibits the public disclosure of a person's DNA analysis. The court disagreed and ruled in favor of Gene by Gene.

The court applied the doctrine of *ejusdem generis* to find that section (c) of the exclusion did not apply to alleged violations of the Alaska Genetic Privacy Act. *Ejusdem generis* provides that "where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." The court reasoned that because sections (a) and (b) of the exclusion (relating to TCPA and CAN-SPAM violations) regulate the use of unsolicited communications (via telephone/facsimile and email, respectively), section (c) should likewise be interpreted to refer to "other forms of unsolicited communication to consumers 'that intrude[ ] into one's seclusion.'" The court therefore concluded that an alleged violation of Alaska's Genetic Privacy Act is outside the scope of the exclusion because it "does not concern unsolicited communication to consumers, but instead regulates the disclosure of a person's DNA analysis."

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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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