Simpson Thacher

Insurance Law Alert

January 2017

In This Issue

Sixth Circuit Predicts That Michigan Supreme Court Would Adopt Pro Rata Allocation Of Defense And Indemnity Costs

The Sixth Circuit ruled that an insurer has no obligation to pay more than its pro rata share of both defense and indemnity for asbestos-related claims, and that an insurer is entitled to reimbursement from the policyholder for any over-payments. *Cont'l. Cas. Co. v. Indian Head Indus., Inc.*, 2016 WL 7321362 (6th Cir. Dec. 16, 2016). (Click here for full article)

"They are just exceptional at what they do, they know coverage law backwards and forwards and they are excellent litigators."

***–Chambers 2016,* quoting a client**

Florida Statute Does Not Require Insurer To Pay Pre-Tender Defense Costs, Says Eleventh Circuit

The Eleventh Circuit ruled that an insurer has no obligation to reimburse the policyholder for pre-tender defense costs, holding that the insurer was not estopped from denying payment based on its failure to comply with a state statute relating to notice of coverage defenses. *EmbroidMe.com, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2017 WL 74694 (11th Cir. Jan. 9, 2017). (Click here for full article)

New York Appellate Court Affirms Dismissal Of LifeLock's Coverage Claims

A New York appellate court ruled that policy exclusions barred coverage for claims alleging deceptive practices and misleading advertising. *LifeLock, Inc. v. Certain Underwriters at Lloyd's*, 2017 WL 161045 (N.Y. App. Div. Jan. 17, 2017). (Click here for full article)

Ohio Appellate Court Addresses Scope Of Coverage For Asbestos Claims

An Ohio appellate court ruled that: (1) each exposure to asbestos constitutes a separate occurrence; (2) the limits of three-year policies apply annually; and (3) "stub" policies are subject to a single aggregate limit. *The William Powell Co. v. OneBeacon Ins. Co.*, 2016 WL 7231786 (Ohio Ct. App. Dec. 14, 2016). (Click here for full article)

Claims-In-Process Exclusion Bars Coverage For Damage That Pre-Dates Insured's Purchase Of Site, Says Indiana Court

An Indiana federal district court ruled that a claims-in-process exclusion bars coverage for property damage caused by contamination that began prior to the policyholder's ownership of land, even if the owners had no knowledge of the pollution. *Atl. Cas. Ins. Co. v. Garcia*, 2017 WL 67617 (N.D. Ind. Jan. 5, 2017). (Click here for full article)

Nebraska Supreme Court Rules That Post-Loss Assignment Is Valid Notwithstanding Lack Of Insurer Consent

The Nebraska Supreme Court ruled that a post-loss assignment of a claim under a homeowner's policy is valid notwithstanding a lack of insurer consent. *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 295 Neb. 419 (Neb. 2016). (Click here for full article)

Ninth Circuit Rules That Insured vs. Insured Exclusion Unambiguously Bars FDIC Claims

The Ninth Circuit ruled that an insured vs. insured exclusion squarely barred coverage for claims brought by the Federal Deposit Insurance Corporation in its capacity as receiver. *Fed. Deposit Ins. Corp. v. BancInsure, Inc.*, 2017 WL 83489 (9th Cir. Jan. 10, 2017). (Click here for full article)

California Court Dismisses Flood Claims As Time-Barred, Rejecting Tolling Argument

A California federal district court dismissed flood-related property damage claims based on the homeowner's failure to comply with the federal jurisdictional requirements of the National Flood Insurance Program. *Apatow v. Am. Bankers Ins. Co. of Florida*, 2016 WL 7422288 (C.D. Cal. Dec. 21, 2016). (Click here for full article)

Massachusetts Appellate Court Reinstates Negligence Claims Against Insurance Agency Based On Misuse Of Personal Customer Information

A Massachusetts appellate court ruled that an insurance agency was not entitled to summary judgment on negligence claims arising out of an employee's misuse of personal customer information. *Adams v. Cong. Auto Ins. Agency, Inc.*, 65 N.E.3d 1229 (Mass. App. Ct. 2016). (Click here for full article)

Citing Insufficient Allegations, Second Circuit Affirms Dismissal Of False Claims Act Suit

The Second Circuit affirmed a New York federal district court decision dismissing a False Claims Act suit against insurers and other entities. *Takemoto v. Nationwide Mut. Ins. Co.*, 2017 WL 214572 (2d Cir. Jan. 18, 2017). (Click here for full article)

Interlocutory Review For Remand Orders In CAFA Cases Is Limited To Diversity Issues, Says Ninth Circuit

The Ninth Circuit ruled that the interlocutory review provision in the Class Action Fairness Act is limited to orders granting or denying remand based on diversity, and does not extend to remand orders based on federal question jurisdiction. *Chan Healthcare Grp., PS v. Liberty Mut. Fire Ins. Co.*, 844 F.3d 1133 (9th Cir. 2017). (Click here for full article)

New York Enacts Regulation Prohibiting Insurers From Refusing To Issue Commercial Crime Policies Based On Employee's Criminal Record

The New York State Department of Financial Services has enacted a regulation that prohibits insurers from refusing to issue commercial crime policies to companies based on their employment of individuals with criminal records. N.Y. Comp. Codes R. & Regs. tit. 11, §76. (Click here for full article)

New York Financial Services Regulator Revises Proposed Cybersecurity Regulations Affecting Insurers

The New York State Department of Financial Services issued revised regulations requiring insurers and other entities to implement stringent measures to protect against data breaches and other cyberattacks. N.Y. Comp. Codes R. & Regs. tit. 23, §500. (Click here for full article)

Allocation Alert:

Sixth Circuit Predicts That Michigan Supreme Court Would Adopt Pro Rata Allocation Of Defense And Indemnity Costs

The Sixth Circuit ruled that an insurer has no obligation to pay more than its pro rata share of both defense and indemnity for asbestos-related claims, and that an insurer is entitled to reimbursement from the policyholder for any over-payments. *Cont'l. Cas. Co. v. Indian Head Indus., Inc.*, 2016 WL 7321362 (6th Cir. Dec. 16, 2016).

Continental sought a declaration that it was obligated to pay only its pro rata share of defense and indemnity for asbestos claims against Indian Head. A Michigan federal district court agreed, ordering allocation based on Continental's time on the risk. The Sixth Circuit affirmed.

Although the Michigan Supreme Court has not directly addressed the issue, the Sixth Circuit concluded that Michigan law would reject "all sums" allocation where, as here, policy language limits coverage to bodily injury "during the policy period." The court distinguished a Michigan appellate court decision applying all sums, explaining that the policy in that case expressly covered injuries continuing after termination of the policy. The court further held that pro rata allocation was appropriate for previously-incurred defense costs, rejecting Indian Head's argument that the duty to defend is incompatible with pro rata allocation. Although the Sixth Circuit has previously rejected pro rata allocation of defense costs, that case involved future, unknown defense costs that were "not easily apportioned."

The court also ruled that Indian Head was responsible for its own damages and defense costs for the post-1987 period in which it had no insurance. Although Michigan law recognizes an exception to holding a policyholder liable for its own damages when insurance is not available in the marketplace, the court ruled that Indian Head failed to demonstrate that insurance was unavailable after 1987. Finally, the court ruled that Continental was entitled to reimbursement of excess insurance payments, notwithstanding the lack of a policy provision addressing reimbursement. The Sixth Circuit predicted that the Michigan Supreme Court would allow reimbursement under an implied-in-fact or implied-in-contract basis where, as here, the insurer expressly and timely reserved its right to reimbursement for uncovered claims.

Defense Costs Alert:

Florida Statute Does Not Require Insurer To Pay Pre-Tender Defense Costs, Says Eleventh Circuit

The Eleventh Circuit ruled that an insurer has no obligation to reimburse the policyholder for pre-tender defense costs, holding that the insurer was not estopped from denying payment based on its failure to comply with a state statute relating to notice of coverage defenses. *EmbroidMe.com, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2017 WL 74694 (11th Cir. Jan. 9, 2017).

EmbroidMe, a promotional products franchise, was sued for copyright infringement. It retained defense counsel without notifying Travelers, its liability insurer. Nearly eighteen months after a complaint was filed, EmbroidMe tendered the claim to Travelers. At that point, EmbroidMe had paid more than $400,000 in attorneys' fees. Travelers agreed to defend under a reservation of rights, but refused to reimburse EmbroidMe for pre-tender defense costs. In ensuing litigation, EmbroidMe alleged breach of contract based on Travelers' refusal to pay the pre-tender defense costs. EmbroidMe acknowledged that the policy expressly required consent from Travelers before incurring costs, but argued that Travelers was estopped from denying payment based

on its failure to comply with Florida's Claims Administration Statute ("CAS"), Fla. Stat. §627.426 (1983), which requires a liability insurer to notify its insured within 30 days of any defense it intends to assert in support of a coverage denial. EmbroidMe argued that Travelers was estopped from denying payment for defense costs because it did not notify EmbroidMe of its refusal to pay until 42 days after tender. A Florida district court disagreed and ruled in Travelers' favor. The Eleventh Circuit affirmed.

Addressing this matter of first impression, the Eleventh Circuit reasoned that Travelers' refusal to reimburse expenses to which it had not consented did not constitute a coverage defense and therefore, the CAS did not apply. The court explained that Travelers' denial was based on an exclusion, because the policy expressly excluded expenses incurred without insurer consent. This distinction between a coverage defense and an exclusion is significant, because the CAS applies to coverage defenses but not exclusions. The court stated: "the CAS cannot resurrect coverage that has been explicitly excluded and because the provision here constitutes such an exclusion … EmbroidMe is not entitled to reimbursement of legal expenses that it incurred without the permission of Travelers."

Coverage Alerts:

New York Appellate Court Affirms Dismissal Of LifeLock's Coverage Claims

Our November 2015 Alert discussed a New York Supreme Court decision dismissing LifeLock's coverage suit against its insurer. The trial court ruled that policy exclusions barred coverage for claims alleging deceptive practices and misleading advertising. *LifeLock, Inc. v. Certain Underwriters at Lloyd's, London*, No. 651577/2015 (N.Y. Sup. Ct. N.Y. Cnty. Nov. 19, 2015). This month, the Appellate Division affirmed the ruling. *LifeLock, Inc. v. Certain Underwriters at Lloyd's*, 2017 WL 161045 (N.Y. App. Div. Jan. 17, 2017).

Several class action suits were filed against LifeLock alleging that it engaged in fraudulent and deceptive activities to induce customers to purchase its services. LifeLock sought coverage from Certain Underwriters at Lloyd's London, which the insurer denied. Underwriters argued that coverage was barred by Exclusion L, which precluded coverage for claims "[a]rising out of any related or continuing acts, errors [or] omissions … where the first such act, error or omission … was committed or occurred prior to the Retroactive Date." Underwriters argued that the underlying claims alleged a pattern of false and misleading advertising since 2005, more than three years before the Retroactive Date of January 8, 2008. In addition, Underwriters argued that coverage was barred pursuant to Exclusion I, which precluded coverage for claims "arising out of or resulting from … unfair competition … false, deceptive or unfair trade practices, or false or deceptive or misleading advertising."

The trial court agreed with Underwriters and dismissed the suit. The Appellate Division, First Department, unanimously affirmed, with costs. Underwriters are represented by Simpson Thacher attorneys Bryce Friedman and Summer Craig.

Ohio Appellate Court Addresses Scope Of Coverage For Asbestos Claims

An Ohio appellate court ruled that: (1) each exposure to asbestos constitutes a separate occurrence; (2) the limits of three-year policies apply annually; and (3) "stub" policies are subject to a single aggregate limit. *The William Powell Co. v. OneBeacon Ins. Co.*, 2016 WL 7231786 (Ohio Ct. App. Dec. 14, 2016).

OneBeacon issued primary and excess policies to Powell. Powell filed a declaratory judgment action seeking a ruling as to several policy construction issues that affected OneBeacon's duty to defend and indemnify asbestos claims against Powell. An Ohio appellate court ruled as follows:

Number of Occurrences: Applying a "triggering-event" theory, the appellate court ruled that each exposure to asbestos constitutes a separate occurrence. The court explained that where numerous asbestos claims span many years and occur at different locations under different circumstances, a causation theory is inapplicable and the number of occurrences is determined by the "triggering event." The court concluded

that the triggering event was each exposure to asbestos, not the more remote cause of the manufacturing of asbestos-containing products. In so ruling, the court explained that a deemer clause (providing that "all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered arising out of one occurrence") did not apply because the exposures did not arise out of "the same general conditions."

Annualization: The court held that certain three-year policies were ambiguous as to aggregate limits and therefore should be construed as providing annual limits. OneBeacon argued that a single aggregate limit is supported by policy language referring to the "total limit" (together with the absence of annualization language). Rejecting this argument, the court held that because the policies were incomplete, the term "aggregate" is ambiguous and must be interpreted with the assistance of extrinsic evidence. Relying on the parties' course of conduct, insurance industry norms and premium amounts, the court concluded that the policies should be read to have annual aggregate limits.

Stub Periods: The court ruled that a single aggregate limit applied to two "stub" policies that covered periods of thirteen and fourteen months, respectively. Policy language provided that "if this policy is issued for a period of three years, the limits of the company liability shall apply separately to each consecutive annual period thereof." With respect to the stub policies at issue, the court explained that Powell was not entitled to annual limits because there were no consecutive annual periods.

Claims-In-Process Exclusion Bars Coverage For Damage That Pre-Dates Insured's Purchase Of Site, Says Indiana Court

An Indiana federal district court ruled that a claims-in-process exclusion bars coverage for property damage caused by contamination that began prior to the policyholder's ownership of land, even if the owners had no knowledge of the pollution. *Atl. Cas. Ins. Co. v. Garcia*, 2017 WL 67617 (N.D. Ind. Jan. 5, 2017).

In 2004, the Garcias purchased property that had previously been the site of a dry cleaning facility. The site housed underground storage tanks containing a toxic solvent. In or around 1999, a site assessment revealed that some tanks were leaking. Testing continued through 2004, but the Garcias were unaware of the contamination or testing until 2014, when the Indiana Department of Environmental Management filed a claim seeking payment for further investigation and remediation. The Garcias sought coverage from Atlantic, their general liability insurer, which denied the claim. Atlantic argued, among other things, that a claims-in-process exclusion barred coverage. The court agreed and granted Atlantic's summary judgment motion.

The exclusion applies to any "loss or claim for damages, whether known or unknown, that (a) first occurred before the policy's inception date, or (b) is alleged to be in the process of occurring as of the policy's inception date … ." Although the Garcias did not dispute that the pollution predated the inception of the Atlantic policy, they argued that the relevant "loss" or "claim for damages" is the Department of Environmental Management's claim, which was filed during the policy period. They also claimed that the exclusion did not apply because they did not begin incurring expenses related to the claim until they entered a remediation program, which was after the policy's inception. The court disagreed, explaining that the Garcias' position incorrectly interprets the exclusion as barring coverage for "claims or expenses" predating the policy, and that "the relevant question is when the *damage* occurred or began occurring." (Emphasis in original). Finally, the court rejected the Garcias' argument that the claims-in-process exclusion merely limits Atlantic's obligations to damages that occurred during the policy period (*i.e.,* its pro rata share).

Assignment Alert:

Nebraska Supreme Court Rules That Post-Loss Assignment Is Valid Notwithstanding Lack Of Insurer Consent

The Nebraska Supreme Court ruled that a post-loss assignment of a claim under a homeowner's policy is valid notwithstanding a lack of insurer consent. *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 295 Neb. 419 (Neb. 2016).

A homeowner retained Millard Gutter to repair roof damage caused by a storm. Farm Bureau, which insured the home, stated that only part of the roof needed to be repaired, but Millard Gutter believed that the entire roof should be replaced. The homeowner replaced the entire roof and then assigned "any and all claims or moneys due or to become due" under his insurance policy to Millard Gutter. Millard Gutter sued Farm Bureau, seeking full payment of the roof repair. Farm Bureau argued, among other things, that the assignment was invalid because it was made without the insurer's consent. A Nebraska trial court ruled in favor of Millard Gutter, and the Nebraska Supreme Court affirmed.

Farm Bureau's policy expressly stated that the rights and duties under the policy "may not be assigned without our written consent" and that without such consent, "[n]o change of interest in this policy is effective." Notwithstanding this provision, the court held that an assignment made after a loss has occurred is valid and enforceable. Noting that the majority of courts have held that anti-assignment clauses do not bar post-loss assignments, the court stated that the "record simply does not demonstrate any increased risk to Farm Bureau or other adverse consequence of the assignment." The court also relied on the absence of state statutory law barring post-loss assignments in the property insurance context. As discussed in previous Alerts, courts have employed various standards and reached different conclusions as to whether an anti-assignment clause bars post-loss assignments made without insurer consent. *See* April and February 2016 Alerts; September 2015 Alert.

D&O Alert:

Ninth Circuit Rules That Insured vs. Insured Exclusion Unambiguously Bars FDIC Claims

Previous Alerts have discussed conflicting decisions relating to the application of an insured vs. insured exclusion to claims brought by the Federal Deposit Insurance Corporation ("FDIC"). *See* January 2015 Alert; October and April 2014 Alerts. In a recent decision, the Ninth Circuit ruled that an insured vs. insured exclusion squarely bars coverage for claims brought by the FDIC in its capacity as receiver. *Fed. Deposit Ins. Corp. v. BancInsure, Inc.*, 2017 WL 83489 (9th Cir. Jan. 10, 2017).

The exclusion at issue precludes coverage for losses arising from actions brought "by, or on behalf of, or at the behest of" Security Pacific (the insured company), or "any successor, trustee, assignee or receiver" of Security Pacific. The court held that this language unambiguously applies to claims brought by the FDIC as receiver. The court rejected the FDIC's argument that other provisions of the policy evidenced an intent to cover FDIC claims, or at a minimum, created ambiguity as to coverage. In particular, the court dismissed the FDIC's contention that it was not a "receiver" within the meaning of the exclusion because it had a "unique role" representing "multiple interests." Similarly, the court declined to find that a shareholder derivative claim exception restored coverage for the FDIC's claims. The court explained: "The shareholder derivative suit exception does not … render the insured-versus-insured exclusion ambiguous with respect to the FDIC as receiver merely because the FDIC *also* succeeded to the right of Security Pacific's shareholders to bring a derivative action" (emphasis in original). Finally, the court rejected the argument that the deletion of a regulatory exclusion (which had barred coverage for losses arising from "any action or proceeding brought by or on behalf of any federal or state regulatory or supervisory agency or deposit insurance organization") evidenced an intent to establish coverage for formerly excluded claims.

As reported in our October 2014 Alert, a California federal district court reached the opposite conclusion in *St. Paul Mercury Ins. Co. v. Hahn*, 2014 WL 5369400 (C.D. Cal.

Oct. 8, 2014), *aff'd*, 2016 WL 6092400 (9th Cir. Oct. 19, 2016), which was affirmed by the Ninth Circuit. There, the court concluded that an insured vs. insured exclusion that barred claims "brought or maintained by or on behalf of any Insured or Company … in any capacity" was ambiguous in the context of FDIC receiver claims. Notably, the exclusion there did not explicitly reference "receiver."

Property Insurance Alert:

California Court Dismisses Flood Claims As Time-Barred, Rejecting Tolling Argument

A California federal district court dismissed flood-related property damage claims based on the homeowner's failure to comply with the federal jurisdictional requirements of the National Flood Insurance Program ("NFIP"). *Apatow v. Am. Bankers Ins. Co. of Florida*, 2016 WL 7422288 (C.D. Cal. Dec. 21, 2016).

When Apatow's home was damaged by storm surge, he sought coverage under a Standard Flood Insurance Policy. The insurer denied the claim. Nearly one year later, Apatow filed suit in state court alleging breach of contract. The insurer removed the case to federal court and sought dismissal based on Apatow's failure to comply with the requirements of the NFIP, which requires plaintiffs to sue insurers in federal court within one year of a claim denial. The court held that Apatow's failure to meet this jurisdictional requirement warranted dismissal as a matter of law. In so ruling, the court rejected Apatow's argument that filing in state court was sufficient to confer jurisdiction on the federal court. The court also rejected the argument that the insurer had extended the limitations period by "reopening" the case. Apatow argued that by engaging in continued communications, and by accepting a new Proof of Loss and issuing a check for partial damage, the insurer had "reopened" the case. The court disagreed, explaining that the insurer's consideration of new information for claim coverage does not restart the limitations period. The court ruled that even if the insurer's decision to grant coverage for some of the claims could be construed as "reopening" the case for purpose of extending the statute of limitations, "once Defendant denied each of Plaintiff's claims, Plaintiff was put on notice that a suit would need to be filed within one year in federal court. The later decision to grant certain claims did not affect the other denials, which remained in place."

Privacy Breach Alert:

Massachusetts Appellate Court Reinstates Negligence Claims Against Insurance Agency Based On Misuse Of Personal Customer Information

Reversing in part a trial court decision, a Massachusetts appellate court ruled that an insurance agency was not entitled to summary judgment on negligence claims arising out of an employee's misuse of personal customer information. *Adams v. Cong. Auto Ins. Agency, Inc.*, 65 N.E.3d 1229 (Mass. App. Ct. 2016).

Elizabeth Burgos was employed as a customer service representative by Congress Auto Insurance Agency. Through her employment, she had access to the data systems of Safety Insurance Company and the Department of Motor Vehicles. When Burgos's boyfriend was involved in a police chase (while driving Burgos's car) that resulted in damage to a third party's automobile, Burgos used her position to obtain confidential information, including the identity, address and phone number of Mark Adams, the third party who had filed a claim. Burgos's boyfriend used that information to make a threatening call to Adams about the claim. Burgos was

subsequently terminated and criminal charges were filed against Burgos and her boyfriend. Adams sued Congress Auto Agency, alleging negligence in the safeguarding of confidential customer data. A Massachusetts trial court granted Congress's summary judgment motion, finding that Adams was unable to satisfy the elements of negligence (duty, breach of duty, causal connection between breach and damages, and damages). The appellate court reversed in part.

The appellate court ruled that the agency had a legal duty to prevent the foreseeable misuse of private information by its employees. Furthermore, the court ruled that a reasonable jury could find that the agency breached its duty. In particular, the court concluded that the agency failed to prevent a conflict of interest by allowing its employees to have access to their own claim information. Similarly, the court ruled that a jury could find that the agency was negligent by failing to investigate Burgos's fitness to have access to databases containing confidential information after it had been put on notice of Burgos's prior dishonest and potentially criminal activity.

The appellate court also found that Adams sufficiently raised an issue of fact with respect to causation. The trial court had ruled that the agency was entitled to summary judgment based on the intervening criminal acts of Burgos and her boyfriend. The appellate court disagreed, explaining that a causal connection may be found where the injury was a foreseeable result of the defendant's negligent conduct. The court stated: "A jury could conclude that the Congress Agency was put on notice that Burgos should not have been entrusted with access to the confidential information of others, especially where that information could involve a claim against her or her boyfriend." Finally, the court ruled that Adams' claims of emotional distress were sufficiently established to withstand summary judgment.

False Claims Act Alert:

Citing Insufficient Allegations, Second Circuit Affirms Dismissal Of False Claims Act Suit

The Second Circuit affirmed a New York federal district court decision dismissing a False Claims Act suit against insurers and other entities. *Takemoto v. Nationwide Mut. Ins. Co.*, 2017 WL 214572 (2d Cir. Jan. 18, 2017).

Takemoto filed a complaint pursuant to the False Claims Act, 31 U.S.C. §3729 *et seq.*, accusing insurers, corporations and administrators of failing to comply with reimbursement obligations under the Medicare Secondary Payer Act, 42 U.S.C. §1395y(b). A New York district court dismissed the complaint, finding that it failed to plead facts as to each defendant's obligation to reimburse the government, a required element under the False Claims Act. Affirming the ruling, the Second Circuit held that Takemoto failed to allege facts establishing an inference of a reimbursement obligation on the part of any defendant. In particular, the court explained that the complaint failed to identify any specific beneficiaries to whom payment was allegedly due; rather, allegations were based on statistics about the overall Medicare population. As such, the court concluded that Takemoto's allegations "'supply nothing but low-octane fuel for speculation' about the requisite reimbursement obligation element of his claims, which cannot defeat Rule 12(b)(6) dismissal even under the basic pleading requirements of Rule 8(a)" (citations omitted). The Second Circuit denied Takemoto's request to amend the complaint based on his failure to indicate how the defects would be cured. Simpson Thacher partner Bryce Friedman represents the Travelers Companies in this matter.

Jurisdiction Alert:

Interlocutory Review For Remand Orders In CAFA Cases Is Limited To Diversity Issues, Says Ninth Circuit

The Ninth Circuit ruled that the interlocutory review provision in the Class Action Fairness Act ("CAFA") is limited to orders granting or denying remand based on diversity, and does not extend to remand orders based on federal question jurisdiction. *Chan Healthcare Grp., PS v. Liberty Mut. Fire Ins. Co.*, 844 F.3d 1133 (9th Cir. Jan. 3, 2017).

Addressing a matter of first impression, the Ninth Circuit ruled that the CAFA provision that allows appellate review of a district court's remand order (28 U.S.C. §1453(c)(1)) is limited to orders granting or denying remand of diversity class actions. Therefore, the court ruled that it lacked jurisdiction under CAFA to review a district court's remand order based on federal question jurisdiction. The court based its decision on legislative history and statutory language, including two references in the CAFA that are "linked exclusively to diversity and fail[] to include similar provisions to federal question jurisdiction." The Fifth, Sixth and Eighth Circuits have reached the same conclusion.

Addressing a separate issue, the Ninth Circuit also ruled that the district court improperly awarded fees to the policyholder. Federal statutory law allows a district court to award fees incurred in a removal motion where a case has subsequently been remanded back to state court, but only if the removing party lacked an "objectively reasonable basis" for seeking removal. 28 U.S.C. §1447(c). Here, the district court had granted fees to the plaintiff based on the finding that the insurer's notice of removal was untimely under the 30-day time limitation of the general removal statute. 28 U.S.C. §1446(b). However, the Ninth Circuit ruled that the insurer's notice of removal was not untimely, because no basis for removal existed until the plaintiff filed a reply brief, which raised a due process issue (*i.e.*, an issue giving rise to federal question jurisdiction). The court held that the notice of removal was timely because it was filed within 30 days of the filing of the reply brief. Rejecting arguments that the clock started running earlier because the insurer had been put "on notice" that a due process claim would be raised, the court stated that such an approach "runs afoul of our precedent and would place a burden on defendants to read the tea leaves and anticipate claims where none had been asserted."

Legislative Alerts:

New York Enacts Regulation Prohibiting Insurers From Refusing To Issue Commercial Crime Policies Based On Employee's Criminal Record

The New York State Department of Financial Services has enacted a regulation that prohibits insurers from refusing to issue commercial crime policies to companies based on their employment of individuals with criminal records. Under N.Y. Comp. Codes R. & Regs. tit. 11, §76, "it would be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state for an insurer that writes commercial crime insurance policies in this state to exclude coverage where the employer has weighed the factors set out in Correction Law Article 23-A and made a determination favorable to the employee." Article 23-A, enacted to prevent discrimination based on prior criminal convictions, requires an employer to consider certain specific factors in deciding whether to hire an individual with a criminal record. The new regulation—the first of its kind in the country—aims to protect companies that have made good faith efforts to employ individuals who were previously incarcerated.

New York Financial Services Regulator Revises Proposed Cybersecurity Regulations Affecting Insurers

In September 2016, the New York State Department of Financial Services proposed regulations that would require financial institutions—including insurers—to implement stringent measures to protect against data breaches and other cyberattacks. The proposal mandated several specific requirements, including the appointment of a chief information security officer, an annual review process and detailed plans for dealing with data breaches. Responding to a flood of criticism regarding the regulation's stringency, the Department issued a revised proposed regulation last month. *See* N.Y. Comp. Codes R. & Regs. tit. 23, §500. The revised provision contains many of the same safeguards included in the original draft, but allows for increased flexibility in the implementation of the requirements. In particular, the new proposal allows a financial institution to customize its cybersecurity program based on the particular risks inherent to its business. However, the proposal still requires institutions to adhere to the enumerated protocols included in the regulation and does not allow companies to design controls based on their own risk comfort levels. The revised proposal relaxes certain other requirements, including the following: the required frequency of risk assessments was changed from "annually" to "periodically"; encryption is not required to protect non-public data if it is "infeasible," in which case, alternative methods of control may be used; and the 72-hour reporting requirement for security breaches is applicable only if the company is already otherwise obligated to report the breach (under other laws or regulations) and if the breach has "a reasonable likelihood of materially harming any material part of the normal operations" of the company. The regulation is effective March 1, 2017, and covered entities will be required to submit a Certification of Compliance commencing February 15, 2018.

Simpson Thacher

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.

David J. Woll
+1-212-455-3136
dwoll@stblaw.com

Mary Beth Forshaw
+1-212-455-2846
mforshaw@stblaw.com

Andrew T. Frankel
+1-212-455-3073
afrankel@stblaw.com

Lynn K. Neuner
+1-212-455-2696
lneuner@stblaw.com

Chet A. Kronenberg
+1-310-407-7557
ckronenberg@stblaw.com

Bryce L. Friedman
+1-212-455-2235
bfriedman@stblaw.com

Michael D. Kibler
+1-310-407-7515
mkibler@stblaw.com

Michael J. Garvey
+1-212-455-7358
mgarvey@stblaw.com

Tyler B. Robinson
+44-(0)20-7275-6118
trobinson@stblaw.com

George S. Wang
+1-212-455-2228
gwang@stblaw.com

Deborah L. Stein
+1-310-407-7525
dstein@stblaw.com

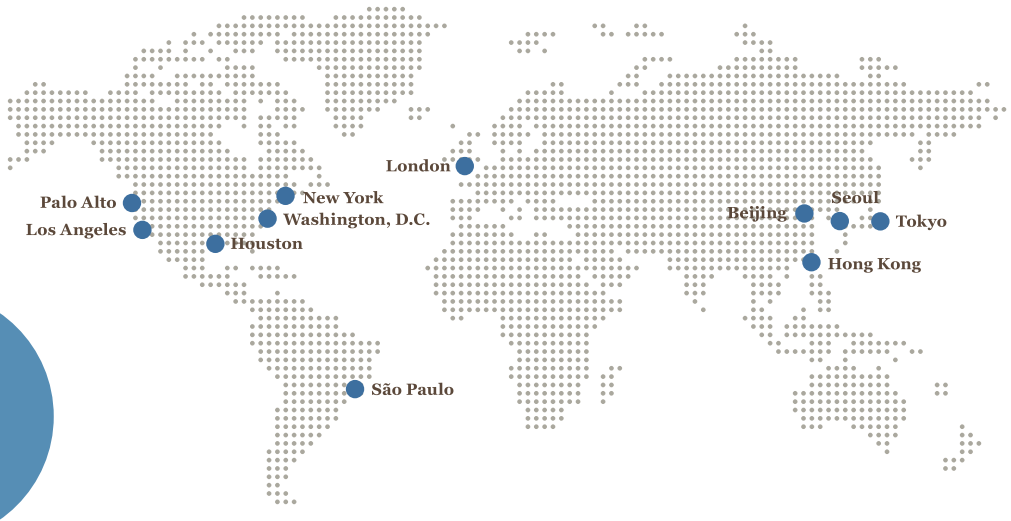
Craig S. Waldman
+1-212-455-2881
cwaldman@stblaw.com

Susannah S. Geltman
+1-212-455-2762
sgeltman@stblaw.com

Elisa Alcabes
+1-212-455-3133
ealcabes@stblaw.com

Summer Craig
+1-212-455-3881
scraig@stblaw.com

This edition of the Insurance Law Alert was prepared by Mary Beth Forshaw mforshaw@stblaw.com /+1-212-455-2846 and Bryce L. Friedman bfriedman@stblaw.com /+1-212-455-2235 with contributions by Karen Cestari kcestari@stblaw.com.



Simpson Thacher Worldwide

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000