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Insurance Law Alert

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Iowa Supreme Court Rules That Allegations Of Gross Negligence May Satisfy "Occurrence" Requirement

Reversing a lower court ruling, the Supreme Court of Iowa ruled that allegations of gross negligence may satisfy the "occurrence" requirement in liability and excess policies. *T.H.E. Insurance Co. v. Glen*, 2020 WL 3022764 (Iowa June 5, 2020). (Click here for full article)

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A New York federal court ruled that an insurer must continue to pay defense costs for a bankrupt opioid distributor, finding that the insurer had not conclusively demonstrated that policy exclusions barred coverage. *Rochester Drug Co-Operative, Inc. v. Hiscox Ins. Co., Inc.*, 2020 WL 3100848 (W.D.N.Y. June 11, 2020). (Click here for full article)

Ohio Appellate Court Rules That Insurer Must Defend Drug Distributor In National Opioid Prescription Litigation

An Ohio appellate court ruled that an insurer must defend a pharmaceutical distributor against certain suits filed by government agencies seeking to cover costs for addressing the opioid problem, finding that the suits sought damages "because of" bodily injury and that coverage was not precluded by a loss-in-progress provision. *Acuity v. Masters Pharmaceutical, Inc.*, 2020 WL 3446652 (Ohio Ct. App. June 24, 2020). (Click here for full article)

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Washington Supreme Court Refuses To Disqualify Insured's Counsel Notwithstanding Its Prior Representation Of Insurer

The Washington Supreme Court refused to disqualify insured's counsel in a bad faith suit against its insurer, notwithstanding that the law firm had represented the insurer in over 165 matters over a ten-year period, including numerous bad faith suits. *Plein v. USAA Casualty Ins. Co.*, 2020 WL 2568541 (Wash. May 21, 2020). (Click here for full article)

Tenth Circuit Rules That Insured Is Prevailing Party Entitled To Fees, Notwithstanding That Judgment Was Lower Than Insurer's Settlement Offer

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South Carolina Supreme Court Rejects "At Issue" Privilege Waiver In Bad Faith Dispute

A South Carolina district court ruled that an insurer did not waive attorney-client privilege by placing the content of certain communications with outside counsel "at issue" in bad faith litigation. *Harriman v. Associated Indus. Ins. Co., Inc.*, 2020 WL 2793610 (D.S.C. May 29, 2020). (Click here for full article)

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Coverage Alerts:

Fourth Circuit Rules That District Court Erred In Dismissing *Qui Tam* Coverage Claims Against Insurer

The Fourth Circuit ruled that a professional liability insurer was obligated to defend a False Claims Act suit, finding that allegations that an adult home care center submitted false Medicaid reimbursement claims "arose out of" a medical incident. *Affinity Living Grp., LLC v. Starstone Specialty Ins. Co.*, 2020 WL 2630845 (4th Cir. May 26, 2020).

Affinity Living Group was sued under the False Claims Act for allegedly submitting Medicaid claims for services that were never provided. Affinity's insurer refused to defend, arguing that the damages sought in the underlying action did not "result from a claim arising out of a medical incident," as required by the policy. A North Carolina district court agreed, finding that the *qui tam* complaint did not seek damages for rendering or failing to render personal care services, but instead sought recovery based on the submission of false reimbursement claims. The Fourth Circuit vacated the ruling.

Under North Carolina law, "arising out of" is interpreted broadly, to require only a causal connection (rather than proximate causation) when it is used in a provision extending coverage. As such, the Fourth Circuit concluded that Starstone had a duty to defend the *qui tam* suit so long as the false billing claims were causally connected to the "failure to render" services, which was a covered "medical incident" under the policy. The court ruled that this causation standard was met because "but for the failure to provide the services, no claim for damages exists." In so ruling, the court rejected the insurer's contention that billing services are "wholly disassociated from, independent of, and remote from" personal care services.

Iowa Supreme Court Rules That Allegations Of Gross Negligence May Satisfy "Occurrence" Requirement

Reversing a lower court ruling, the Supreme Court of Iowa ruled that allegations of gross negligence may satisfy the "occurrence" requirement in liability and excess policies. *T.H.E. Insurance Co. v. Glen*, 2020 WL 3022764 (Iowa June 5, 2020).

The coverage dispute arose out of an incident at an amusement park in which an employee was fatally injured. The decedent's estate alleged that his death resulted from grossly negligent acts by the ride's operator. The park's insurer sought a declaration that it had no duty to defend or indemnify the suit on the basis that the complaint did not allege a covered "occurrence." A lower court granted the insurer's summary judgment motion, finding that the gross negligence claim could not be covered under the policies because it did not allege an "accident" that was "unexpected and unintended." The Iowa Supreme Court reversed.

The Iowa Supreme Court ruled that a gross negligence claim is not necessarily incompatible with a covered occurrence. Under Iowa statutory law, gross negligence must amount to "wanton neglect for the safety of another." The court explained that when an actor wantonly neglects another's safety, it does not necessarily follow that he "knew or should have known that there was a substantial probability that certain consequences will result from his actions."

Addressing a separate issue, the Iowa Supreme Court ruled that section II of the liability policy, entitled "WHO IS AN INSURED," did not operate to expand the scope of coverage beyond that provided in section I of the policy. The decedent's estate argued that Section II provided an independent basis for coverage because it covers acts of employees of the amusement park that are within the scope of their employment. The court rejected this assertion, stating:

> The insuring clause in section I sets the parameters of the risks that are insured, while section II establishes who is insured. A person with a claim under the policy must satisfy the coverage requirements of the insuring clause in section I and be an "insured" under section II . . . . We find that they are not in conflict, but instead establish separate tests, *both* of which must be satisfied to give rise to a duty to defend and indemnify under the CGL policy.

Opioid Litigation Alerts:

New York Court Rules That Insurer Must Continue Funding Opioid Distributor's Defense

A New York federal court ruled that an insurer must continue to pay defense costs for a bankrupt opioid distributor, finding that the insurer had not conclusively demonstrated that policy exclusions barred coverage. *Rochester Drug Co-Operative, Inc. v. Hiscox Ins. Co., Inc.*, 2020 WL 3100848 (W.D.N.Y. June 11, 2020).

Rochester Drug, a drug distribution cooperative, was sued in numerous state and federal actions for its alleged involvement in the unlawful distribution of opioids. Hiscox initially acknowledged potential coverage for the lawsuits, but after Rochester Drug entered into a delayed prosecution agreement ("DPA") and stipulation with the government, Hiscox notified Rochester Drug that admissions in the DPA precluded coverage based on an Illegal Conduct Exclusion.

The court granted Rochester Drug's motion for a preliminary injunction regarding Hiscox's duty to advance defense costs, finding that Rochester Drug demonstrated the likelihood of irreparable harm absent preliminary relief and of success on the merits regarding Hiscox's duty to pay defense costs. More specifically, the court concluded that Rochester Drug raised "sufficiently serious questions" as to whether the Illegal Conduct Exclusion, among others, would bar coverage for the underlying claims. The Illegal Conduct Exclusion precludes coverage for loss arising out of any "deliberate criminal or deliberate fraudulent act, or any willful violation of any statute, rule or law, if any final adjudication establishes that such [conduct] . . . was committed."

The court ruled that the DPA is not a final adjudication, noting that it was not substantively reviewed by a court. As to the stipulation, which the court deemed a "closer question," the court ruled that even if the stipulation is deemed a final adjudication, it does not establish that Rochester Drug committed a deliberate criminal or fraudulent act, or willfully violated the law. Although Rochester Drug admitted in the stipulation that it "knowingly failed to implement an adequate system to detect, investigate and report suspicious orders of controlled substances," the court concluded that this statement did not establish that the company deliberately committed a crime or violation of law.

Finally, the court ruled that coverage was not necessarily barred by a Prior Knowledge Exclusion. Although Rochester Drug had knowledge of a civil investigation by the Drug Enforcement Agency before the policy was issued, the court noted that the underlying claims against Rochester Drug extended beyond that civil claim and encompassed numerous other causes of action about which Rochester Drug had no previous knowledge.

Ohio Appellate Court Rules That Insurer Must Defend Drug Distributor In National Opioid Prescription Litigation

Reversing a trial court decision, an Ohio appellate court ruled that an insurer must defend a pharmaceutical distributor against certain suits filed by government agencies seeking to cover costs for addressing the opioid problem, finding that the suits sought damages "because of" bodily injury and that coverage was not precluded by a loss-in-progress provision. *Acuity v. Masters Pharmaceutical, Inc.*, 2020 WL 3446652 (Ohio Ct. App. June 24, 2020).

Acuity sought a declaration that it owed no defense or indemnity to Masters Pharmaceutical in national prescription opioid suits filed by government entities. The underlying suits alleged that opioid manufacturers and distributors failed to monitor and report suspicious opiate orders, which contributed to an epidemic that caused financial harm to the government entities. More specifically, the government entities alleged that they incurred increased expenses relating to law enforcement, judicial resources and medical costs.

As discussed in our February 2019 Alert, an Ohio trial court granted Acuity's summary judgment motion, ruling that the damages sought in the underlying litigation were not "because of" bodily injury and instead were economic loss claims. Additionally, the trial court held that there was no coverage because the policy excluded claims that were previously known to Masters. According to the underlying suits, Masters filled suspicious orders and knew of the opioid addiction crisis prior to obtaining insurance from Acuity.

The appellate court reversed, ruling that "the policies expressly provide for a defense where organizations claim economic damages, so long as the damages occurred because of bodily injury." In so ruling, the court relied on *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771 (7th Cir. 2016) (discussed in our July/August 2016 Alert), in which the Seventh Circuit ruled that general liability policies triggered an insurer's duty to defend claims against a pharmaceutical company in opioid litigation. The court deemed it irrelevant that the government entities themselves did not sustain bodily injury, noting that their economic losses were "because of" bodily injury. The court distinguished *Medmarc Casualty Insurance Co. v. Avent America, Inc.*, 612. F.3d 607 (7th Cir. 2010), in which the Seventh Circuit ruled that an insurer had no duty to defend a suit against a manufacturer based on the presence of harmful components in baby bottle products, finding that the suit did not allege bodily injury.

Finally, addressing a matter of first impression under Ohio law, the appellate court ruled that a loss-in-progress provision did not bar coverage. The provision states that coverage is unavailable if the insured "knew, prior to the policy period, that the bodily injury or property damage occurred," and that the "continuation, change or resumption of such bodily injury or property damage during or after the policy period will be deemed to have been known prior to the policy period." The court concluded that the insurer did not establish Master's knowledge of bodily injury prior to the 2010 policy inception, notwithstanding that in 2008, the Drug Enforcement Agency issued a show-cause order alleging that Masters had failed to maintain effective controls against the diversion of opioids and that in 2009, Masters was required to pay $500,000 and implement a monitoring and compliance system. The court stated:

> We agree that [Masters] may have been aware there was a risk that if it filled suspicious orders, diversion of its products could contribute to the opioid epidemic, thus causing damage to the government entities. But, we hold that mere knowledge of this risk is not enough to bar coverage under the loss-in-progress provision.

Conflict Of Interest Alert:

Washington Supreme Court Refuses To Disqualify Insured's Counsel Notwithstanding Its Prior Representation Of Insurer

The Washington Supreme Court refused to disqualify insured's counsel in a bad faith suit

against its insurer, notwithstanding that the law firm had represented the insurer in over 165 matters over a ten-year period, including numerous bad faith suits. *Plein v. USAA Casualty Ins. Co.*, 2020 WL 2568541 (Wash. May 21, 2020).

Homeowners retained a law firm to represent them in a bad faith suit against their property insurer. The suit was based on the insurer's refusal to pay for certain costs arising out of fire damage. Members of the firm had served as the insurer's defense counsel for many years, and had thus gained access to the insurer's litigation strategies and claims handling practices, among other things. In addition, the firm acted as the insurer's defense counsel in several suits alleging bad faith pursuant to Washington statutory law, including a suit based on the insurer's handling of fire damage claims. As such, the insurer moved to disqualify the law firm pursuant to the Rules of Professional Conduct ("RPC") 1.9(a), which states:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

A trial court denied the insurer's motion to disqualify, finding that the instant matter was not substantially related to the firm's prior representation of the insurer. An appellate court reversed. The appellate court relied on comment 3 to RPC 1.9, which states that matters may be substantially related if there "is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." The appellate court reasoned that the law firm learned significant confidential information about the insurer's strategies for bath faith litigation through its prior representation of the insurer, thus giving rise to a significant risk that the law firm had gained information that would materially advance the homeowners' suit. The Washington Supreme Court reversed.

Addressing this matter of first impression under Washington law, the Washington Supreme Court ruled that (1) the insurer bears the burden of demonstrating a "substantial relationship" between the present and previous matters, and (2) that no such showing had been made. The court reasoned that "substantially related" requires a factual relationship between the prior and pending matters—*e.g.,* that the matters turn on the same "particular situation or transaction."

The court concluded that no such factual relationship existed here, notwithstanding the firm's prior representation of the insurer in a fire damage-related bath faith suit. Citing to Fifth Circuit precedent, the court found that an insurer's business customs, including "confidential claims handling materials" and "litigation philosophies and strategies," constitute general knowledge of a client's policies which, under comment 3 to RPC 1.9, "ordinarily will not preclude a subsequent representation." In addition, the court noted that comment 2 to RPC 1.9 states that "a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client." Finally, the court declined to disqualify the firm based on the "playbook" or "duty of loyalty" approaches, deeming them inconsistent with RPC 1.9.

Attorney's Fees Alert:

Tenth Circuit Rules That Insured Is Prevailing Party Entitled To Fees, Notwithstanding That Judgment Was Lower Than Insurer's Settlement Offer

The Tenth Circuit ruled that an insured that received a favorable judgment was the "prevailing party" entitled to attorneys' fees pursuant to Oklahoma statutory law even though the insured rejected a settlement that was substantially higher than the ultimate judgment. *Hamilton v. Northfield Ins. Co.*, 2020 WL 3042064 (10th Cir. June 8, 2020).

Hamilton sued Northfield Insurance Company, seeking coverage for a leaking roof. Northfield offered $45,000 to cover Hamilton's actual damages, litigation expenses and other fees. Hamilton rejected the offer and the case proceeded to trial, resulting in a $10,642 jury verdict in Hamilton's favor. Thereafter, Hamilton sought attorneys' fees and interest pursuant to Okla. Stat. tit. 36 § 3629. Northfield argued that Hamilton was not the "prevailing party" under the statute because the settlement offer exceed the final damages award. An Oklahoma district court agreed and denied Hamilton's motion. On appeal, the Tenth Circuit affirmed, but subsequently granted rehearing and vacated its decision. The Tenth Circuit certified to the Oklahoma Supreme Court the following questions:

1. In determining which is the prevailing party under Okla. Stat. tit. 36 § 3629(B), should a court consider settlement offers made by the insurer outside the sixty- (formerly, ninety-) day window for making such offers pursuant to the statute?

2. In determining which is the prevailing party under Okla. Stat. tit. 36 § 3629(B), should a court add to the verdict costs and attorney fees incurred up until the offer of settlement for comparison with a settlement offer that contemplated costs and fees?

Last month, the Oklahoma Supreme Court answered the first question in the negative, stating that a court "may consider only those timely offers of settlement of the underlying insurance *claim*—and not offers to resolve an ensuing *lawsuit* that results from the insurer's denial of the same—when determining the prevailing party for the purposes of awarding attorney fees and costs under section 3629(B)." (Emphasis in original). Having ruled that section 3629(B) applies only to settlement offers made by the insurer prior to litigation (and thus before legal fees have been incurred), the court noted that the answer to the second question was inherently resolved in the negative.

On remand, the Tenth Circuit ruled that in light of the Oklahoma Supreme Court's answer to the first certified question, Hamilton was the prevailing party because he received a favorable judgment. The court explained that Northfield's post-litigation settlement offer was not a statutory settlement offer within the meaning of section 3629(B). As such, Hamilton was entitled to reasonable attorneys' fees and statutory interest.

Privilege Alert:

South Carolina Supreme Court Rejects "At Issue" Privilege Waiver In Bad Faith Dispute

A South Carolina district court ruled that an insurer did not waive attorney-client privilege by placing the content of certain communications with outside counsel "at issue" in bad faith litigation. *Harriman v. Associated Indus. Ins. Co., Inc.*, 2020 WL 2793610 (D.S.C. May 29, 2020).

Harriman sued Associated Industries Insurance Company seeking coverage for underlying defamation claims filed against her. During discovery, Associated Industries produced certain documents in response to Harriman's interrogatories and document requests. Associated Industries did not produce a privilege log at that time. Several months later, Associated Industries supplemented its production and produced a privilege log. Thereafter, Harriman moved to compel production of certain documents, including communications between Associated Industries and its outside counsel.

The court denied Harriman's motion, finding that the requested documents were protected by attorney-client privilege. The court rejected Harriman's contention that Associated Industries waived privilege by relying on outside counsel's advice in denying coverage and by failing to produce a timely privilege log. Harriman asserted that attorney-client privilege is waived when an insurer "delegate[s] the initial coverage evaluation to outside counsel and denie[s] coverage based on his advice." The court ruled that reliance on outside counsel is insufficient to constitute waiver where, as here, the policyholder did not place outside counsel's advice "at issue" in the litigation, explaining that Associated Industries' defense did not "necessarily include[] information learned from counsel." In so ruling, the court emphasized that "privilege is not waived solely when a client consults counsel for advice and the client subsequently takes action based on counsel's advice." Additionally, the court refused to find waiver based on Associated Industries' failure to timely produce a privilege log, noting that waiver was too strong a sanction under the circumstances.

STB News Alerts

Simpson Thacher has once again been ranked among the leading law firms in the United States in *The Legal 500 United States 2020*. The Firm was recognized in 45 practice areas, including a total of 20 rankings in the top tier and a #1 ranking in "Insurance: Advice to Insurers."

Simpson Thacher was named as the 2020 "Litigation Department of the Year" for the category of Insurance by the *New York Law Journal*.

Susannah Geltman was named a 2020 "Rising Star" by the *New York Law Journal*. The *NYLJ* "Rising Stars" series recognizes the region's most promising lawyers under the age of 40. Susannah was one of fewer than 30 attorneys chosen for this honor.

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.

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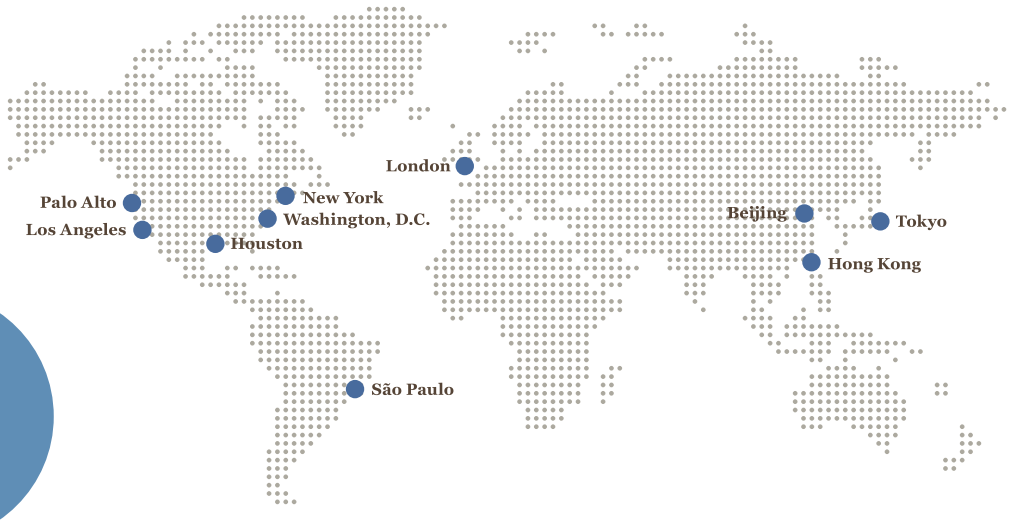

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