Simpson Thacher

Insurance Law Alert

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"If it looks like it's going to go to trial, we will switch counsel to Simpson Thacher. That alone sends the other side a message that things are getting serious."

–Benchmark Litigation 2016 quoting a client

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A New York appellate court ruled that a policy exclusion barring coverage for losses caused by the dishonest acts of brokers applied to Madoff-related losses even though he was not "acting" as a legitimate broker. *United States Fire Ins. Co. v. Nine Thirty FEF Investments, LLC*, 2015 WL 5794368 (N.Y. App. Div. 1st Dep't Oct. 6, 2015). (click here for full article)

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A Minnesota federal district court ruled that a crime policy did not cover the loss of returns that the policyholder allegedly earned on certain investments, but lost due to the fraud of its investment advisors. *3M Co. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2015 WL 5687879 (D. Minn. Sept. 28, 2015). (click here for full article)

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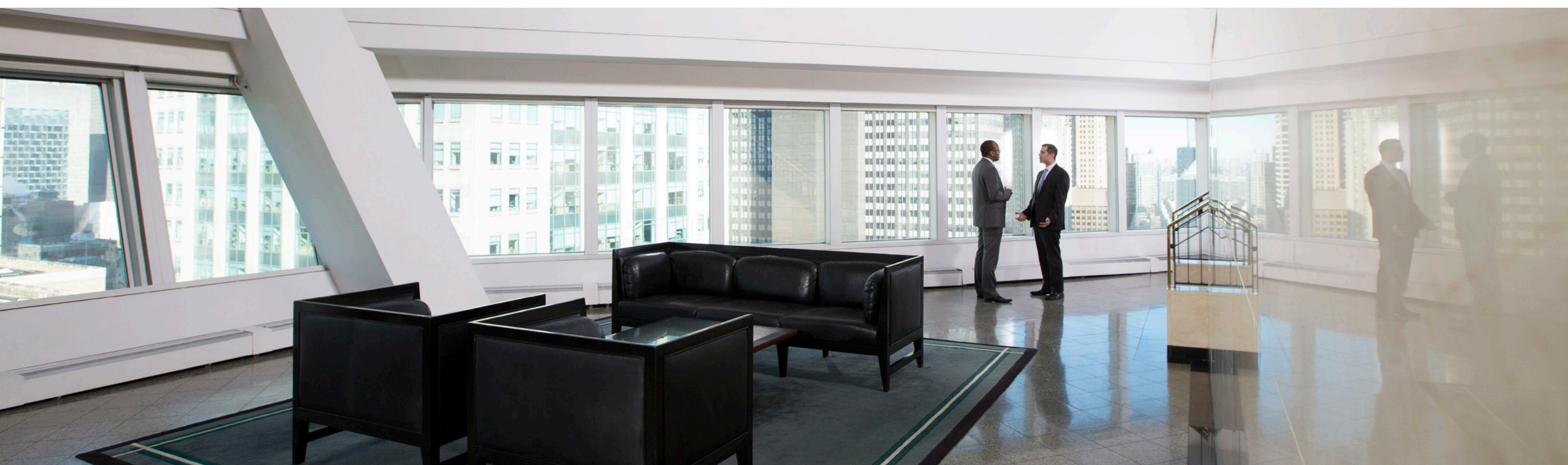
Eleventh Circuit Rules That Contractual Liability Exclusion Bars Coverage for Tort Claims

The Eleventh Circuit ruled that a contractual liability exclusion barred coverage for tort claims that had a "clear nexus" and were "inextricably intertwined" with certain operative contracts. *Bond Safeguard Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2015 WL 5781002 (11th Cir. Oct. 5, 2015). (click here for full article)



Defense Alert:

Nevada Supreme Court Adopts Cumis Rule For Deciding When Insurer Must Fund Independent Policyholder Counsel

Ruling on a matter of first impression under Nevada law, the Nevada Supreme Court ruled that an insurer must provide independent counsel for its insured when an actual conflict exists between the two parties, but that a reservation of rights letter does not create a *per se* conflict. *State Farm Mutual Auto. Ins. Co. v. Hansen*, 2015 WL 5656978 (Nev. Sept. 24, 2015).

Answering questions certified by a federal district court, the Nevada Supreme Court ruled that when an actual conflict of interest exists between an insurer and its policyholder, the insurer must provide independent counsel of the policyholder's choosing. The court explained that a conflict of interest exists when the outcome in the underlying litigation will affect the determination of coverage. The court emphasized that a reservation of rights does not automatically create a conflict of interest. Rather, a conflict of interest determination must be made on a case-by-case basis, taking into account whether insurer-appointed counsel will have control over an issue in the underlying litigation that will directly affect the coverage analysis. Notably, there is no conflict "if the reservation of rights is based on coverage issues that are only extrinsic or ancillary to the issues actually litigated in the underlying action." In adopting California's *Cumis* rule, the Nevada Supreme Court rejected the notion (endorsed by a number of jurisdictions) that such conflicts of interest are sufficiently addressed by reference to professional ethics rules, or that divergent interests between an insured and policyholder do not create a conflict of interest because the policyholder is the "sole client" of counsel. As the court noted, Nevada is a "dual-representation state," recognizing that insurer-appointed counsel represents both the policyholder and the insurer.

Data Privacy Alerts:

Seventh Circuit Limits Scope of "Publication" for Liability Coverage Purposes

As reported in our January 2014 Alert, the Connecticut Supreme Court has ruled that claims arising out of the accidental loss of computer data are not covered by general liability policies if there was no "publication" of the data to a third party. *Recall Total Info. Mgmt., Inc. v. Federal Ins. Co.*, 2015 WL 2371957 (Conn. May 26, 2015). Last month, the Seventh Circuit employed similar reasoning and held that a company's practice of secretly recording customer phone calls for its own purposes did not constitute "publication" under an advertising injury provision. *Defender Security Co. v. First Mercury Ins. Co.*, 2015 WL 569251 (7th Cir. Sept. 29, 2015).

A customer sued Defender Security Company, alleging violations of state statutory law based on the company's practice of recording customer phone calls without permission. The recordings, which were stored for various business purposes, contained personal information, including customers' addresses, dates of birth and social security numbers. First Mercury Insurance Company refused to defend the suit on the basis that it did not allege covered advertising injury. In particular, First Mercury argued that there was no "publication" of the personal data because the recordings were not released to any third party. An Indiana federal district court agreed and dismissed Defender's breach of contract claim against First Mercury. The Seventh Circuit affirmed.

Although "publication" was not defined in the policy, the Seventh Circuit concluded that the term requires a release of the information by the party holding it. Because

the suit against Defender did not allege that the recordings (or the information contained therein) were shared with or transmitted to any third party, the court held that there was no publication. In so ruling, the court rejected Defender's assertion that publication occurred when the material was transmitted to a separate recording device. Rather, the court analogized the recordings to note-taking during phone calls, explaining that the existence of notes in a filing cabinet would not constitute publication.

Third Circuit Rules That Class Action Suits Based on ZIP Code Collection Do Not Allege Personal and Advertising Injury

The Third Circuit ruled that insurers had no duty to defend underlying suits alleging violations of state statutes and common law privacy rights based on the collection of personal ZIP code information in connection with credit card purchases. *OneBeacon America Ins. Co. v. Urban Outfitters, Inc.*, 2015 WL 5333845 (3d Cir. Sept. 15, 2015).

The policyholders sought Personal and Advertising Injury coverage under liability and umbrella policies for three class action complaints. Each complaint alleged that the policyholders violated statutory and common law by collecting customers' ZIP code information for marketing and pecuniary benefit. However, each complaint included different factual allegations as to the policyholders' use of the information. A Pennsylvania federal district court ruled that the insurers had no duty to defend or indemnify any of the suits. *OneBeacon America Ins. Co. v. Urban Outfitters, Inc.*,21 F. Supp.3d 426 (E.D. Pa. 2014) (discussed in June 2014 Alert). The Third Circuit affirmed.

First, the Third Circuit held that the collection of personal information for a company's own pecuniary interests does not constitute "publication" for purposes of Personal and Advertising Injury coverage. Although the policies did not define "publication," the court held that the term was unambiguous and that Pennsylvania law generally requires dissemination to the public in order to establish publication. Therefore, the policyholders' use of personal ZIP code information for internal business-related purposes did not constitute publication. Second, the court held that even where publication to third parties is alleged, a policy exclusion for claims alleging privacy-related statutory violations precluded coverage. Finally, the court held that where policyholders allegedly used the ZIP code information to send unsolicited advertisements, there was no violation of privacy (as required by the advertising injury provision) under Pennsylvania law. The court cited to fax blasting coverage cases, noting that Pennsylvania courts have held that the right to privacy referenced in Personal and Advertising Injury provisions does not encompass the right to seclusion and is instead limited to the protection of secrecy interests.

Montana Court Rules That Insurers Have No Duty to Defend Spyware Suits

A Montana federal district court ruled that primary and umbrella insurers had no duty to defend two suits alleging that the policyholder secretly installed spyware programs on consumers' computers. *Am. Econ. Ins. Co. v. Aspen Way Enterprises, Inc.*, 2015 WL 568013 (D. Mont. Sept. 25, 2015).

A class action suit against Aspen Way, a "rent-to-own" store, alleged that Aspen Way installed undetectable software on computers that were leased or sold to customers. According to the complaint, the software allowed Aspen Way to secretly take photographs with the computer's webcam, capture keystrokes and take screen shots – all without the consumer's knowledge. The complaint alleged violations of state statutory law and common law right to privacy. The common law claims were dismissed,

leaving only the cause of action alleging a violation of the Electronic Communications Privacy Act. Liberty Mutual agreed to defend the suit under a reservation of rights. A second suit was filed against Aspen Way by the State of Washington alleging violations of state statutory law. This suit was resolved by a consent decree, under which Aspen Way agreed to pay $150,000. Liberty Mutual paid this sum on behalf of Aspen Way, but reserved the right to seek recoupment upon a declaration of non-coverage. Thereafter, Liberty mutual filed suit seeking reimbursement from Aspen Way and a declaration that it had no duty to defend either suit. The court granted Liberty Mutual's summary judgment motion as to the duty to defend.

The court ruled that the class action complaint alleged "Personal and Advertising Injury" under Liberty Mutual's primary and umbrella policies because it alleged "publication ... of material that violates a person's right of privacy." The court explained that under Montana law, "publication" occurs when information "is transmitted to a third party." Here, because the complaint alleged that customers' personal information was "forwarded to unknown persons and locations," the publication requirement was met. However, the court held that coverage was barred by a "Recording and Distribution of Material or Information in Violation of Law Exclusion," which excluded coverage for violations of statutes that address the collection or distribution of material or information. Notably, the exclusionary language in two of the umbrella policies contained typographical errors which rendered the provision nonsensical. However, the court reformed the language to mirror the grammatically-correct language in the primary and other umbrella policies, finding that Liberty Mutual had established by clear and convincing evidence that the omission was a mistake that Aspen should have suspected.

With respect to the Washington State action, the court concluded that Liberty Mutual had no duty to defend because the complaint did not allege facts that, if proven, would constitute "publication." As the court explained, the allegations were based only on Aspen Way's installation of the spyware and its retention of data, rather than on any alleged transmission to third parties.

Number of Occurrences Alert:

Second Circuit Rules That Series of Related Events Constitutes Three Separate Accidents Under Policy

Applying New York's "unfortunate event test," the Second Circuit held that a series of related automobile accidents within a short time span constituted three separate "accidents" for purposes of policy coverage. *Nat'l Liab. & Fire Ins. Co. v. Itzkowitz*, 2015 WL 5332109 (2d Cir. Sept. 15, 2015), *as amended* (Sept. 22, 2015).

The relevant sequence of events began when a dump box attached to the back of a truck hit and damaged a highway overpass. After hitting the overpass, the dump box separated from the truck and landed on the highway. Between thirty seconds and five minutes later, a vehicle struck the detached box. At some point between a few seconds and twenty minutes thereafter, a second vehicle struck the box. The parties involved in the incident argued that this series of events constituted three separate "accidents" under the policy, whereas National Liability advocated a one-occurrence position. A New York federal district court ruled in favor of the drivers, and the Second Circuit affirmed.

Absent policy language indicating an intent to aggregate separate incidents into a single occurrence (as the court noted, "accident" and "occurrence" are used interchangeably in this context), New York law follows the unfortunate event test to determine how many occurrences exist for coverage purposes. The unfortunate event test focuses on (1) the "operative incident" giving rise to liability, and (2) "whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors." Here, as a preliminary matter, the court rejected National Liability's contention that the policy language at issue (providing that all injury and damage "resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one 'accident'") evidenced an intent to aggregate separate accidents into a single, unified occurrence. Applying the unfortunate event test, the court

concluded that the incidents constituted three separate accidents. The court reasoned that each collision was a "separate operative incident" and that "although the incidents occurred close in time, nothing suggests that the narrow timespan between each incident played a role in causing any of the other incidents." The court further explained that although the incidents shared a common origin (the dump truck's collision with the overpass), the events were not part of the "same unbroken continuum."

Notably, court declined to "draw a hard line at any particular number of seconds or minutes that must elapse before two incidents are distinct accidents." Rather, court emphasized that courts must employ "'common sense' balancing" in applying the unfortunate event test.

Ponzi Scheme Alerts:

New York Appellate Court Rules That Brokerage Exclusion Bars Coverage for Madoff-Related Losses

Our October 2013 Alert reported on a New York trial court decision holding that a policy exclusion barring coverage for losses caused by the dishonest acts of brokers did not apply to Madoff-related losses because Madoff and Madoff Securities were not acting as brokers but "were actually imposters who merely pretended to be or do something as part of their fraudulent scheme." *United States Fire Ins. Co. v. Nine Thirty FEF Investments, LLC*, 44 Misc.3d 1213(A), 997 N.Y.S.2d 670 (N.Y. Sup. Ct. Oct. 1, 2013). This month, a New York appellate court reversed the ruling. *United States Fire Ins. Co. v. Nine Thirty FEF Investments, LLC*, 2015 WL 5794368 (N.Y. App. Div. 1st Dep't Oct. 6, 2015).

Two investment companies sought coverage for Madoff-related losses under financial bonds issued by U.S. Fire Insurance Company. U.S. Fire denied coverage on several bases, including "Exclusion (x)," which precluded coverage for "loss resulting directly or indirectly from any dishonest or fraudulent act or acts committed by any non-Employee who is a securities … broker, agent or other representative of the same general character." The trial court had ruled that Exclusion (x) did not apply because Madoff had not been "acting" as a securities broker in connection with the losses but rather had engaged in only illusory brokerage activities. Rejecting this reasoning, the appellate court emphasized that the exclusion uses the phrase "who *is* a securities broker" and does not require the non-employee to have been "acting" as a securities broker. The appellate court held that the exclusion applied because it was undisputed that Madoff was a registered broker during the relevant time frame. The court further noted that application of Exclusion (x) did not contradict or otherwise nullify another policy provision that covered losses arising from the dishonest acts of outside investments advisors. As the court explained, that provision could still provide coverage for losses resulting from the dishonest acts of outside investors who are not brokers.

Minnesota Court Rules That Crime Policy Does Not Cover Loss of Investment Returns Caused by Ponzi Scheme

A Minnesota federal district court ruled that a crime policy did not cover the loss of returns that the policyholder allegedly earned on certain investments, but lost due to the fraud of its investment advisors. *3M Co. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2015 WL 5687879 (D. Minn. Sept. 28, 2015).

3M invested its employee-benefit plan assets in WG Trading Company. The investment was structured as a limited partnership in WG Trading. After it was discovered that the founders of WG Trading were operating a Ponzi scheme, the SEC brought suit, and 3M was able to recover all of the capital contributions that it had invested in WG Trading. In submitting an insurance claim, 3M argued that it suffered a loss because some of its capital had been invested in "legitimate vehicles and produced legitimate earnings," which 3M never recovered. National Union denied coverage on several bases, including that 3M failed to establish "ownership" of those earnings, as required by the policy. The court agreed and granted National Union's summary judgment motion.

The policy's "ownership provision" requires covered losses to be "owned by the Insured, or held by the Insured in any capacity whether or not the Insured is legally liable, or may be property as respects which the Insured is legally liable." The court held that even assuming that 3M's investment generated legitimate earnings that could be quantified and attributed to 3M, those lost earnings were not covered under the policy because 3M did not "own" those earnings at the time they were stolen. First, the court rejected 3M's contention that the ownership provision was irrelevant to its claim for coverage under the Employee Dishonesty clause. Instead, the court concluded that the ownership provision operates to limit coverage afforded under the Employee Dishonesty clause by requiring 3M to have some kind of interest in the property on which the claims are based. Second, the court concluded that the lost earnings for which 3M sought indemnification did not qualify as property "owned" by 3M. The court explained that 3M owned only a limited partnership interest in WG Trading; therefore, all earnings were owned by WG Trading up until the point at which they were distributed. In this context, the court explained that 3M's "general right to receive distributions from the partnership" does not constitute an ownership of specific earnings prior to distribution. Finally, the court deemed irrelevant certain ERISA regulations that more broadly construe "own" in terms of investments in limited partnerships, explaining that the purposes of those regulations "is to ensure that fiduciary responsibilities are spread broadly … not an attempt to redefine property rights established under state law."

Coverage Alerts:

Intentional Acts Exclusion Does Not Bar Coverage for Texting-Related Train Crash

Applying New York law, a California court ruled that an intentional acts exclusion did not bar coverage for claims arising out of a train crash allegedly caused by the train conductor's use of a cell phone while on duty. *Those Certain Underwriters at Lloyd's, London v. Connex Railroad, LLC*, No. BC493509 (Cal. Superior Ct. Sept. 18, 2015) (transcript).

The coverage dispute arose out of a train accident that resulted in numerous deaths. Underlying lawsuits against the train owner and operator were filed and ultimately settled. Certain Underwriters, as excess insurers, contributed to the settlement fund. Thereafter, Certain Underwriters filed suit seeking reimbursement of the settlement payments on the basis that an intentional acts policy exclusion barred coverage for the claims. In particular, Certain Underwriters argued that the train company knew that its engineers were frequently using cell phones while on duty and that such conduct was likely to cause an accident, but took no action to prevent or punish such behavior. The court disagreed and granted the policyholders' summary judgment motion.

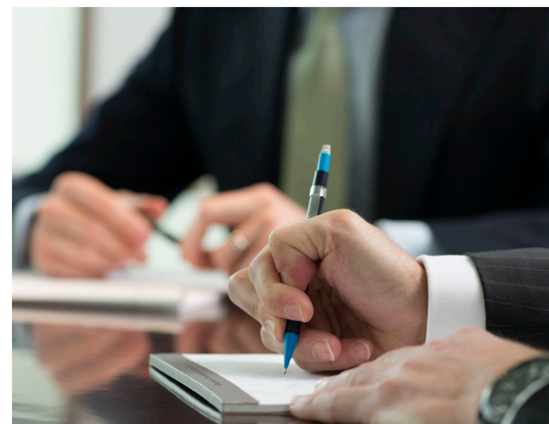
The intentional acts exclusion barred coverage for "bodily injury which the insured intended or expected or reasonably could have expected." The court explained that New York law requires a policyholder to have "intended or expected the consequences flowing directly and immediately from the act" in order for the exclusion to apply. Here,

the court concluded that allegations that the train company willfully ignored violations of regulations against cell phone use despite knowledge that such violations were likely to cause an accident did not meet the "intended or expected" standard. The court reasoned that such allegations established only negligence or recklessness. In addition, the court emphasized that the evidence failed to raise a triable issue of fact that the train company reasonably expected the specific accident at issue because prior to that crash, the company had not experienced any other train accidents caused by cell phone use. The decision, which applies a "stringent New York standard" for application of intentional acts exclusion, is likely to be appealed. We will keep you posted on further developments in this matter.

Eleventh Circuit Rules That Contractual Liability Exclusion Bars Coverage for Tort Claims

The Eleventh Circuit ruled that a contractual liability exclusion barred coverage for tort claims that had a "clear nexus" and were "inextricably intertwined" with certain operative contracts. *Bond Safeguard Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2015 WL 5781002 (11th Cir. Oct. 5, 2015).

Real Estate developer Land Resource, LLC ("LRC") contracted with municipalities to develop residential subdivisions. LRC obtained surety bonds from Bond Safeguard Insurance Company and Lexon Insurance Company (collectively "Bond-Lexon"). The surety bonds guaranteed LRC's timely completion of the subdivisions. In connection with the surety bonds, LRC and Bond-Lexon entered into a General Agreement of Indemnity ("GAI") under which LRC agreed to indemnify Bond-Lexon for any liability incurred in connection with the bonds. Several years after initiation of a subdivision project, LRC ceased work and Bond-Lexon was obligated to pay the municipalities pursuant to the surety bonds. Thereafter, Bond-Lexon sued LRC. Bond-Lexon initially alleged breach of contract and negligence, but later amended its complaint to allege only negligence. LRC sought coverage from National Union, which the insurer denied. National Union argued that there was no coverage because a contractual liability exclusion applied to all losses "arising out of, based upon or attributable in any actual or alleged contractual liability of the Company of any other Insured under any express contract or agreement." A Florida federal district court agreed and ruled in favor of National Union. The district court concluded that the contractual liability exclusion was "unambiguously broad so as to preclude coverage for tort claims that depended on the existence of the insured's contractual liability under any express contract or agreement." The Eleventh Circuit affirmed.



Although Florida courts have not interpreted the precise language at issue, the Eleventh Circuit held that under Florida law, the term "arising out of" should be interpreted broadly to mean "some causal connection." The court concluded that this standard was met because the alleged tort losses arose from LRC's contractual breach of either the GAI or its contracts with the municipalities. More specifically, the court held that although Bond-Lexon's claim sounded in negligence and was based in part on conduct that pre-dated the GIA, those alleged acts of negligence "occurred during the course of LRC's performance under the development contracts with the municipalities." The court therefore concluded that Bond-Lexon's claim "depended on the existence of contractual liability of some kind" and was thus excluded from coverage.

The Eleventh Circuit's interpretation of the phrase "arising out of" was outcome-determinative in this case. However, as reported in previous Alerts, other courts disagree as to whether the phrase should be construed broadly to require only some causal connection (as was the case here) or construed narrowly to require proximate or "but for" causation. *See* June 2015 Alert; May 2012 Alert.

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