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INSURANCE LAW ALERT

SEPTEMBER 2014

This Alert addresses recent decisions relating to the exhaustion of insurance policies for purposes of accessing excess coverage, the scope of advertising and personal injury coverage and how to determine the number of occurrences. In addition, we report on two recent rulings relating to an insurer's right to contribution of defense costs from another insurer. Finally, we discuss decisions relating to D&O coverage, bad faith, late notice and the common interest doctrine.

- ***Texas Appellate Court Rules That Exhaustion Provision Does Not Require Full Payment of Policy Limits by Lower Level Insurers***

  A Texas appellate court ruled that a high level excess insurer was obligated to contribute to a policyholder's settlement notwithstanding that lower level insurers had paid less than their full policy limits. *Plantation Pipe Line Co. v. Highlands Ins. Co.*, 2014 WL 4346160 (Tex. App. Aug. 29, 2014).

  (click here for full article)

- ***Failure to Establish Primary Policy Exhaustion is Fatal to Contribution Claim Against Excess Insurer, Says Tenth Circuit***

  The Tenth Circuit ruled that an excess insurer was not entitled to contribution from a fellow excess insurer because it failed to establish exhaustion of the primary policy underlying the non-contributing excess insurer. *Scottsdale Ins. Co. v. National Union Fire Ins. Co.*, No. 12-1513 (10th Cir. Sept. 2, 2014).

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- ***Sixth Circuit Finds No General Liability Coverage for Misappropriation and Infringement Claims***

  The Sixth Circuit ruled that a general liability insurer had no duty to defend or indemnify claims alleging improper use of another company's database and trademarked name. *Liberty Corp. Capital Ltd. v. Security Safe Outlet*, 2014 WL 3973726 (6th Cir. Aug. 15, 2014).

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- ***Courts Issue Conflicting Decisions Regarding Validity of Insurer Contribution Claims***

  The Connecticut Supreme Court and a South Carolina federal district court issued conflicting rulings as to whether an insurer may seek contribution from a fellow insurer for a pro rata share of defense costs. *Travelers Cas. & Sur. Co. of America v. Netherlands Ins. Co.*, 312 Conn. 714 (Conn. 2014); *Auto-Owners Ins. Co. v. Travelers Cas. & Sur. Co. of America*, 2014 WL 3687338 (D.S.C. July 22, 2014).

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- ***Oregon Court Rules That Construction Defect Claims Arise Out of One Occurrence***

  An Oregon federal district court ruled that numerous incidents of property damage alleged in a construction defect case were caused by a single occurrence – namely, the developers' failure to build the condominiums in a defect-free manner. *Chartis Specialty Ins. Co. v. American Contractors Ins. Co. Risk Retention Grp.*, 2014 WL 3943722 (D. Or. Aug. 12, 2014).

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- ***New York Bankruptcy Court Lifts Stay to Permit Defense Cost Payment by D&O Insurers***

  A New York bankruptcy court ruled that D&O policies were not property of a debtor's estate and that insurers were permitted to pay policy proceeds to defend individual directors and officers. *In re MF Global Holdings Ltd.*, 2014 WL 4375687 (Bankr. S.D.N.Y. Sept. 4, 2014).

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- ***Second Circuit Affirms Dismissal of Reinsurance Claims Based on Late Notice***

  The Second Circuit affirmed a New York federal district court opinion granting a reinsurer's summary judgment motion on the basis of late notice. *AIU Ins. Co. v. TIG Ins. Co.*, 2014 WL 4211080 (2d Cir. Aug. 27, 2014).

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- ***Florida Appellate Court Rules That Insurer's Breach of Contract is Not Condition Precedent to Bad Faith Claim***

  A Florida appellate court ruled that an insurer's breach of the insurance policy is not a precondition to a bad faith claim, so long as the insurer's liability for coverage and the extent of damages are established. *Cammarata v. State Farm Florida Ins. Co.*, 2014 WL 4327948 (Fla. 4th DCA Sept. 3, 2014).

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- ***New Jersey Supreme Court Endorses Common Interest Protection of Privileged Materials***

  The New Jersey Supreme Court ruled that attorney-client and work product materials remain privileged despite disclosure to third parties if the materials were shared "in a manner calculated to preserve their confidentiality, in anticipation of litigation, and in furtherance of a common purpose." *O'Boyle v. Borough of Longport*, 218 N.J. 168 (N.J. 2014).

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Excess Alerts:

Texas Appellate Court Rules That Exhaustion Provision Does Not Require Full Payment of Policy Limits by Lower Level Insurers

Reversing a trial court decision, a Texas appellate court ruled that a high level excess insurer was obligated to contribute to a policyholder's settlement notwithstanding that lower level insurers had paid less than their full policy limits. *Plantation Pipe Line Co. v. Highlands Ins. Co.*, 2014 WL 4346160 (Tex. App. Aug. 29, 2014).

Plantation, a pipeline operator, spent approximately $12 million to remediate petroleum leaks. Thereafter, Plantation sought coverage from its primary carrier, American, and its first and second level excess insurers, Cal Union and Lumbermens. The insurers reached a settlement under which they each paid less than their full policy limits. Plantation then demanded indemnity from Highlands, which had issued a high level "Special Risk Policy" covering loss from $8 million to $18 million. Highlands denied coverage on the basis that the other insurance policies were not fully exhausted. In ensuing litigation, a Texas trial court granted Highlands' summary judgment motion, finding that it was not liable because the other insurers had settled for less than their policy limits. The appellate court reversed.

The Highlands policy stated that liability attached "only after the Underlying Umbrella Insurers have paid or have been held liable to pay the full amount of their respective ultimate net loss liability." Although the term "ultimate net loss" was not defined in the Highlands policy, it was defined in the Lumbermens policy, to which the Highlands policy followed form, as "all sums which the insured … become[s] legally obligated to pay as damages, whether by reason of adjudication or settlement … ." The appellate court reasoned that these two provisions, read together, did not require the Highlands policy attachment point to be reached solely by the underlying insurers' payments. Rather, the court held that the policy language required only that the total sum of payments made (by Plantation and its insurers) reach the $8 million attachment point, which was the case here. In so ruling, the court explicitly distinguished the policy language at issue in *Citigroup, Inc. v. Federal Ins. Co.*, 649 F.3d 367 (5th Cir. 2011) (discussed in September 2011 Alert), in which the Fifth Circuit ruled that an exhaustion provision specifically requiring payment of policy limits by underlying insurers warranted dismissal of claims against an excess insurer where the policyholder had reached a below-limits settlement with its primary insurer. Other decisions in this context reach different results, often driven largely by applicable policy language. *See* May 2014 Alert, June 2013 Alert, October 2012 Alert, and September and October 2011 Alerts.

Failure to Establish Primary Policy Exhaustion is Fatal to Contribution Claim Against Excess Insurer, Says Tenth Circuit

The Tenth Circuit ruled that an excess insurer is not entitled to contribution from another excess insurer because exhaustion of the primary policy underlying the non-contributing excess insurer had not been estabished. *Scottsdale Ins. Co. v. National Union Fire Ins. Co.*, No. 12-1513 (10th Cir. Sept. 2, 2014).

National Union and Scottsdale issued consecutive excess policies to Northwest Construction Company. Scottsdale's policy was in effect from 2002 to 2003 while National Union's policies were in effect from

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2003 to 2004 and 2004 to 2005. The coverage dispute arose after Northwest settled an underlying construction defect suit. Pursuant to the settlement, the primary insurers with policies in effect from 2002 to 2003 (Transcontinental) and 2003 to 2004 (Valley Forge) each paid their full $2 million aggregate limits. The primary insurer in 2004 to 2005 (American Zurich) contributed only $75,000 of its $2 million aggregate limit. Scottsdale also contributed to the settlement, but National Union refused to do so. In a related agreement, Scottsdale paid $500,000 to CNA Financial Corporation, which owned Transcontinental and Valley Forge. Thereafter, Scottsdale sued National Union, seeking reimbursement of settlement payments. A Colorado federal district court granted National Union's summary judgment motion, finding that Scottsdale failed to establish exhaustion of the primary policies underlying National Union's excess policies. The Tenth Circuit affirmed.

The parties disputed whether exhaustion should be "horizontal" (such that all primary policies must be exhausted before excess coverage is triggered) or "vertical" (such that each excess policy in a triggered year must contribute once the immediate underlying coverage is exhausted, regardless of whether other primary policies are exhausted). The Tenth Circuit declined to decide that issue, and ruled instead that Scottsdale had failed to establish exhaustion for the purposes of triggering National Union's coverage under either theory. The court explained that horizontal exhaustion had not been established because American Zurich paid only $75,000 of its $2 million limit. Likewise, there was no vertical exhaustion for either of the National Union policy periods. Although Valley Forge had paid its policy limits in the settlement, the exhaustion of that policy was cast in doubt following Scottsdale's $500,000 payment to CNA Financial, Valley Forge's parent company. The court reasoned that CNA might have distributed all or part of that payment to Valley Forge, thereby eradicating the exhaustion of that policy. Although Scottsdale argued that it did not intend for the payment to be allocated to Valley Forge, the court held the record did not establish this fact. In this context, the court noted that Scottsdale could have specified the intended allocation of its $500,000 in the settlement agreement.

Advertising Injury Alert:

Sixth Circuit Finds No General Liability Coverage for Misappropriation and Infringement Claims

Policyholders frequently seek general liability coverage for claims alleging misappropriation and infringement of proprietary information. Courts have largely rejected these claims because they do not present "advertising injury" or "property damage" insured by liability policies. In a recent decision, the Sixth Circuit, following this reasoning, ruled that a general liability insurer had no duty to defend or indemnify claims alleging improper use of another company's database and trademarked name. *Liberty Corp. Capital Ltd. v. Security Safe Outlet*, 2014 WL 3973726 (6th Cir. Aug. 15, 2014).

The coverage dispute arose out of a business transaction between two firearms retailers, BudsGunShop.com ("Buds") and Security Safe Outlet ("SSO"). Buds alleged that SSO improperly used its customer database and name in order to establish a competing company. Liberty, SSO's general liability insurer, filed a declaratory judgment action, seeking a ruling that it had no duty to defend or indemnify SSO. A Kentucky federal district court agreed, reasoning that the underlying complaint failed to allege advertising injury or property damage. The Sixth Circuit affirmed.

The court ruled that the improper use of customer information to generate "mass promotional emails" does not constitute injury arising out of the use of an "advertising idea." The court explained that even assuming that emails to potential customers were "advertisements," there was no use of another's "advertising idea" because a customer list (in contrast

to a plan, scheme or design for marketing products) is not an "advertising idea."

SSO also argued that Lanham Act and other infringement-related claims alleged advertising injury because they arose out of an "oral or written publication … that … disparages a person's or organization's goods, products, or services." More specifically, SSO contended that the improper use of another company's name causes harm to that company's identity or reputation. While other courts have rejected this argument, *see e.g., USF&G Co. v. Ashley Reed Trading, Inc.*, No. 11 Civ. 4782 (S.D.N.Y. Aug. 20, 2014) (counterfeit sale of trademarked products in violation of Lanham Act does not constitute "advertising injury" because sale of goods is not advertising activity), the Sixth Circuit declined to decide the issue, ruling that even assuming such claims alleged disparagement, they were nonetheless excluded by virtue of trademark-infringement and breach-of-contract exclusions.

The court rejected SSO's argument that injury to a company's identity and reputation constitutes a "loss of use of tangible property." The court reasoned that goodwill and reputation are intangible elements, and that in any event, the underlying complaint alleged trademark infringement, not a "loss of use" of a trademark.

Contribution Alert:

Courts Issue Conflicting Decisions Regarding Validity of Insurer Contribution Claims

In recent months, the Connecticut Supreme Court and a South Carolina federal district court issued conflicting rulings as to whether an insurer may seek contribution from a fellow insurer for a pro rata share of defense costs.

In *Travelers Cas. & Sur. Co. of America v. Netherlands Ins. Co.*, 312 Conn. 714 (Conn. 2014), the Connecticut Supreme Court allowed an insurer to seek pro rata contribution of defense costs from another insurer, rejecting an argument that the plaintiff insurer lacked standing to bring the suit.

The State of Connecticut sued Lombardo, a masonry company, for damages caused by water leaks in a building constructed in part by Lombardo. Travelers, which insured Lombardo during the construction period, agreed to defend Lombardo. Netherlands, which issued later policies during the time frame in which the leaks were discovered, refused to defend. Travelers sued Netherlands seeking a pro rata share of defense costs. Netherlands moved to dismiss for lack of subject matter jurisdiction, claiming that Travelers lacked standing because it was neither a party to nor a third-party beneficiary of the Netherlands-Lombardo insurance contract. The trial court disagreed, finding that Netherlands had a duty to defend the underlying complaint and that based on Netherland's time on the risk, it was obligated to pay nearly half of Lombardo's defense costs. The Connecticut Supreme Court affirmed.

In doing so, the Connecticut Supreme Court joined the majority of jurisdictions in holding that "an entity that is not a named insured or otherwise party to certain insurance policies may demonstrate 'a specific, personal and legal interest in [those] policies' that would give it standing to commence a declaratory judgment action." In some jurisdictions, courts have required the inclusion of the insured as a necessary party to such a declaratory judgment action. The Connecticut Supreme Court explicitly rejected this requirement, explaining that under Connecticut case law, the failure to give notice to or join an indispensable party does not impact a court's subject matter jurisdiction.

In contrast, in *Auto-Owners Ins. Co. v. Travelers Cas. & Sur. Co. of America*, 2014 WL 3687338 (D.S.C. July 22, 2014), a federal district court in South Carolina dismissed Auto-Owners' declaratory judgment suit against Travelers, ruling that South Carolina law does not recognize a contribution claim by one insurer against another with respect to the defense of a common insured.

Hyperion Towers, a condominium association, was insured by Auto-Owners under a general liability policy and by Travelers pursuant to a management and

organizational liability policy. When Hyperion Towers was sued by condominium owners, Auto-Owners agreed to provide a defense. Auto-Owners then sued Travelers, seeking a declaration that it was required to participate in the defense. The court dismissed the suit, finding no basis in South Carolina law for the relief sought.

As a preliminary matter, the court concluded that Auto-Owners had standing to sue Travelers. However, the court ruled that Auto-Owners failed to state a claim upon which relief could be granted. The court explained that under South Carolina Supreme Court precedent, an insurer's duty to defend is "several and the insurer is not entitled to divide the duty nor require contribution from another absent a specific contractual right." In so ruling, the court emphasized that a defending insurer is a "stranger to the contract" between the non-defending insurer and the policyholder and thus is not damaged by any alleged breach of that contract. The court further noted that even where claims are asserted as contribution, unjust enrichment or equitable subrogation (rather than as a prospective declaratory judgment action, as was the case here), they nonetheless fail for the same reasons. Finally, the court dismissed arguments based on each policy's "other insurance" clause as irrelevant to the defense cost contribution analysis.

Number of Occurrences Alert:

Oregon Court Rules That Construction Defect Claims Arise Out of One Occurrence

An Oregon federal district court ruled that numerous incidents of property damage alleged in a construction defect case were caused by a single occurrence – namely, the developers' failure to build the condominiums in a defect-free manner. *Chartis Specialty Ins. Co. v. American Contractors Ins. Co. Risk Retention Grp.*, 2014 WL 3943722 (D. Or. Aug. 12, 2014).

ACIG and Chartis issued general liability policies to Hoffman, a development company. The insurers settled a lawsuit brought by condominium owners against Hoffman alleging damage caused by numerous structural and installation defects. Chartis sought a declaration that the property damage alleged in the underlying suit was caused by more than one "occurrence." The court disagreed, and granted Hoffman's summary judgment motion.

The court reasoned that the underlying complaint alleged that the property damage was caused by "the Developers' failure to ensure the [condominium] was properly developed," which constituted "exposure to substantially the same general harmful conditions." A critical factor in this case appears to be the role of the policyholder as property developer, rather than contractor, as the court suggested that a different result might have been reached if separate acts of negligent construction performed by the policyholder had been alleged.

D&O Alert:

New York Bankruptcy Court Lifts Stay to Permit Defense Costs Payment by D&O Insurers

Our May 2012 Alert discussed a decision that permitted D&O and E&O insurers to advance defense costs to individual policyholders, over the objections of plaintiffs suing the company, who claimed that the insurance proceeds were estate property. *In re MF Global Holdings Ltd.*, 2012 WL 1191892 (Bankr. S.D.N.Y. Apr. 10, 2012). In that decision, the bankruptcy court declined to decide whether debtor MF Global had an interest in the policy proceeds. The court relied instead on the Priority of Payment provisions in the policies and principles of equity to set a $30 million limit on the amount of policy proceeds that the individual insureds could access (an amount later increased to $43.8 million). Having exhausted this limit, the policyholders sought an order allowing payment for defense of covered claims up to full policy limits (less approximately $13 million – an amount that MF Global could claim under the policies for indemnification of certain individual officers). In a decision issued this

month, the court granted the policyholders' motion, finding that MF Global has no legal or equitable interest in the D&O policies' proceeds. *In re MF Global Holdings Ltd.*, 2014 WL 4375687 (Bankr. S.D.N.Y. Sept. 4, 2014).

The court noted that decisions addressing whether the proceeds of a liability policy are property of a debtor's estate turn largely on applicable policy language. Where a policy provides only direct coverage to a debtor, most courts have found that the proceeds are estate property. In contrast, where a policy covers only the directors and officers, policy proceeds are typically not deemed property of the estate. Where, as here, the policies provided coverage to both entities, a determinative issue is whether "depletion of the proceeds would have an adverse effect on the estate." The court reasoned that depletion of the D&O proceeds would not adversely affect the estate because MF Global was unlikely to be named in any lawsuits that would give rise to coverage under the D&O policies. In particular, the court noted that MF Global is not a defendant in any action alleging covered claims and can no longer be sued due to applicable statutes of limitations, and that MF Global had not pursued any indemnification claims covered by the D&O policies. In addition, the court noted that even if MF Global had a contractual claim to the D&O proceeds, the Priority of Payment provisions required that defense costs be advanced to the individual insureds before other payments.

Reinsurance Alert:

Second Circuit Affirms Dismissal of Reinsurance Claims Based on Late Notice

Our April 2013 Alert discussed a New York federal district court opinion granting a reinsurer's summary judgment motion on the basis of late notice. *AIU Ins. Co. v. TIG Ins. Co.*, 2013 WL 1195258 (S.D.N.Y. Mar. 25, 2013). There, the court ruled that under Illinois law, late notice defeats a ceding insurer's coverage claim regardless of prejudice to the reinsurer. Last month, the Second Circuit affirmed the decision. *AIU Ins. Co. v. TIG Ins. Co.*, 2014 WL 4211080 (2d Cir. Aug. 27, 2014). The Second Circuit ruled that the district court properly applied Illinois (rather than New York) law and that Illinois law does not require a showing of prejudice. The court stated that "[d]espite the absence of any statement from either the Illinois Supreme Court or a court of that State's appellate division, various courts addressing this precise issue have held that the law of Illinois does not require a reinsurer to demonstrate prejudice resulting from late notice."

Bad Faith Alert:

Florida Appellate Court Rules That Insurer's Breach of Contract is Not Condition Precedent to Bad Faith Claim

Resolving an unsettled question under Florida law, a Florida appellate court ruled that an insurer's breach of the insurance policy is not a precondition to a bad faith claim, so long as the insurer's liability for coverage and the extent of damages are established. *Cammarata v. State Farm Florida Ins. Co.*, 2014 WL 4327948 (Fla. 4th DCA Sept. 3, 2014).

Appellate courts in Florida have issued mixed decisions as to whether a breach of contract is a condition precedent to a bad faith claim against an insurer. In *Cammarata*, the court addressed this split in authority, and concluded that a bad faith claim may be ripe for adjudication notwithstanding the absence of an insurer's contractual breach. The court held that the only preconditions to a bad faith claim (aside from statutory notice requirements) are determinations relating to (1) the insurer's liability for coverage and (2) the extent of damages. The court further held that these two conditions may be met by the terms of a settlement agreement, and need not be resolved by litigation. Finally, citing to *Trafalgar at Greenacres, Ltd. v. Zurich American Ins. Co.*, 100 So.3d 1155 (Fla. 4th DCA 2012) (discussed in our October 2012 Alert and holding that an appraisal award constituted a "favorable resolution" sufficient to form the basis of a bad faith claim), the court concluded that the parties' settlement in connection

with the appraisal process, which determined the extent of damages, satisfied the conditions precedent to a bad faith action.

Discovery Alert:

New Jersey Supreme Court Endorses Common Interest Doctrine to Protect Privileged Materials

Although New Jersey appellate courts have applied the common interest doctrine in deciding privilege disputes, the New Jersey Supreme Court had not until recently expressly adopted the doctrine or addressed its parameters. In a decision issued this summer, New Jersey's highest court ruled that attorney-client and work product materials remain privileged despite disclosure to third parties if the materials were shared "in a manner calculated to preserve their confidentiality, in anticipation of litigation, and in furtherance of a common purpose." *O'Boyle v. Borough of Longport*, 218 N.J. 168 (N.J. 2014).

The decision arose from several suits against a local borough and its officials over governance issues. Two attorneys, each representing different defendants in the separate lawsuits, decided to cooperate in their respective defenses, and executed a joint strategy memorandum. During litigation, the plaintiff sought production of materials exchanged between the attorneys pursuant to the Open Public Records Act ("OPRA") and the common law right to access. The defendants asserted privilege. A trial court ruled in favor of the defendants on the basis that the documents were not public records under OPRA, and were in any event privileged. An appellate court declined to resolve whether the withheld documents were public records under OPRA, and instead held that they were protected from production due to work product and attorney-client privilege. The appellate court reasoned that the privilege was not waived by the sharing of the materials because the two attorneys shared a common interest, and that the common interest doctrine is not abrogated by a party's right to public records under OPRA or by common law right of access. The New Jersey Supreme Court affirmed.

Clarifying the scope of the common interest doctrine under New Jersey law, the court held that it is not necessary for parties to share "identical interests" or for litigation to have actually commenced. Furthermore, the court ruled that communications need not be confined to counsel; communications between counsel and a representative of another party with a common interest may also be protected. The court pronounced the following rule of law:

> The common interest exception to waiver of confidential attorney-client communications or work product due to disclosure to third parties applies to communications between attorneys for different parties if the disclosure is made due to actual or anticipated litigation for the purpose of furthering a common interest, and the disclosure is made in a manner to preserve the confidentiality of the disclosed material and to prevent disclosure to adverse parties.

As the court noted, other jurisdictions vary in their application of the common interest doctrine, with some courts requiring identical legal interests among sharing parties and/or a threat of actual litigation.

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