Simpson Thacher

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In This Issue

Delaware District Court Upholds Boy Scouts Chapter 11 Bankruptcy Plan

A Delaware district court upheld the Chapter 11 reorganization plan of the Boy Scouts of America, which provided for a $2.5 billion settlement trust to compensate tens of thousands of sexual abuse claimants. *In re Boy Scouts of America and Delaware BSA, LLC*, 2023 U.S. Dist. LEXIS 53884 (D. Del. Mar. 27, 2023). (Click here for full article)

Reversing District Court, Third Circuit Rules That Issue Of Fact Exists As To D&O Insurer's Obligation To Pay Defense Costs Stemming From SEC Subpoena

The Third Circuit ruled that a Delaware district court erred in granting a D&O insurer's summary judgment motion as to its duty to pay defense costs incurred in complying with a subpoena issued by the Securities and Exchange Commission. *Liberty Ins. Underwriters, Inc. v. Cocrystal Pharma, Inc.*, No. 22-2242 (3d Cir. Apr. 25, 2023). (Click here for full article)

Eleventh Circuit Rules That Policy Language Trumps Parties' Clear Expressions of Intent As To Policy Coverage

Reversing a Florida district court decision, the Eleventh Circuit ruled that property insurance policies provided coverage for damage stemming from "named windstorms" notwithstanding express communications between the insurer and policyholder evidencing their mutual intent to exclude such coverage. *Shiloh Christian Center v. Aspen Specialty Ins. Co.*, 2023 U.S. App. LEXIS 8847 (Apr. 13, 2023). (Click here for full article)

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A Missouri federal district court ruled that arbitration provisions subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards are enforceable against a policyholder notwithstanding a state anti-arbitration statute. *Foresight Energy, LLC v. Ace American Ins. Co.*, No. 4:22-cv-00887 (E.D. Mo. Mar. 21, 2023). (Click here for full article)

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Ninth Circuit Enforces Professional Services Exclusion And Rules That Insurer Is Entitled To Reimbursement Of Settlement Payment

The Ninth Circuit ruled that a professional services exclusion barred coverage for underlying claims and that the insurer was therefore entitled to reimbursement of settlement payments to the policyholder. *Mass. Bay Ins. Co. v. Neuropathy Solutions, Inc.*, 2023 U.S. App. LEXIS 7813 (9th Cir. Apr. 3, 2023). (Click here for full article)

Simpson Thacher News: Insurance Publications and Speaking Engagements

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Delaware District Court Upholds Boy Scouts Chapter 11 Bankruptcy Plan

HOLDING

A Delaware district court upheld the Chapter 11 reorganization plan of the Boy Scouts of America, which provided for a $2.5 billion settlement trust to compensate tens of thousands of sexual abuse claimants. *In re Boy Scouts of America and Delaware BSA, LLC*, 2023 U.S. Dist. LEXIS 53884 (D. Del. Mar. 27, 2023).

BACKGROUND

Facing a wave of sexual abuse claims, the Boy Scouts of America filed for bankruptcy. Last year, following a series of evidentiary hearings, a federal bankruptcy judge confirmed the plan, deeming it "fair and equitable." The plan included a settlement between several insurers and claimant groups that would help fund the $2.5 billion trust. In particular, the plan contemplated that the settling insurers will buy back policies issued to the Boy Scouts of America through a $1.6 billion contribution to the fund. The plan also required contributions from the Boy Scouts of America and its local charters in exchange for an injunction that channeled existing and future abuse claims to the settlement trust and a release of liability. More than a dozen non-settling insurers (as well as certain claimant groups) appealed the plan. One objection to the plan was its alleged failure to include adequate measures to verify the legitimacy of the sexual abuse claims.

DECISION

In upholding the plan, the district court held that the non-settling insurers had not shown clear error in the decision confirming the plan. Among other things, the court found no clear error in the overall monetary value of abuse claims or in the bankruptcy court's determination that the plan was proposed in good faith. The court also upheld the bankruptcy court's finding that it had jurisdiction over claims relating to the injunction and releases of liability. In that context, the court noted the bankruptcy court's "residual authority" to approve of plans based on various statutory provisions, even if not expressly stated in the Bankruptcy Code.

COMMENTS

The plan, which represents the largest sexual abuse settlement in U.S. history, not only establishes the $2.5 billion trust, but also potentially implicates $4 billion in policy limits from insurers that were not parties to the settlement, and assets that have not been liquidated. On March 31, certain insurers filed an emergency motion for a stay pending appeal of the decision. The insurers argued that the case presents "fundamental questions of bankruptcy law of vital importance that could have widespread impact in mass tort bankruptcies for years to come." This month, the Third Circuit denied the motion, pending resolution of all appeals.

Reversing District Court, Third Circuit Rules That Issue Of Fact Exists As To D&O Insurer's Obligation To Pay Defense Costs Stemming From SEC Subpoena

HOLDING

The Third Circuit ruled that a Delaware district court erred in granting a D&O insurer's summary judgment motion as to its duty to pay defense costs incurred in complying with a subpoena issued by the Securities and Exchange Commission. *Liberty Ins. Underwriters, Inc. v. Cocrystal Pharma, Inc.*, No. 22-2242 (3d Cir. Apr. 25, 2023).

BACKGROUND

Cocrystal was formed in 2014 following the merger of Biozone Pharmaceutical and Cocrystal Discovery. After the merger, Biozone ceased to exist. Cocrystal purchased D&O coverage from Liberty that covered claims made between 2015 and 2018. In 2015, the SEC subpoenaed Cocrystal requesting various documents about both Cocrystal and Biozone. While the SEC did not indicate which entity was the target of its investigation, it appeared that the SEC was primarily interested in Biozone. Liberty denied coverage for the costs of complying with the subpoena, arguing that there was no "Claim" under the policy. However, in 2017, after receiving more information about the SEC's investigation, Liberty paid Cocrystal $1.1 million to cover its defense costs.

In 2018, after Liberty's policy expired, the SEC filed an enforcement action against former Biozone officers and directors. Thereafter, private plaintiffs brought derivative actions and a securities class action against Cocrystal, alleging that Cocrystal's officers made false and misleading statements following the merger. Cocrystal sought coverage for these suits based on an "Interrelated Wrongful Acts" provision, under which all claims arising from acts that have a "common nexus" are deemed to have been made on the date the earliest claim was made. Liberty denied coverage, and also sought reimbursement of the defense costs it paid based on the SEC enforcement action against only Biozone executives. The district court granted Liberty's summary judgment motion and the Third Circuit reversed.

DECISION

The Third Circuit ruled that issues of fact existed as to whether Liberty was obligated to pay Cocrystal's costs of complying with the subpoena because the subpoena established the "possibility of wrongful acts" being investigated by the SEC. In so ruling, the court noted that various document requests related to the actions and operations of Cocrystal following the merger.

In addition, the Third Circuit concluded that summary judgment could not be issued as to Liberty's duty to pay the costs of defending the three private lawsuits filed after expiration of its policy. The court explained: "If it is found that the SEC investigated a Wrongful Act by Cocrystal—making the subpoena a proper claim under the policy, then the 2018 Lawsuits may relate back and be covered."

COMMENTS

The scope of a D&O insurer's duty to pay the costs of complying with an SEC subpoena is a frequently litigated issue. Outcomes are highly fact specific, turning on both applicable policy language and the particular nature of the SEC's requests. Importantly, in *Cocrystal*, the Third Circuit held that the ultimate outcome of SEC investigations was not relevant to defense cost analysis. In finding that Liberty had no duty to cover Cocrystal's costs of complying with the subpoena, the district court had relied upon the fact that the eventual SEC enforcement action charged only former Biozone executives and did not implicate any Cocrystal directors or officers. The Third Circuit rejected this reasoning, emphasizing that the subpoena at issue raised the possibility of wrongful acts by Cocrystal and explaining that the duty to defend is based on the possibility of liability "at the beginning of the case, not based on its outcome."

Eleventh Circuit Rules That Policy Language Trumps Parties' Clear Expressions of Intent As To Policy Coverage

HOLDING

Reversing a Florida district court decision, the Eleventh Circuit ruled that property insurance policies provided coverage for damage stemming from "named windstorms" notwithstanding express communications between the insurer and policyholder evidencing their mutual intent to exclude such coverage. *Shiloh Christian Center v. Aspen Specialty Ins. Co.*, 2023 U.S. App. LEXIS 8847 (Apr. 13, 2023).

BACKGROUND

A 2015 policy issued by Aspen to Shiloh covered damage arising from named windstorms. However, during the middle of that policy period, Shiloh informed Aspen that it no longer wished to maintain coverage for named windstorm-related claims. Therefore, Aspen issued an endorsement removing such coverage and reducing the premium. In 2016, during negotiations for a renewal policy, a broker gave Shiloh a quote for the "same coverage" as provided previously, including, in particular, coverage that excluded named storms. A binder confirmed the parties' understanding, by indicating that the agreed-to scope of coverage excluded claims arising from named windstorms. However, the 2016 policy did not contain any exclusion for named windstorms. A 2017 renewal policy, which was issued following communications between the parties that expressly reiterated continued non-coverage for named windstorms, also failed to include such an exclusion.

When Shiloh sought coverage for two named windstorms that occurred in 2016 and 2017, Aspen denied coverage. In ensuing litigation, a Florida district court granted Aspen's summary judgment motion. The district court reasoned that despite the absence of named windstorm exclusions in the policies, evidence of the parties' intent to exclude such coverage was overwhelming. The Eleventh Circuit reversed.

DECISION

The Eleventh Circuit explained that unambiguous policy language must be enforced as written, regardless of whether extrinsic evidence contradicts the policy's terms. The court held that the 2016 policy unambiguously covered damage stemming from named windstorms because there was no explicit or implicit reference to an exclusion for named windstorms in the policy. In so ruling, the court rejected the district court's finding that the parties' annual renewals created a "continuous chain" of coverage under the terms initially created by the 2015 endorsement. The Eleventh Circuit reasoned that even if such a "chain" of coverage existed, the terms of coverage under each annual policy were not necessarily identical.

As for the 2017 policy, Shiloh conceded that it was facially ambiguous because it did not contain a named windstorm exclusion, but in the deductible section, contained a parenthetical that stated "excluding Named Windstorms." Applying the doctrine of *contra proferentem*, the court resolved this ambiguity against the insurer.

COMMENTS

A notable element of the Eleventh Circuit's decision is the court's use of *contra proferentem* to resolve ambiguity in the 2017 policy, rather than reliance on extrinsic evidence—evidence which indisputably indicated the parties' mutual intent to exclude coverage for damage resulting from named windstorms. While courts employ different rules of policy construction in interpreting ambiguous policies, the Eleventh Circuit held that under Florida law, a facially ambiguous policy should be liberally construed in favor of coverage without regard to extrinsic evidence relating to the parties' intent. In a footnote, however, the court left unanswered the question of whether extrinsic evidence could be considered in resolving latent ambiguities in insurance policies.

Missouri Court Rules That Arbitration Clause In Insurance Policies Is Enforceable Notwithstanding State Statute Precluding Arbitration Of Insurance Disputes

HOLDING

A Missouri federal district court ruled that arbitration provisions subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") are enforceable against a policyholder notwithstanding a state anti-arbitration statute. *Foresight Energy, LLC v. Ace American Ins. Co.*, No. 4:22-cv-00887 (E.D. Mo. Mar. 21, 2023).

BACKGROUND

When the policyholder sought coverage for damage resulting from a coal mine fire, several insurers invoked the international arbitration clauses contained in their policies. Thereafter, the policyholder sued, alleging breach of contract and seeking a declaration of coverage. The policyholder argued that the arbitration clauses were unenforceable under Missouri's Uniform Arbitration Act, Mo. Rev. Stat. § 435.530, which prohibits mandatory arbitration in insurance contracts. The court granted the insurers' motion to dismiss or stay pending arbitration.

DECISION

The central issue in dispute was whether Missouri's anti-arbitration statute reverse-preempts the Convention, a multi-national treaty that provides for the reciprocal enforcement of international arbitration agreements by signatory nations. Under the McCarran-Ferguson Act, state laws may preempt Acts of Congress where the state law specifically regulates the business of insurance. The court concluded that there was no reverse preemption under the McCarran-Ferguson Act, reasoning that the Act applies only to domestic legislation and was not intended to allow state laws to preempt international treaties. The court therefore held that the international arbitration clauses were enforceable notwithstanding state law barring arbitration of insurance disputes. In so ruling, the court cited the "mounting precedent favoring the enforcement of the Convention," including decisions by Courts of Appeals in the Fourth and Fifth Circuits.

COMMENTS

As the court noted, there is no judicial consensus on whether state laws prohibiting arbitration of insurance disputes reverse preempt the Convention. The Second Circuit has ruled that the Convention is subject to reverse preemption under the McCarran-Ferguson Act, whereas the Ninth Circuit reached the opposite conclusion. Those two decisions were based on analysis of whether the Convention is a "self-executing" treaty (*i.e.*, is automatically enforced as domestic law), or conversely, whether it requires an "Act of Congress" to become domestic law, in which case it would implicate reverse-preemption under the McCarran-Ferguson Act.

The *Foresight* court deemed it unnecessary to decide whether the Convention is a self-executing treaty or instead required congressional action for its implementation. The court based its ruling on the more general principle that the Convention is not reverse-preempted by state anti-arbitration statutes because the McCarran-Ferguson Act applies only to domestic laws and not international treaties.

Ninth Circuit Enforces Professional Services Exclusion And Rules That Insurer Is Entitled To Reimbursement Of Settlement Payment

HOLDING

The Ninth Circuit ruled that a professional services exclusion barred coverage for underlying claims and that the insurer was therefore entitled to reimbursement of settlement payments to the policyholder. *Mass. Bay Ins. Co. v. Neuropathy Solutions, Inc.*, 2023 U.S. App. LEXIS 7813 (9th Cir. Apr. 3, 2023).

BACKGROUND

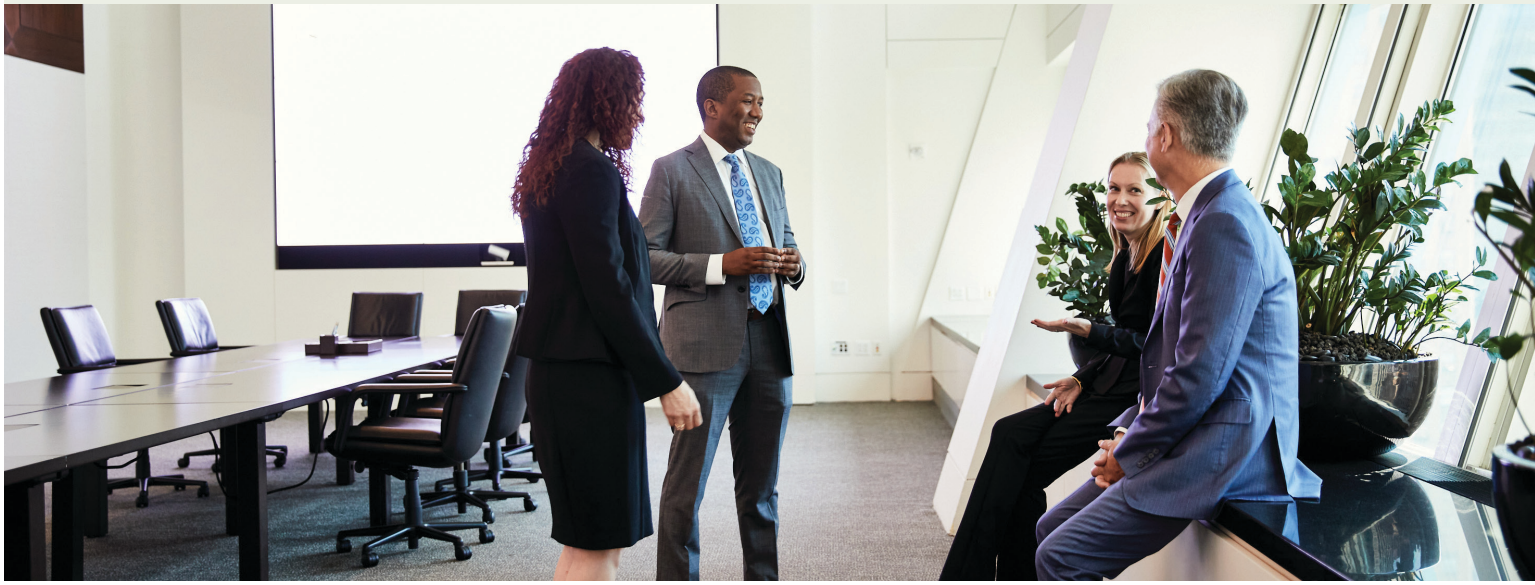
An underlying suit against Neuropathy alleged that it falsely advertised and recklessly administered non-FDA approved "stem cell" injections, which resulted in severe bodily injuries. The insurer issued a reservation of rights and ultimately settled the underlying suit. Thereafter, the insurer sued Neuropathy, seeking reimbursement of the settlement amount. A California district court ruled that the insurer was obligated to defend and indemnify Neuropathy in the underlying action and was therefore not entitled to reimbursement. The Ninth Circuit reversed.

DECISION

The Ninth Circuit ruled that coverage was precluded by a professional services exclusion that applied to bodily injury "caused by the rendering of or failure to render any professional service . . . regardless of whether any such service, advice or instruction is ordinary to any insured's profession." The policy further provided that professional services encompass advertising, medical treatment and any health or service advice or instruction. The court concluded that Neuropathy's liability in the underlying suit stemmed from professional services, since it alleged that the company engaged in deceptive advertising and practices in connection with the provision of medical services.

COMMENTS

In ruling that coverage was barred by the professional services exclusion, the Ninth Circuit deemed it irrelevant that pursuant to a contract with a third party, Neuropathy was only assigned administrative duties, and that the medical professionals who performed the injections were not employed by Neuropathy. The court explained that the professional services exclusion extended to the supervision or monitoring of others who provide professional services.



Simpson Thacher News: Insurance Publications and Speaking Engagements

Bryce Friedman and Karen Cestari served as Contributing Editors of the 2023 edition of *Lexology Getting the Deal Through: Insurance Litigation*, authoring the publication's United States chapter. The chapter, formatted as a Q&A, highlights preliminary and jurisdictional considerations in insurance litigation in the U.S. and frequently litigated issues relating to the interpretation of insurance contracts. It also summarizes recent insurance litigation trends and provides an outlook for the year ahead.

Chet Kronenberg participated as one of two panelists in a webinar produced by Strafford Publication titled, "Resolving Insurers' and Insureds' Settlement Dilemmas When Policy Limits Are Insufficient: Multiple Insured and Multiple Claims." The webinar included discussion of how an insurer's duty to settle may be impacted by two difficult but recurring situations: (1) when multiple claimants are competing for insufficient policy limits against an insured, and (2) when claimants from a single occurrence will release fewer than all of multiple insureds sharing the same limit of liability.

Bryce Friedman authored an article titled, "New York Contributes To The Demise Of Every Exposure Testimony In Asbestos And Talc Litigation," which was published by *Mealey's*. The article details the New York Court of Appeals' recent opinion in *Nemeth v. Brenntag North America* and its potential impact on asbestos and alleged asbestos-in-talc litigation nationwide. It further explores the implications of the "any exposure" theory, as well as its impact in New York and other states across the country.

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Simpson Thacher has been an international leader in the practice of insurance and reinsurance law for more than a quarter of a century. Our insurance litigation team practices worldwide.

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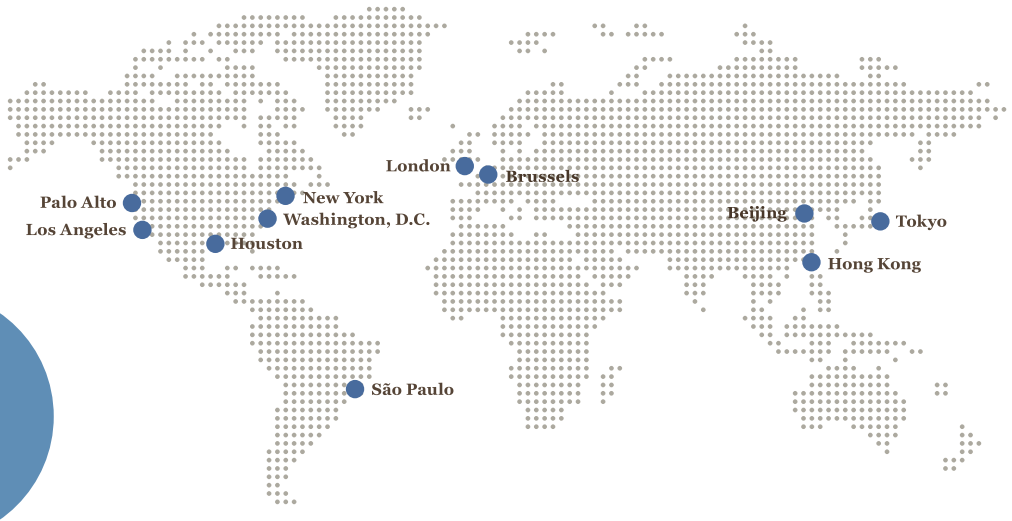

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