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Pennsylvania Court Rules That Umbrella Insurers Are Obligated To Defend Opioid Litigation

A Pennsylvania federal district court ruled that two umbrella insurers were obligated to contribute to the policyholder's defense, finding that underlying claims brought by government entities alleged damages "because of bodily injury." *Giant Eagle v. American Guarantee and Liability Ins. Co.*, 2020 WL 6565272 (W.D. Pa. Nov. 9, 2020). (Click here for full article)

Another Round Of Decisions Define The Scope Of Covid-Related Coverage

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The Eleventh Circuit ruled that a primary insurer is liable to an excess insurer for negligently failing to settle the underlying suit against the policyholder, rejecting the primary insurer's "safe harbor" defense. *American Guarantee & Liability Ins. Co. v. Liberty Surplus Ins. Co.*, 2020 WL 6554654 (11th Cir. Nov. 9, 2020). (Click here for full article)

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Policyholder May Pursue Missouri Statutory Bad Faith Claim Notwithstanding New York Choice Of Law Provision, Says Missouri Court

A Missouri federal district court ruled that a policyholder could pursue a Missouri statutory "vexatious refusal to pay" claim against its insurer, notwithstanding a policy provision that designated New York law as controlling. *Maritz Holdings Inc. v. Certain Underwriters at Lloyd's London Subscribing to Policies Numbered B122F10115115 and F10115116*, 2020 WL 7023952 (E.D. Mo. Nov. 30, 2020). (Click here for full article)

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Cyber Alert:

No Coverage For Email Spoofing Losses, Says New Jersey Court

A New Jersey federal district court ruled that an insurer had no duty to indemnify losses arising out of an email spoofing scam, finding that a theft exclusion unambiguously barred coverage. *Authentic Title Services, Inc. v. Greenwich Ins. Co.*, 2020 WL 6739880 (D.N.J. Nov. 17, 2020).

Authentic, a title insurance agent, participated in a real estate transaction in which Quicken Loans was the mortgage lender. During the course of the transaction, the parties exchanged emails concerning a wire transfer of funds from Authentic to Quicken. Several emails sent to Authentic purported to be from Quicken employees, but in actuality were sent by criminals using email addresses nearly identical to those of Quicken employees. The spoofed emails instructed Authentic to follow certain wiring instructions. After the transfer of funds, the parties discovered the fraud and Authentic sought coverage under an Errors and Omissions policy. The insurer denied coverage based on an exclusion that applied to losses "arising out of . . . the commingling, improper use, theft, stealing, conversion, embezzlement or misappropriation of funds or accounts."

In ensuing litigation, the court granted the insurer's summary judgment motion seeking a declaration of no coverage. The court held that the "claim for coverage undeniably originated from, grew out of, or had a substantial nexus to funds belonging to Quicken that were transferred into the Fraudulent Account." In addition, the court concluded that the scenario involved "theft," "stealing," "misappropriation" or "conversion," rejecting Authentic's contention that the terms are ambiguous as to whether they include conduct by the insured, or are limited to conduct by third parties. In so ruling, the court noted that other policy exclusions contain language specifying to whom they apply, indicating that the parties intended the theft exclusion to apply regardless of whether the insured was involved.

Opioid Alert:

Pennsylvania Court Rules That Umbrella Insurers Are Obligated To Defend Opioid Litigation

Over the past year, several courts have ruled that general liability insurers are obligated to defend opioid manufacturers and distributers against class action suits brought by government entities, finding that the underlying claims allege damages "because of bodily injury." *See* October, July/August, and June 2020 Alerts. Last month, a Pennsylvania federal district court followed suit, ruling that two umbrella insurers were obligated to contribute to the policyholder's defense. *Giant Eagle v. American Guarantee and Liability Ins. Co.*, 2020 WL 6565272 (W.D. Pa. Nov. 9, 2020).

Giant Eagle, a supermarket with pharmaceutical services, was named as a defendant in numerous lawsuits. Some of the suits were brought by families of individuals affected by opioid addition, while others were filed by counties purportedly seeking damages for the costs of medical treatment and other services related to opioid dependence. Two of Giant Eagle's umbrella insurers refused to defend, arguing that the underlying suits did not seek damages potentially covered by their policies. The court disagreed and granted Giant Eagle's partial summary judgment motion.

The court ruled that economic losses incurred by the counties in addressing opioid addition (*e.g.*, costs related to medical treatment and recovery services) were damages "because of bodily injury." In addition, the court held that the complaints alleged an "occurrence" or "accident" under the relevant policies. In particular, the court noted that the complaints alleged negligence with respect to Giant Eagle's failure to identify suspicious opioid

orders and reasoned that public nuisance claims, which allege that Giant Eagle "should have known" about pill mills, sufficiently alleged fortuitous actions.

The court rejected the insurers' contention that the underlying claims alleged multiple occurrences, such that Giant Eagle was obligated to satisfy per-occurrence SIRs and deductibles before seeking a defense from umbrella insurers. The court explained that for purposes of determining the insurers' duty to defend, the complaints need only "potentially allege a single occurrence." Applying Pennsylvania's cause-oriented test for number of occurrences, the court stated: "It is certainly possible . . . that a court could find that a single occurrence, i.e., Giant Eagle's comprehensive failure to maintain effective controls over its opioid distribution and sales, resulted in the injuries suffered by the plaintiffs in the underlying lawsuits." In addition, the court concluded that under a "first manifestation rule," the underlying claims alleged injury that potentially occurred during the policy years at issue. In particular, the court noted that the record was insufficient to determine when bodily injury first manifested, and that the complaints allege bodily injury occurring from 1999 through the present. As such, a potential for coverage under the policies existed, and the duty to defend was triggered.

Finally, the court ruled that the insurers' duty to defend was triggered because Giant Eagle's payment of defense costs in the underlying suits constitutes a "loss" as defined in the umbrella policies.

In *Acuity v. Masters Pharmaceutical, Inc.*, 2020 WL 3446652 (Ohio Ct. App. June 24, 2020), discussed in our June 2020 Alert, an Ohio appellate court ruled that an insurer must defend a pharmaceutical distributor against certain suits filed by government agencies seeking to cover costs relating to 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. This month, the Ohio Supreme Court agreed to review the appellate court decision. *Acuity v. Masters Pharmaceutical Inc.*, No. 2020-1134 (Ohio Dec. 15, 2020).

Covid Alert:

Another Round Of Decisions Define The Scope Of Covid-Related Coverage

Over the past month, more than 30 courts across the country have issued rulings in lawsuits in which policyholders seek insurance coverage for Covid-related business losses. The overwhelming majority of courts have dismissed the policyholders' complaints as matter of law, finding that economic losses stemming from business interruptions do not satisfy the "direct physical loss of or damage to property" requirement of general liability policies. A substantial number of courts have also concluded that civil authority coverage is unavailable because government orders have not prohibited access to insured premises and because property located in close proximity to the insured premises has not been physically damaged. Among these rulings were two decisions issued by federal courts in the Southern District of New York. *See Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405 (S.D.N.Y. Dec. 11, 2020); *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, 2020 WL 7360252 (S.D.N.Y. Dec. 15, 2020). Other courts have dismissed complaints based on the presence of a virus exclusion in the governing policy. Virtually all courts have rejected policyholders' regulatory estoppel arguments, finding no basis in fact or law for application of the doctrine.

A small minority of courts have declined to dismiss policyholder's suits on the pleadings, citing ambiguity in policy language or factual issues in dispute. *See JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, 2020 WL 7258108 (D. Nev. 30, 2020); *Elegant Massage, LLC v. State Farm Mutual Auto. Ins. Co.*, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020).

Finally, judicial panels granted motions to centralize proceedings in multidistrict litigation in New York and Pennsylvania. The New York MDL involves lawsuits alleging that an insurer is obligated to pay for trips cancelled because of Covid. The Pennsylvania MDL involves individual and putative class action cases alleging that the insurer wrongfully refused to cover business income loss due to Covid-related government orders. *See In re: Generali COVID-19 Travel Ins. Litig.*, 2020 WL 7382300 (U.S. Jud. Pan. Mult. Lit. Dec. 15, 2020); *In re: Erie COVID-19 Bus. Interruption Protection Ins. Litig.*, 2020 WL 7384529 (U.S. Jud. Pan. Mult. Lit. Dec. 15, 2020).

Excess Alert:

Eleventh Circuit Upholds Excess Insurer's Failure-To-Settle Claim Against Primary Insurer

The Eleventh Circuit ruled that a primary insurer is liable to an excess insurer for negligently failing to settle the underlying suit against the policyholder, rejecting the primary insurer's "safe harbor" defense. *American Guarantee & Liability Ins. Co. v. Liberty Surplus Ins. Co.*, 2020 WL 6554654 (11th Cir. Nov. 9, 2020).

A tenant sued the owner and management company of his apartment complex for injuries incurred in a gas explosion. The defendants collectively held several primary and excess liability policies. Liberty, a primary insurer, defended the suit. The tenant issued a settlement demand of $5 million with a thirty-day expiration. In response, Liberty offered $50,000. The tenant indicated he would not negotiate further unless Liberty offered its $1 million policy limit, and thereafter lowered his demand to $3 million subject to Liberty tendering its policy limit. Settlement negotiations continued for several months without success. After trial, the jury returned a verdict of $72.96 million in compensatory and punitive damages and attorney's fees.

Thereafter, American Guarantee, an excess insurer, sued Liberty, alleging that it negligently failed to settle the underlying suit and seeking reimbursement for the $2 million that American Guarantee contributed to the ultimate $15 million settlement. A Georgia district court found that Liberty was negligent in failing to settle and the Eleventh Circuit affirmed.

Under Georgia law, an excess insurer may bring a failure-to-settle claim against a primary insurer pursuant to equitable subrogation. The Eleventh Circuit ruled that American Guarantee satisfied the elements of such a claim because Liberty's duty to settle was triggered by the tenant's settlement demands, which were within the insurers' combined policy limits. In addition, the court ruled that Liberty was not entitled to a "safe harbor" because it eventually offered its policy limits. An insurer that receives a settlement demand involving multiple insurers is protected by a "safe harbor" from liability if it meets the portion of the demand over which it has control. However, the court deemed the safe harbor doctrine inapplicable where, as here, the insurer responds to a settlement demand by attaching conditions within its own control. Here, Liberty restricted the use of its policy limit through a high-low agreement.

Bodily Injury Alert:

Consumer Class Action Against Cereal Manufacturer Fails To Allege "Bodily Injury," Says Missouri Court

A Missouri federal district court ruled that a cereal manufacturer was not entitled to general liability coverage for class action claims alleging consumer fraud based on the company's alleged practice of misrepresenting high-sugar content cereals as "healthy." *Post Holdings, Inc. v. Liberty Mutual Fire Ins. Co.*, 2020 WL 6381817 (E.D. Mo. Oct. 30, 2020).

A putative class action suit alleged violations of California statutory law, and express and

implied warranties based on the company's alleged "policy and practice of labeling high-sugar cereals . . . with various health and wellness claims that suggest the cereals are healthy, when they are not." The complaint further alleges that the sugar content in the cereals is "highly likely to contribute" to "increased risk for, and actual contraction of, chronic disease." Plaintiffs therefore claim that they suffered bodily injury "in the form of increased risk" of certain illnesses. The insurer denied coverage based on a lack of "bodily injury," defined by the policy as "sickness or disease sustained by a person, including death resulting from any of these at any time; and [m]ental anguish, shock or humiliation arising out of the bodily injury."

The court granted the insurer's summary judgment motion, ruling that "[a]lthough the . . . Suit contains references to 'bodily injury,' upon analysis, it is abundantly clear that no 'bodily injury' is alleged to have been *sustained* by the . . . plaintiffs." The court explained that allegations of possible harm do not constitute causes of action for bodily injury absent actual adverse effects sustained by the plaintiffs. In addition, the court ruled that emotional damages are not covered unless they result from actual physical injury.

Duty To Defend Alert:

Pennsylvania Court Rules That PRP Letter Is A "Suit" Triggering Duty To Defend And Endorses Hybrid Approach To Categorizing RI/FS Costs As Defense/Indemnity

Addressing a matter of first impression under Pennsylvania law, a Pennsylvania court ruled that a Potentially Responsible Person ("PRP") notification constitutes a "suit" for purposes of triggering an insurer's duty to defend. The court also endorsed a "hybrid" approach to allocating remedial investigation ("RI") and feasibility study ("FS") expenses as indemnity or defense costs. *Penn. Manuf. Assoc. Ins. Co. v. Johnson Matthey, Inc.*, 2020 WL 6788769 (Penn. Comm. Ct. Nov. 19, 2020).

In 2006, the Department of Environmental Protection ("DEP") identified Johnson Matthey as a PRP for environmental contamination at a land site. Thereafter, Johnson Matthey entered into a consent order and agreement in which it agreed to undertake RI/FS actions. In 2010, the DEP added Johnson Matthey as a defendant in ongoing CERCLA litigation. Johnson Matthey and its insurer disputed two issues: (1) whether the insurer's duty to defend was triggered by the 2006 PRP letter or by the 2010 addition of Johnson Matthey as a defendant to the lawsuit; and (2) whether the RI/FS costs are indemnity costs, subject to the policies' liability limits, or defense costs.

The court noted that while Pennsylvania's appellate courts have not yet addressed the question of whether an environmental agency proceeding prior to the filing of a complaint is a "suit" that triggers an insurer's duty to defend, numerous other state and federal courts have concluded that PRP letters are the "functional equivalent" of suits. The court agreed with the reasoning in those decisions and held that the insurer's duty to defend was triggered by the 2006 PRP letter. In so ruling, the court emphasized the legal consequences of a PRP letter, the adjudicative authority of administrative proceedings and the involuntary nature of compliance with such actions.

The court also noted that jurisdictions have taken various approaches to determine whether RI/FS costs should be considered defense or indemnity costs. Adopting a "hybrid" method that allocates costs between defense and indemnity, the court set forth the following standard:

> [W]e presume that to the extent an expense is primarily attributable to an RI, which addresses the sources, scope, and extent of the contamination, it is a defense cost. The burden should be on the insurer, or any party disadvantaged by the presumption, to show that the insured has derived an unjust benefit from such an allocation . . . . Likewise, we presume that to the extent that an expense is primarily attributable to an FS, which comprises plans for selecting and implementing the remediation alternatives for the site, it is an indemnity cost. The burden should be on the insured, or any party disadvantaged by the presumption, to show that the insurer has derived an unjust benefit from such an allocation . . . .

Choice Of Law Alert:

Policyholder May Pursue Missouri Statutory Bad Faith Claim Notwithstanding New York Choice Of Law Provision, Says Missouri Court

A Missouri federal district court ruled that a policyholder could pursue a Missouri statutory "vexatious refusal to pay" claim against its insurer, notwithstanding a policy provision that designated New York law as controlling. *Maritz Holdings Inc. v. Certain Underwriters at Lloyd's London Subscribing to Policies Numbered B122F10115115 and F10115116*, 2020 WL 7023952 (E.D. Mo. Nov. 30, 2020).

The policyholder sought coverage under a breach-response policy for two security breaches. When the insurer denied coverage, the policyholder sued, alleging breach of contract and vexatious refusal to pay pursuant to Missouri statutory law. The insurer moved to dismiss the statutory claim, arguing that it fails to state a claim under New York law, which governs all disputes "arising out of" the policy pursuant to a choice of law provision.

The court agreed with the insurer that "arising out of" is not limited to disputes arising out of policy interpretation, and extends to vexatious refusal to pay claims. However, applying Missouri conflict of law rules, the court concluded that the Missouri statute advances an important public policy—"the equitable and fair treatment of Missouri insureds"—and therefore overrides the choice of law provision.

STB News Alerts

Bryce Friedman, Susannah Geltman and Lynn Neuner recently authored chapters in *Commercial Litigation in New York State Courts*, a joint venture of Thomson Reuters and the New York County Lawyers Association. The text covers the subjects most often encountered in commercial cases. Susannah Geltman co-authored the "Negligence" chapter, Bryce Friedman authored a chapter titled "Reinsurance," and Lynn Neuner co-authored the "Crisis Management" chapter. The fifth edition of *Commercial Litigation in New York State Courts* features the work of 256 expert authors, including some of the best commercial litigators in New York.

The 20th edition of the *Handbook on Insurance Coverage Disputes* has been released this month. The *Handbook*, co-authored by former Simpson Thacher partner and New York State Supreme Court Justice Barry R. Ostrager, and edited by Elisa Alcabes and Karen Cestari, discusses thousands of insurance and reinsurance-related decisions, including the most recent and significant coverage rulings on emerging issues, such as Covid, the opioid epidemic and cyber incidents.

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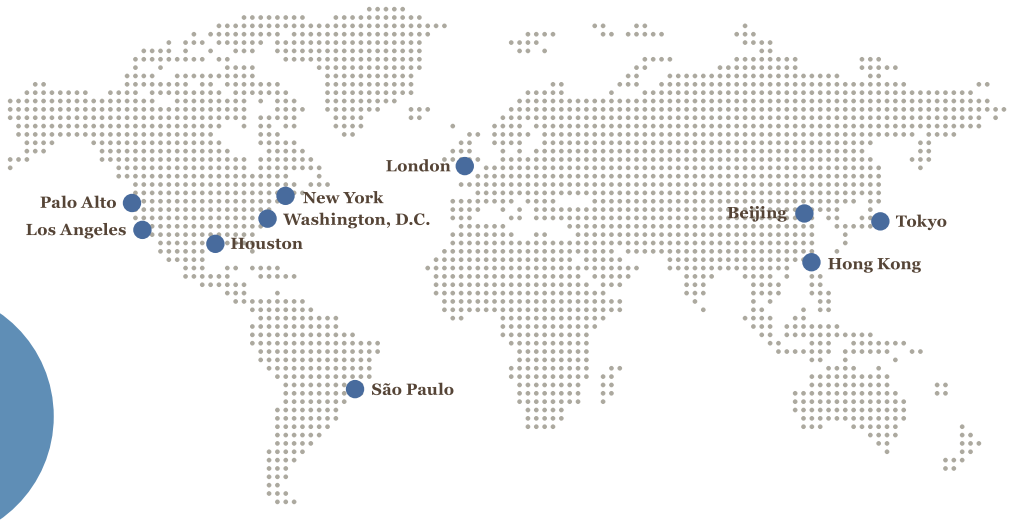

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