Simpson Thacher

Insurance Law Alert

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A Washington district court granted an insurer's summary judgment motion, ruling that it had no obligation to contribute to a settlement because the policyholder had never tendered the claim to it. *Munich Re Syndicate Ltd 457 v. Fireman's Fund Ins. Co.*, 2022 WL 16625601 (E.D. Wash. Nov. 1, 2022). (Click here for full article)

Fourth Circuit Rules That Insurers' Reservations Of Rights Were Insufficient

Applying South Carolina law, the Fourth Circuit ruled that three reservation of rights letters were insufficient to provide a basis for a coverage denial. *Stoneledge at Lake Keowee Owners' Assoc., Inc. v. Cincinnati Ins. Co.*, 2022 WL 17592121 (4th Cir. Dec. 13, 2022). (Click here for full article)

"If you have a major issue, an exceptionally high value or critical claim, Simpson is where you turn."

– The Legal 500
(quoting a client)

California Court Refuses To Order Consolidated Arbitration Of Dispute Involving Two Reinsurance Agreements

A California trial court denied a motion to compel consolidated arbitration of an entity's dispute with two reinsurers relating to the same claim. *Schools Ins. Authority v. General Reinsurance Corp.*, No. 34-2022-00326377 (Cal. Super. Ct. Nov. 23, 2022). (Click here for full article)

Insured Breached Its Duty To Cooperate And Is Therefore Not Entitled To Coverage, Says Ninth Circuit

Affirming a Washington district court decision, the Ninth Circuit ruled that an insured breached its duty to cooperate and was therefore not entitled to coverage under a marine policy. *United States Fire Ins. Co. v. Icicle Seafoods, Inc.*, 2022 WL 17424295 (9th Cir. Dec. 6, 2022). (Click here for full article)

Two Appellate Courts Address Scope Of Coverage For Intentional Acts Resulting In Unintended Injuries

A South Carolina appellate court ruled that an intentional acts exclusion barred coverage for injuries arising out of a physical altercation, regardless of whether the insured party intended to cause harm to the victim, *South Carolina Farm Bureau Mutual Ins. Co. v. Longphre*, 2022 WL 17484348 (S.C. Ct. App. Dec. 7, 2022), whereas a New York appellate court denied an insurer's summary judgment motion regarding its duty to defend and indemnify claims arising out of a physical altercation. *Vermont Mutual Ins. Group v. LePore*, 2022 WL 17490490 (N.Y. App. Div. Dec. 8, 2022). (Click here for full article)

Joining Vast Majority Of State And Federal Courts, Ohio Supreme Court Rules That Pandemic-Related Business Losses Are Not Covered By All Risk Property Policy

Answering a certified question, the Ohio Supreme Court ruled that a business owner was not entitled to coverage for losses incurred in the wake of government closure orders aimed at slowing the spread of the virus. *Neuro-Communication Services, Inc. v. Cincinnati Ins. Co.*, 2022 WL 17573883 (Ohio Dec. 12, 2022). (Click here for full article)

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Contribution Alert:

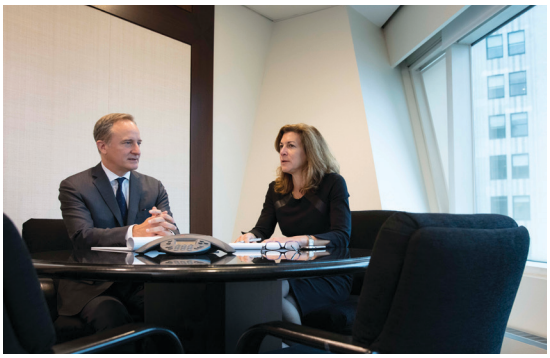
Selective Tender Rule Bars Insurer's Equitable Contribution Claim Against Another Insurer, Says Washington Court

A Washington district court granted an insurer's summary judgment motion, ruling that it had no obligation to contribute to a settlement because the policyholder had never tendered the claim to it. *Munich Re Syndicate Ltd 457 v. Fireman's Fund Ins. Co.*, 2022 WL 16625601 (E.D. Wash. Nov. 1, 2022).

A winery sought coverage from Munich Re for losses incurred as a result of contaminated wine. The winery did not tender the claim to Fireman's Fund, which had also issued a policy during the relevant time period, based on a broker's belief that the Fireman's Fund policy did not cover the loss. Munich Re ultimately paid nearly $700,000 and then sought contribution from Fireman's Fund. In connection with its contribution request, Munich Re forwarded to Fireman's Fund an unsigned "Release and Subrogation Agreement" that purportedly assigned all indemnification rights to Munich Re. When Fireman's Fund refused to contribute to the settlement, Munich Re sued, asserting claims for equitable contribution and equitable indemnification. The court dismissed both claims.

The court ruled that under Washington's selective tender rule, Fireman's Fund could not be liable to Munich Re for a claim for which its insured did not request coverage. As the court noted, the selective tender rule "preserves the insured's right to invoke or not to invoke the terms of its insurance contracts." Because the underlying claim was never tendered to Fireman's Fund, the court concluded that there could be no right of equitable contribution. The court also dismissed the equitable indemnification claim, noting that under Washington law, that cause of action is "mainly recognized as an equitable ground under which attorney's fees may be awarded." In any event, the court noted that Munich Re failed to allege any wrongful act or omission, a required element of an equitable indemnification claim.

Finally, the court rejected Munich Re's attempt to assert a contribution claim under a theory of subrogation. Munich Re argued that the selective tender rule does not bar contractual subrogation pursuant to the draft Release and Subrogation Agreement. Rejecting this contention, the court explained that subrogation was not pled in the complaint and was presented for the first time in opposition to Fireman's Fund's summary judgment motion. It declined to allow Munich Re to amend its complaint, stating "[a]mendment at this time would render pointless the Court's scheduling deadlines and also prejudice Fireman's Fund."



Reservation Of Rights Alert:

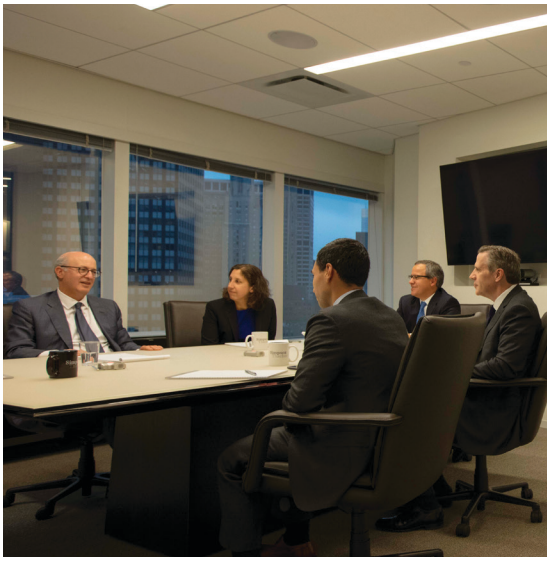
Fourth Circuit Rules That Insurers' Reservations Of Rights Were Insufficient

Applying South Carolina law, the Fourth Circuit ruled that three reservation of rights letters were insufficient to provide a basis for a coverage denial. *Stoneledge at Lake Keowee Owners' Assoc., Inc. v. Cincinnati Ins. Co.*, 2022 WL 17592121 (4th Cir. Dec. 13, 2022).

The coverage dispute arose out of faulty construction claims brought by a homeowners association against contractors. The contractors' general liability insurers, Builders Mutual and Cincinnati, sent three reservation of rights letters over the course of the underlying litigation. After the underlying claims were resolved by a partial judgment and subsequent settlement, the contractors sought a declaration of coverage. Ruling on the parties' cross-motions for summary judgment, a South Carolina district court held that the insurers had failed to adequately reserve their right to contest coverage. The Fourth Circuit affirmed.

The Fourth Circuit concluded that the insurers' reservations of rights did not include sufficient information relating to the potential bases for a coverage denial. Applying the standard set forth in *Harleysville Group Insurance v. Heritage Communities, Inc.*, 803 S.E.2d 288 (S.C. 2017) (discussed in our February 2017 Alert), the court explained that "generic denials of coverage coupled with furnishing the insured with a copy of all or most of the policy provisions (through a cut-and-paste method) is not sufficient." Here, the first letter "merely refers the insured to certain policy exclusions and summarizes the general nature of those exclusions." The court found that this was precisely the type of reservation that the *Harleysville* court deemed insufficient. The second letter similarly referred to "coverage issues" in general and indicated that "your work product is not covered" under certain referenced exclusions. The court stated: "Under *Harleysville*, simply stating a policy exclusion—without more—does not constitute a sufficient reservation of rights."

As to a third letter, the court noted it was a "closer question," but concluded that the listing of several exclusions, together with statements that "coverage may be limited by several other exclusions and endorsements" and that "[i]t is doubtful that the claim alleges the happening of an 'occurrence' or that the 'claim alleges property damage within the policy definition," was insufficient. In so ruling, the court emphasized that a reservation of rights must address the question of "why" coverage may be unavailable under certain policy provisions.



Arbitration Alert:

California Court Refuses To Order Consolidated Arbitration Of Dispute Involving Two Reinsurance Agreements

A California trial court denied a motion to compel consolidated arbitration of an entity's dispute with two reinsurers relating to the same claim. *Schools Ins. Authority v. General Reinsurance Corp.*, No. 34-2022-00326377 (Cal. Super. Ct. Nov. 23, 2022).

Schools Insurance Authority ("SIA"), an entity that administers risk for public school districts, entered into separate reinsurance agreements with General Reinsurance Corp. and Great American Insurance Company, both of which contained arbitration provisions. After SIA paid $2.6 million to settle a claim against a school district, it sought indemnification from the reinsurers. Both denied coverage on the basis that the claim was outside the effective date of their coverage periods. The parties tentatively agreed to a consolidated arbitration but were not able to agree on certain rules, including the appointment of an arbitrator. SIA sought to compel the reinsurers to participate in a consolidated arbitration pursuant to the California Code of Civil Procedure, which permits a court to consolidate arbitration proceedings when certain factors are met.

The court denied the motion to compel consolidated arbitration, ruling that California's procedural rules were inapplicable based on the explicit reference to the Federal Arbitration Act ("FAA") in the agreement between General Reinsurance and SIA. The court explained that where, as here, an agreement states that claims must be arbitrated pursuant to the FAA and there is no other provision indicating an intent to incorporate California arbitration law, the arbitration is governed exclusively by the FAA's procedures rather than state procedural law.

The court noted that the agreement contained a provision stating that it would be interpreted in accordance with California law, but explained that such reference (which was not within the arbitration provision) was a choice of law provision and did not evidence an intent to substitute state arbitration procedural rules for the

default FAA procedural rules. The court stated: "Again, the governing language in the arbitration provision only refers to the FAA and the general choice-of-law provision only provides that the contract is governed by and interpreted pursuant to California law. There is no statement that the contract is 'enforced' pursuant to California law."

In addition, the court rejected SIA's contention that General Reinsurance implicitly waived any objection to a consolidated arbitration. The court reasoned that even though the parties tentatively agreed to some form of a consolidated arbitration, General Reinsurance did not consent to the specific consolidated arbitration request by SIA in accordance with California procedural law.

Finally, the court emphasized that notwithstanding its ruling, the parties were free to reach any agreement regarding a consolidated arbitration and that any decisions relating to a consolidated arbitration would be made by the arbitrator, not the court.

Coverage Alerts:

Insured Breached Its Duty To Cooperate And Is Therefore Not Entitled To Coverage, Says Ninth Circuit

Affirming a Washington district court decision, the Ninth Circuit ruled that an insured breached its duty to cooperate and was therefore not entitled to coverage under a marine policy. *United States Fire Ins. Co. v. Icicle Seafoods, Inc.*, 2022 WL 17424295 (9th Cir. Dec. 6, 2022).

A policyholder sought "loss of hire" coverage from its insurers for losses allegedly stemming from damage to a fish processing vessel. The insurers disputed coverage under their policies and also argued that the policyholder breached its duty to cooperate in the adjustment of the claim. The district court ruled that the policyholder breached an express duty to cooperate by withholding historical financial information sought by the insurers and that the insurers were therefore discharged of their coverage obligations. The Ninth Circuit affirmed.

The Ninth Circuit held that the district court misconstrued a specific loss mitigation provision as imposing a duty to cooperate, but concluded that the error was harmless because Washington law imposes an implied duty of good faith and fair dealing that obligates parties to cooperate with each other. The court noted that an insurer may be relieved of its coverage obligations if the policyholder fails to comply with a material request and the insurer suffers resulting prejudice, regardless of whether the duty to cooperate is expressly included in the contract or implied by law, as was the case here. The court concluded that this standard was met because the policyholder failed to produce material financial information relating to the underlying claim for more than a year, despite the insurers' requests. The court further held that the insurers were prejudiced by the delay because the policyholder threatened administrative action and a bad faith claim if it did not receive payment in full for the claim. The court explained: "Insurers then faced a 'Hobson's choice' of either paying the [unsubstantiated] claim, or exposing itself to bad faith liability."

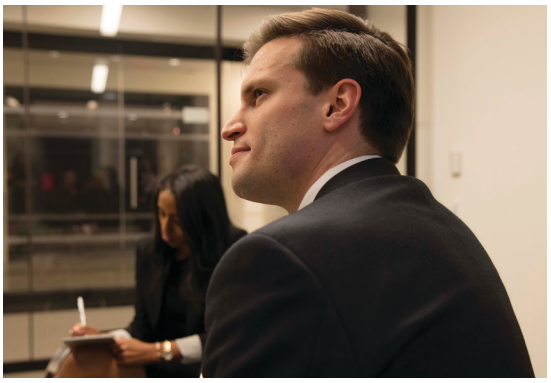
Two Appellate Courts Address Scope Of Coverage For Intentional Acts Resulting In Unintended Injuries

A South Carolina appellate court ruled that an intentional acts exclusion barred coverage for injuries arising out of a physical altercation, regardless of whether the insured party intended to cause harm to the victim. *South Carolina Farm Bureau Mutual Ins. Co. v. Longphre*, 2022 WL 17484348 (S.C. Ct. App. Dec. 7, 2022).

An individual injured in a physical altercation argued that Farm Bureau, which insured the other individual in the fight, was required to provide coverage for his injuries. Farm Bureau denied coverage based on an intentional acts exclusion. The court explained that the exclusion applied because the record indicated that the insured intentionally pushed the injured party. The court deemed it irrelevant that the record also contained evidence that the insured did not intend to cause injury, explaining that coverage is excluded for unexpected results of intentional acts. In granting Farm Bureau's summary judgment motion, the court noted that the underlying complaint's couching

of the incident in terms of negligence did not create a genuine issue of material fact where, as here, the factual record indicates unequivocal intentional conduct.

In contrast, a New York appellate court affirmed a trial court decision denying an insurer's summary judgment motion regarding its duty to defend and indemnify claims arising out of a physical altercation. *Vermont Mutual Ins. Group v. LePore*, 2022 WL 17490490 (N.Y. App. Div. Dec. 8, 2022).



LePore was sued by Cole for injuries Cole sustained while trying to diffuse an altercation between LePore and another party. LePore sought coverage under a homeowners' policy which excluded coverage for bodily injury "[w]hich is expected or intended" by an insured. The insurer denied coverage, arguing that there was no "occurrence" under the policy and that an intentional acts exclusion applied.

The court held that the insurer failed to meet the "heavy burden" required to be relieved of its duty to defend on a summary judgment motion, emphasizing that there must be "no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision." The court explained that the bill of particulars indicated that LePore negligently and carelessly struck Cole while she was trying to stop the altercation, that Cole was inadvertently hit by LePore, and that LePore did not intend to injure Cole. The court held that these allegations gave rise to the possibility that Cole's injuries resulted from LePore's unintentional conduct. The court noted that while "the record contains evidence suggesting that the incident at issue was an intentional tort, 'the pleadings can be read as alleging that [Cole's] injuries were negligently inflicted by [LePore].'"

The court noted that an insured may be entitled to coverage for an intentional act that causes an unintended injury, and explained that in evaluating whether coverage exists, a court typically looks to the point of view of the insured to determine whether a result was unexpected. Finally, the court held that the doctrine of transferred intent (under which a defendant may be held responsible for unintentionally harming an individual if the defendant intended to harm a different individual) was inapplicable because it applies to a tort analysis rather than an insurer's duties pursuant to a contract.

COVID-19 Alert:

Joining Vast Majority Of State And Federal Courts, Ohio Supreme Court Rules That Pandemic-Related Business Losses Are Not Covered By All Risk Property Policy

Answering a certified question, the Ohio Supreme Court ruled that a business owner was not entitled to coverage for losses incurred in the wake of government closure orders aimed at slowing the spread of the virus. *Neuro-Communication Services, Inc. v. Cincinnati Ins. Co.*, 2022 WL 17573883 (Ohio Dec. 12, 2022).

An Ohio district court certified the following question to the Ohio Supreme Court:

> Does the general presence in the community, or on surfaces at a premises, of the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property; or does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises?

The court answered in the negative, holding that none of the three scenarios listed in the question involved direct physical loss or damage. As a preliminary matter, the court agreed with the insurer that "loss" requires something physical in nature and does not include a loss of the ability to use property for its intended purpose.

The court noted that the policy's "period of restoration" provision, which refers to repair, rebuilding or replacement, reinforces the conclusion that loss must involve some sort of physical alteration.

With respect to the three factual scenarios presented in the certified question, the court noted that the first and third were "relatively straightforward to answer" because they "clearly do not involve any physical alteration of Covered Property." The court noted that the answer to the second scenario may be less obvious, but was "not appreciably different." In particular, the court explained that regardless of whether virus particles exist only temporarily on surfaces (a fact disputed by the parties), their mere existence does not involve any physical alteration to property.

The court deemed it irrelevant that subsequent policies issued by Cincinnati included a virus exclusion (whereas the policy at issue did not) because the parol evidence rule prohibits consideration of other agreements absent ambiguity. Finally, the court distinguished cases outside the COVID-19 context in which physical loss or damage was found notwithstanding an alleged absence of physical or structural alteration. Those cases, arising out of the presence of harmful gases, vapors or dust, involved different policy language, property that was rendered uninhabitable or "an entirely different degree of harm."

In other COVID-19 coverage news, the Michigan Supreme Court issued three summary orders this month, denying appeals brought by insured restaurants whose claims for business loss coverage were denied by appellate courts. *See Gavrilides Mgmt. Co., LLC v. Michigan Ins. Co.,* SC 164166 (Mich. Dec. 7, 2022); *Three Won Three, Corp. v. Property-Owners Ins. Co.*, SC 164565 (Mich. Dec. 7, 2022); *Gourmet Deli Ren Cen, Inc. v. Farm Bureau Gen. Ins. Co. of Michigan*, SC 164578 (Mich. Dec. 7, 2022).

STB News Alerts

Chet Kronenberg and associate Lindsay DiMaggio authored an article titled "Ky. Ruling Shows Need For Consistent Insurer Claim Replies," published by *Law360*. The article details a recent decision in which the Kentucky Supreme Court ruled that a policyholder's tender of a government subpoena to its directors and officers liability insurer a few years before it was named as a defendant in related civil litigation did not trigger a prior-notice exclusion in its professional liability policy. The article further explores implications of the decision in future coverage litigation arising out of years-long governmental investigations.

Andy Frankel and Summer Craig authored the United States chapter in the fifth edition of *The Insurance Disputes Law Review*. The book, which is published as part of *The Law Reviews* series, explores the quickly-evolving area of insurance disputes across 18 jurisdictions worldwide over the past year. It examines important developments, features commentary on dealing with insurance disputes and highlights mechanisms for dispute resolution in each jurisdiction.

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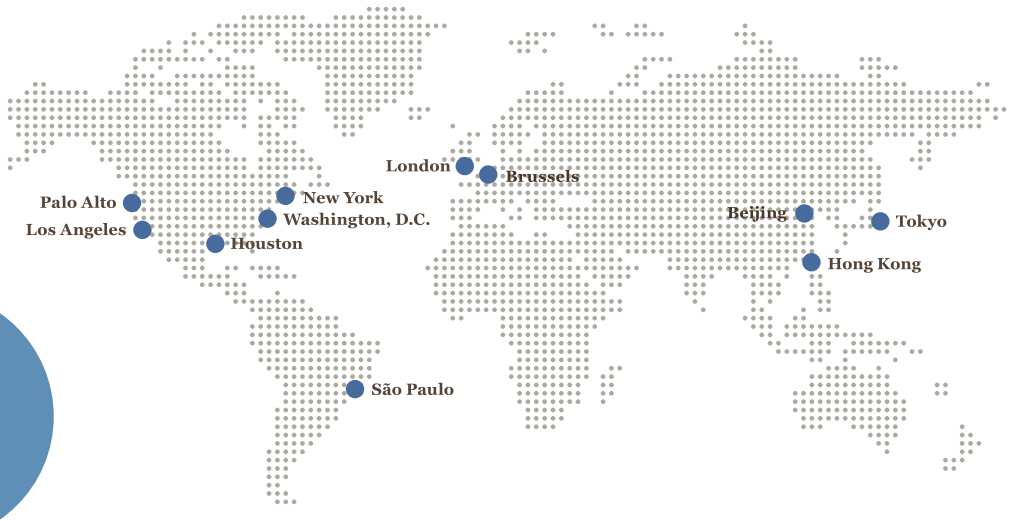

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