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The Supreme Court of New Jersey ruled that underlying claimants were entitled to assert claims against an insurance company pursuant to New Jersey's Direct Action Statute, but that the dispute was subject to the arbitration clause in the insurance policies. *Crystal Point Condominium Assoc., Inc. v. Kinsale Ins. Co.*, 2022 WL 2793326 (N.J. July 18, 2022). (Click here for full article)

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The Second Circuit addressed the coverage limits available under stub policies, the effect of non-cumulation provisions, and the duty of an excess insurer to "drop down" upon a primary insurer's insolvency. *Ferguson Enterprises, Inc. v. American Home Assurance Co.*, 2022 WL 2165921 (2d Cir. June 16, 2022). (Click here for full article)

New York Court Rules On Allocation And Exhaustion In Asbestos Coverage Suit

A New York trial court addressed the allocation of losses across policy periods and exhaustion of primary policies in a recent asbestos coverage lawsuit. *Meissner v. Ridge Construction, Inc.*, 2022 N.Y. Misc. LEXIS 3106 (N.Y. Sup. Ct. Monroe Cnty. July 18, 2022). (Click here for full article)

South Dakota Supreme Court Declines To Apply Concurrent Causation Doctrine

The Supreme Court of South Dakota refused to apply the concurrent causation doctrine and held that policyholders were not entitled to coverage based on a policy exclusion. *Nationwide Agribusiness Ins. Co. v. Fitch*, 2022 WL 2165952 (S.D. June 15, 2022). (Click here for full article)

Liability Policies Cover Property Damage Caused By Seismic Activity Related To Oil And Gas Exploration, Says Oklahoma Supreme Court

The Supreme Court of Oklahoma ruled that a general liability policy covered property damage losses resulting from seismic activity stemming from the policyholder's oil and gas exploration activity. *Crown Energy Co. v. Mid-Continent Cas. Co.*, 2022 OK 60 (June 14, 2022). (Click here for full article)

Addressing Matter Of First Impression, Montana Supreme Court Rules That Earth Movement Exclusion In Liability Policy Bars Coverage For Construction Defect Claims

The Supreme Court of Montana ruled that a trial court erred in deeming an earth movement exclusion ambiguous as to property damage claims arising out of negligent construction. *Loendorf v. Employers Mutual Cas. Co.*, 2022 WL 2816311 (Mont. July 19, 2022). (Click here for full article)

Reinsurance Alerts:

Eleventh Circuit Rules That Reinsurance Agreement Lacks A Follow The Fortunes Clause And Declines To Infer One

The Eleventh Circuit ruled that a reinsurance agreement does not contain a follow the fortunes clause and refused to infer application of the doctrine, finding that such a reading would be inconsistent with the agreement's plain language. *Public Risk Mgmt. of Fla. v. Munich Reinsurance Am., Inc.*, 2022 WL 2338572 (11th Cir. June 29, 2022).

Public Risk Management ("PRM"), a self-insured risk management program that insures local government entities in Florida, sought reinsurance coverage from Munich for a settlement PRM had reached with underlying claimants. Munich denied that it had any obligation to provide reinsurance because the underlying loss occurred before the inception of the reinsurance agreement. A Florida district court ruled in Munich's favor, finding that the evidence indicated that the operative occurrence happened outside the policy period. On appeal, PRM argued that Munich was obligated to cover the settlement pursuant to the follow the fortunes doctrine. The Eleventh Circuit disagreed and affirmed the district court decision.

The Eleventh Circuit ruled that the reinsurance contract did not contain a follow the fortunes clause. The agreement required Munich to indemnify PRM for "Ultimate Net Loss" "paid by PRM as a result of Occurrences . . . during the term of this Agreement under PRM's Coverage Document underwritten by PRM and covered under this Agreement." The agreement defined "Ultimate Net Loss" as "the sum or sums paid by PRM for which it is liable, under the Coverage Document reinsured hereunder." Additionally, the agreement specified that Munich must issue payment after it receives "proof of payment . . . and coverage hereunder." The court explained that pursuant to this language, Munich would not be required to reimburse PRM for defense or indemnity if PRM was not liable under the policy reinsured by Munich. The court further held that this language is squarely inconsistent with the follow the fortunes doctrine, which would bind Munich to PRM's good faith coverage decisions.

Finally, the court declined to infer that the follow the fortunes doctrine applies to all reinsurance agreements under Florida law. The court held that where, as here, a reinsurance agreement "contains terms that are plainly and unambiguously inconsistent with the follow the fortunes doctrine . . . . the Supreme Court of Florida would not infer application of the doctrine." Notably, the court did not decide whether such inference would be appropriate in other circumstances, such as when an agreement lacks an express follow the fortunes clause and language that is inconsistent with the doctrine.

Reinsurer Has No Duty To Reimburse Cedent's Payments Notwithstanding Follow The Settlements Clause, Says New York Appellate Court

A New York appellate court ruled that a cedent was not entitled to reimbursement of defense costs it paid under its umbrella policies because the reinsurance policies did not cover such costs and a follow the settlements provision did not apply in such circumstances. *Utica Mutual Ins. Co. v. Abeille Gen. Ins. Co.*, 2022 WL 2092908 (N.Y. App. Div. 4th Dep't June 10, 2022).

Utica issued primary and umbrella policies to the underlying insured, who had been sued in an asbestos-related bodily injury action. Utica paid defense costs under the primary policies, but disputed its obligation to pay defense costs under the umbrella policies after primary policy exhaustion. Utica ultimately settled with its policyholder and agreed to pay defense costs and losses under the umbrella policies. Thereafter, Utica sought reinsurance.

The reinsurer refused to pay, arguing that Utica had no obligation to pay under the umbrella policies, rendering reinsurance coverage unavailable.

A New York trial court agreed with the reinsurer, finding that the unambiguous terms of Utica's umbrella policy indicated that it did not cover the disputed defense costs and were thus not reinsured. However, the trial court declined to grant the reinsurer's summary judgment motion based on purported issues of fact relating to the follow the settlements doctrine. The appellate court modified the order and granted the reinsurer's motion.

The appellate court affirmed the trial court's ruling that the umbrella policies did not cover the defense costs in the underlying action. In addition, the court ruled that follow the settlements clauses in the reinsurance agreements did not require the reinsurer to reimburse Utica. While such clauses require a reinsurer to indemnify payments "reasonably within the terms of the original policy, even if technically not covered by it," they do not require reinsurance coverage where, as here, the payments are "clearly beyond the scope of the original policy."

Allocation Alert:

New York Court Rules That Insured Is Responsible For Costs Allocated To Self-Insured Periods

A New York trial court ruled that a policyholder was responsible for its pro rata share of defense costs attributable to self-insured periods. *National Hockey League v. TIG Ins. Co.*, 2022 WL 2733210 (N.Y. Sup. Ct. New York Cnty. June 24, 2022).

In the underlying multidistrict litigation, a putative class of retired hockey players sued the NHL, alleging repetitive concussive injuries during their careers. The NHL provided notice of the litigation to its insurers, who agreed, pursuant to a reservation of rights, to front defense costs for the independent counsel that NHL had retained. In the present action, the NHL sought to recover the unpaid portions of its defense costs.

The insurers argued that they had no obligation to reimburse those costs because the NHL never tendered the defense of the underlying action to them and instead retained independent counsel. Additionally, the insurers argued that to the extent defense costs must be reimbursed, allocation to the NHL is warranted because it was uninsured for almost 60 of the 95 years at issue in the underlying litigation.

The court rejected the insurers' tender argument, emphasizing that they were notified of the litigation, aware of the NHL's selection of counsel, and agreed to fund the defense costs in part without disclaiming coverage or demanding to control the defense. As to allocation, the court held that policy language limiting the insurers' obligations to losses or occurrences "during the policy period" requires pro rata allocation of indemnity costs. Further, the court held that pro rata allocation of defense costs, with pro rata apportionment to the NHL for uninsured periods, was appropriate.

Assignment Alert:

Reversing Lower Court, Wisconsin Supreme Court Rules That Assignment Was Valid, Notwithstanding Lack Of Insurer Consent

The Supreme Court of Wisconsin ruled that an assignment of insurance benefits was valid, notwithstanding the lack of insurer consent, because the losses at issue had already occurred. *Pepsi-Cola Metropolitan Bottling Co., Inc. v. Employers Ins. Co. of Wausau*, 2022 WL 2542321 (Wisc. July 8, 2022).

Wausau issued primary and umbrella policies to "Old Waukesha" in the 1960s. Thereafter, over the course of the next few decades, Old Waukesha participated in a series of assignments and transfers, after which Pneumo Abex became the successor in interest to Old Waukesha and Pepsi was the "net of insurance" indemnitor of Pneumo Abex for numerous asbestos suits. When Pepsi sought coverage from Wausau, the insurer refused to defend on the basis that the assignment of policies without its consent was invalid. A lower court agreed and granted Wausau's summary judgment motion.

The Supreme Court of Wisconsin reversed, holding that under long-standing state law, an anti-assignment provision is not enforceable where the assignment occurs after a "loss" has occurred under an occurrence-based policy. The court found that exposure to asbestos was the operative occurrence and since it took place during the relevant policy periods, the "loss" had already occurred before the assignments took place. In so ruling, the court emphasized that a "loss" is the actual "occurrence" in this context, rejecting Wausau's assertion that an assignment is not "post-loss" unless the loss has actually been reported and the insurer acknowledges liability.

Direct Action/ Arbitration Alert:

New Jersey Supreme Court Rules That Claimants May Seek Recovery From Insurer Pursuant To Direct Action Statute But Subject To Arbitration Clause In Insurance Contracts

The Supreme Court of New Jersey ruled that underlying claimants were entitled to assert claims against an insurance company pursuant to New Jersey's Direct Action Statute, but that the dispute was subject to the arbitration clause in the insurance policies. *Crystal Point Condominium Assoc., Inc. v. Kinsale Ins. Co.*, 2022 WL 2793326 (N.J. July 18, 2022).

Crystal Point, a building management company, sued contractors after it discovered construction defects. The suit resulted in a default judgment and writs of execution against the contractors. Thereafter, Crystal Point sued Kinsale, the contractors' insurer, seeking a declaration of coverage, as allowed by the New Jersey Direct Action Statute (N.J.S.A. 17:28-2). Kinsale argued that the statute did not apply because Crystal Point had not demonstrated that the contractors were insolvent and alternatively, that the dispute was subject to arbitration pursuant to an arbitration clause in the insurance policies.

A New Jersey trial court ruled that the Direct Action statute did not apply because Crystal Point failed to establish that the insured contractors were insolvent or bankrupt, as required by the statue. In addition, the trial court granted Kinsale's motion to compel arbitration. An intermediate appellate court reversed. After considering supplemental evidence, the intermediate appellate court ruled that the contractors' failure to satisfy the writs of execution sufficiently established insolvency or bankruptcy. The court also reversed the arbitration ruling, finding that the arbitration clause in the policies did not encompass the claims.

The Supreme Court of New Jersey reversed in part and affirmed in part. The court ruled that while Crystal Point was entitled to assert direct claims against Kinsale, the claims must be arbitrated. The court agreed that the supplemental record established prima facie evidence of insolvency or bankruptcy based on the unsatisfied writs of execution. As to arbitration, the court explained that claims under Direct Action Statute are derivative, subject to "the terms of the policy," which, here, included an arbitration clause.

Coverage Alerts:

Second Circuit Addresses Coverage Limits Under Stub Policies And Application Of Non-Cumulation Clauses

The Second Circuit addressed the coverage limits available under stub policies, the effect of non-cumulation provisions, and the duty of an excess insurer to "drop down" upon a primary insurer's insolvency. *Ferguson Enterprises, Inc. v. American Home Assurance Co.*, 2022 WL 2165921 (2d Cir. June 16, 2022).

In this declaratory judgment action, various insurers sought rulings as to their rights and

obligations in connection with underlying asbestos litigation. Applying California law, a New York district court granted the insurers' summary judgment motion as to three issues. The Second Circuit affirmed in part and reversed in part.

Stub Policies

Reversing the district court, the Second Circuit ruled that with respect to three policies, the full aggregate limits were available during stub policy periods.

One policy covered a three-year period and provided a limit of liability of $10 million "in the aggregate of each annual period." By endorsement, and in consideration of an additional premium, the policy period was extended by ten days. The endorsement documenting the extension stated that "[a]ll other terms and conditions remain the same." The court concluded that this language was ambiguous as to whether the ten-day stub period carried with it a full endorsement limit, separate and apart from preceding annual period, or whether it simply extended the annual period. Resolving this ambiguity in favor of the insured's "objectively reasonable expectations," the court concluded that the policy had four annual aggregate limits of $10 million each. Applying the same reasoning, the court deemed a similar extension endorsement in a second policy ambiguous.

A third policy in effect from December 18, 1984 to April 1, 1986, included an aggregate limit of $5 million "during each policy year." The court held that the undefined term "policy year" was ambiguous in the context of this 15.5-month policy period. In particular, the court explained that it could be reasonably interpreted to mean no less than 365 days, in which case the policy had only one policy year and one aggregate limit, or conversely, to mean that a new "policy year" begins on each anniversary of the policy's effective date, such that there were two policy years (each beginning on December 18) and two aggregate limits. In accordance with the policyholder's reasonable expectations, the court adopted the latter interpretation.

Non-Cumulation Provision

The district court granted an insurer's summary judgment motion with respect to a non-cumulation provision in its umbrella and excess policies, holding that the policy

"clearly and unambiguously limit[ed] the potential liability under both . . . policies and this per-occurrence limit applie[d] across policy periods," thereby making "[a]ny potential reduction . . . depend[ent] on the limits reached in previous policies." The Second Circuit vacated the ruling, deeming it unclear in its scope. More specifically, the Second Circuit noted that the ruling was ambiguous as to whether it held, as a general matter, that non-cumulation clauses may be enforced as anti-stacking provisions or that in this particular case, the provision was actually triggered such that aggregate limits under specific policies were reduced by virtue of payments under earlier policies. Finding a lack of factual support for the latter conclusion, the court remanded the matter for further proceedings.

Drop Down Obligation

The Second Circuit affirmed the district court's ruling that an excess insurer need not "drop down" to provide coverage following the primary insurer's insolvency. The court explained that exhaustion of primary policies, for purposes of triggering an excess insurer's coverage obligations, occurs by virtue of payment, not insolvency.

New York Court Rules On Allocation And Exhaustion In Asbestos Coverage Suit

A New York trial court addressed the allocation of losses across policy periods and exhaustion of primary policies in a recent asbestos coverage lawsuit. *Meissner v. Ridge Construction, Inc.*, 2022 N.Y. Misc. LEXIS 3106 (N.Y. Sup. Ct. Monroe Cnty. July 18, 2022).

In the underlying suit, a claimant was awarded $8 million for asbestos-related injuries. Because the defendant construction

company was dissolved, the claimant brought suit against its excess insurers to collect the verdict pursuant to New York Insurance Law §3420. Underwriters argued that its policies did not cover the underlying losses and asserted several coverage defenses.

Relying on the New York Court of Appeals' decision in *In re Viking Pump*, 27 N.Y.3d 244 (2016) (discussed in our May 2016 Alert), the court ruled that where, as here, policies contain prior insurance and non-cumulation provisions, all sums allocation and vertical exhaustion are appropriate.

With respect to exhaustion, the court ruled that a buy-back settlement agreement between a primary insurer and the policyholder established full and proper exhaustion of the primary policy so as to trigger coverage under the excess policy. The court held that the "actual payment" requirement of the excess policy was met because the claimants granted Underwriters a credit for the full amount of the primary policy. The court explained that if the dissolved policyholder had been financially viable, it could "fill the gap" in coverage for the primary policy limits. Since the claimants "stand in the shoes" of the policyholder in this action, they adequately filled the gap by issuing a credit against the excess policy so as to meet the exhaustion requirement.

South Dakota Supreme Court Declines To Apply Concurrent Causation Doctrine

The Supreme Court of South Dakota refused to apply the concurrent causation doctrine and held that policyholders were not entitled to coverage based on a policy exclusion. *Nationwide Agribusiness Ins. Co. v. Fitch*, 2022 WL 2165952 (S.D. June 15, 2022).

The policyholders, a family of farmers and cattle ranchers, were sued by a nephew who sustained injuries while riding on a utility-terrain vehicle on their property. Nationwide initially defended under a reservation of rights, but then sought a declaration that it had no duty to defend or indemnify the underlying claims. The trial court granted Nationwide's summary judgment motion, ruling that a policy exclusion relating to recreational vehicles excluded coverage.

The Supreme Court of South Dakota affirmed, ruling that the lower court correctly refused to apply the concurrent causation doctrine. Under that doctrine, a court may find coverage, notwithstanding a valid exclusion, if a loss is also attributable to a covered peril. The underlying claimant argued that the doctrine applied because his injuries were the result of two independent causes—the use of the recreational vehicle (excluded) and the policyholders' negligence (covered). The court noted that it has not expressly accepted the doctrine, but held that even if it did, the doctrine would be inapplicable here because the concurrent events were not "distinct from each other," but rather, "inextricably intertwined." More specifically, the court explained that any alleged acts of negligence by the policyholders "are part and parcel" of their nephew's use of the vehicle and that the injuries could not have occurred without use of the excluded recreational vehicle.

Liability Policies Cover Property Damage Caused By Seismic Activity Related To Oil And Gas Exploration, Says Oklahoma Supreme Court

The Supreme Court of Oklahoma ruled that a general liability policy covered property damage losses resulting from seismic activity stemming from the policyholder's oil and gas exploration activity. *Crown Energy Co. v. Mid-Continent Cas. Co.*, 2022 OK 60 (June 14, 2022).

Crown, an oil and gas producer, was named as a defendant in a class action suit alleging property damage caused by seismic activity stemming from Crown's use of waste water disposal wells. Mid-Continent denied coverage, arguing that the damage was not caused by an "occurrence" and that in any event, a pollution exclusion barred coverage. The court rejected both contentions and ruled in Crown's favor.

Mid-Continent argued that because Crown's injection of waste water into the disposal wells was intentional, its activities could not constitute an "accident" for insurance coverage purposes. Rejecting this assertion, the court reasoned that the resulting seismic activity was not a "natural and probable consequence" of Crown's disposal activities. The court explained that "some risk" of seismic activity does not mean that it is a natural and probable consequence of Crown's waste water disposal activities.

The court also ruled that the pollution exclusion did not bar coverage, deeming it ambiguous under the factual scenario presented. The court relied on *National American Ins. Co. v. New Dominion*, 2021 OK 62 (2021) (discussed in our December 2021 Alert), in which it ruled that a pollution exclusion did not apply to similar underlying losses. Mid-Continent argued that the exclusion here was broader than that in *New Dominion* because it contained expansive "arising out of" language and because unlike in *New Dominion*, the present exclusion did not rely on a separate definition of "pollutants." The court acknowledged these distinctions, but concluded that they did not "expand [the exclusion's] scope to such an extent that it would preclude coverage for the underlying claims."

Addressing Matter Of First Impression, Montana Supreme Court Rules That Earth Movement Exclusion In Liability Policy Bars Coverage For Construction Defect Claims

The Supreme Court of Montana ruled that a trial court erred in deeming an earth movement exclusion ambiguous as to property damage claims arising out of negligent construction. *Loendorf v. Employers Mutual Cas. Co.*, 2022 WL 2816311 (Mont. July 19, 2022).

After discovering foundation cracks and structural damage in their homes, homeowners sued the builder, alleging negligent construction. The complaint alleged that the damage resulted from the faulty construction of foundation systems and the settling of soil near and beneath the homes. Employers, the builder's liability insurer, defended under a reservation of rights. While the litigation was pending, the homeowners filed a declaratory judgment action seeking a ruling that Employers was obligated to indemnify the underlying claims.

A trial court ruled in the homeowners' favor, ruling that an earth movement exclusion, which applied to damage "arising out of, caused by, resulting from, contributed to, aggravated by, or related to . . . settling . . . or any other movement of land, earth or mud," did not apply. The trial court reasoned that the exclusion applied only where earth movement is the result of "settling of the earth rather than earth movement as a result of the insured's actions" and that the exclusion was limited to "long-term earth movement that spanned years."

Addressing this matter of first impression under Montana law, the Supreme Court of Montana reversed, ruling that the unambiguous language of the exclusion encompassed claims of property damage caused by the insured's negligence and involving the movement of earth. The court stated:

> Applying the Earth Movement Exclusion based on a perceived distinction between "natural" and "human-caused" earth movements is an erroneous framework that improperly injects further causation concepts into the Policy. While the Homeowners are correct that the Exclusion does not attempt to differentiate between natural and human-caused earth movement, that does not render it ambiguous, but rather encompassing, by design. The Exclusion broadly eliminates coverage for the insured's liability for damage that is related to any earth movements.

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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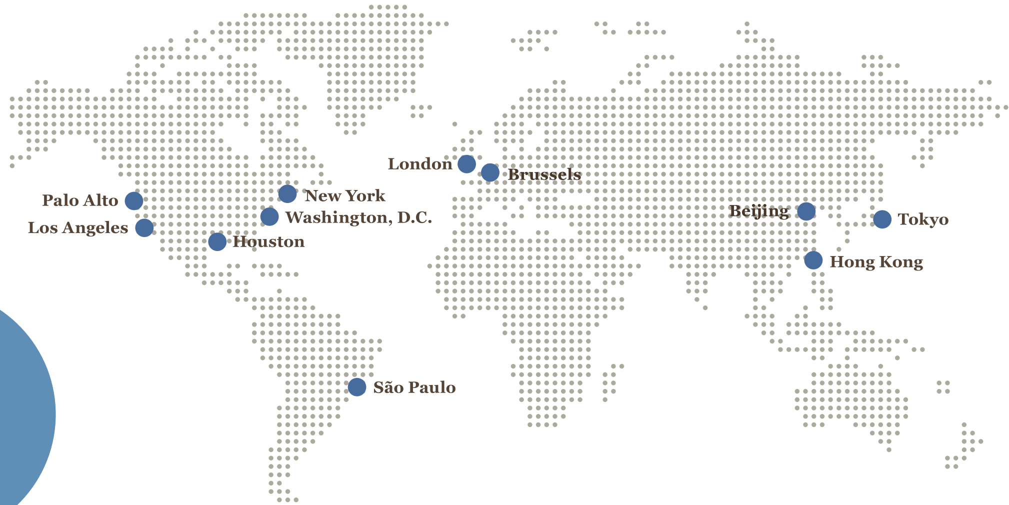

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