Simpson Thacher

Insurance Law Alert

March 2025

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Alaska Supreme Court Rules That Pollution Exclusion In Property Policy Does Not Apply To Carbon Monoxide Claims

The Alaska Supreme Court ruled that a pollution exclusion in a property policy did not bar coverage for carbon-monoxide-related claims. *Est. of Wheeler v. Garrison Prop. & Cas. Ins. Co.*, 2025 Alas. LEXIS 32 (Alaska Feb. 28, 2025). (Click here for full article)

Ninth Circuit Affirms Dismissal Of Insured's Suit Against Property Insurer Based On Standing And Ripeness

The Ninth Circuit ruled that a California federal district court properly dismissed a suit against a property insurer, finding that the insured lacked standing to bring the suit and that the dispute as to the value of loss was not ripe. *50 Exch. Terrace LLC v. Mount Vernon Specialty Ins. Co.*, 129 F.4th 1186 (9th Cir. 2025). (Click here for full article)

Ninth Circuit Rules That District Court Erred In Finding That Amount In Controversy Is Determined By Insurance Policy Limit

Reversing a California federal district court decision, the Ninth Circuit ruled that there was an "arguable basis" that the amount in controversy for diversity jurisdiction in a declaratory judgment action was satisfied by potential liability in excess of policy limits. *Farmers Direct Prop. & Cas. Ins. Co. v. Perez*, 2025 U.S. App. LEXIS 5245 (9th Cir. Mar. 6, 2025).
(Click here for full article)

Simpson Thacher News

Click here to read more about the Firm's insurance-related honors.

Missouri Court Rules That Policy Exclusion Precludes Coverage For Opioid Claims

HOLDING

A Missouri trial court ruled that a "your products" exclusion in liability policies barred coverage for underlying opioid-related claims against a drug manufacturer. *Opioid Master Disbursement Tr. II v. Ace Am. Ins. Co.*, 2025 Mo. Cir. LEXIS 4 (Mo. Cir. Ct. Mar. 10, 2025).

BACKGROUND

Mallinckrodt, an opioid manufacturer, filed for Chapter 11 bankruptcy in 2020 and its Plan of Reorganization took effect in 2022. As part of the Plan, a Delaware court approved the creation of a trust for personal injury claims against the company.

Thereafter, a court approved of Mallinckrodt's plan to exit the bankruptcy, but the company re-entered Chapter 11 proceedings in 2023 based on a potential default on hundreds of millions of dollars in debt. The court ultimately approved Mallinckrodt's second Plan of Reorganization.

In the present coverage case, a trust created in 2022 (known as the "Opioid Master Disbursement Trust II"), filed suit seeking coverage under Mallinckrodt's liability policies. The insurers argued that coverage was barred by a "your products" exclusion. The court agreed and granted the insurers' motion for summary judgment.

DECISION

The relevant "your products" exclusion barred coverage for claims "arising out of" Mallinckrodt's products. In concluding that the provision precluded coverage for the underlying opioid-related claims against Mallinckrodt, the court explained that, under Missouri law, "arising out of" is interpreted broadly to mean "originating from," "having its origins in," "growing out of," or "flowing from." Additionally, the court noted that the definition of "your product" also encompassed representations made about those products.

The court rejected the trust's assertion that the exclusion applied only to Mallinckrodt's representations about its own products, and not to generic representations about the use of opioids generally. The court stated: "Any alleged injuries caused by Mallinckrodt's 'unbranded' representations arose out of Mallinckrodt's products, both because those unbranded representations were part of Mallinckrodt's efforts to boast its own opioid product sales and because unbranded representations about the safety and efficacy of opioids in general encompass Mallinckrodt's products."

The court also held that coverage was not available under umbrella and excess policies because it was undisputed that the "claims-made-and-reported" requirements of those policies were not satisfied.

COMMENTS

The decision expressly distinguished between the causation standard created by "arising out of" verbiage in an insurance policy and the standard for proximate causation under Missouri law, explaining that "arising out of" "includes a much broader spectrum" of conduct than that encompassed by proximate causation.

New York Court Denies Competing Summary Judgment Motions In Reinsurance Dispute Involving A Fronting Arrangement

HOLDING

Finding both parties' interpretations reasonable, a New York federal district court denied cross-motions for summary judgment in a reinsurance dispute involving a fronting arrangement. *TIG Ins. Co. v. Swiss Reinsurance Am. Corp.*, 2025 U.S. Dist. LEXIS 40519 (S.D.N.Y. Mar. 3, 2025).

BACKGROUND

Ranger Insurance Company issued policies to Duke Power Company and Carolina Power & Light Company (together, "Duke"). The policies were part of a fronting arrangement between Ranger Insurance and Associated Electric and Gas Insurance Services Limited ("AEGIS"). The fronting arrangement was necessary because AEGIS was not licensed to conduct insurance business in North Carolina but Ranger Insurance was licensed. During the effective period of the Ranger Insurance policies (1982-1985), AEGIS handled and paid all covered claims. TIG Insurance Company, the plaintiff in the present action, is the successor to Ranger Insurance. Neither Ranger Insurance nor successor TIG paid any claims under the Ranger Insurance policies.

Six of the Ranger Insurance policies were reinsured under facultative certificates issued by Swiss Reinsurance. Each certificate stated that Swiss Reinsurance "does hereby reinsure [TIG] (herein called the Company) with respect to the Company's policy hereinafter described, in consideration of the payment of the premium." The policy referenced in each certificate was the applicable underlying policy issued by Ranger Insurance to Duke.

Decades after the issuance of the policies, in March 2017, Duke sued AEGIS, TIG and other insurers in North Carolina, seeking coverage for underlying coal-ash-related claims. In connection with that suit, TIG and AEGIS agreed that AEGIS was responsible for all past and future loss, as well as defense costs payable under the Ranger Insurance policies. AEGIS ultimately settled the suit, and then sent Swiss Reinsurance a bill seeking indemnification for 57% of the settlement amount pursuant to the facultative certificates. TIG argued that the percentage constituted the portion for which TIG was responsible, and by extension, the portion that Swiss Reinsurance was obligated to pay under the reinsurance certificates. When Swiss Reinsurance refused to pay, TIG filed suit, alleging breach of contract.

DECISION

The central issue in dispute was whether Swiss Reinsurance breached the terms of the facultative certificates by refusing to pay a portion of the settlement payment AEGIS made to Duke. TIG argued that the certificates "plainly anticipated" Swiss Reinsurance being responsible for such payments based on language stating that "[a]ll claims involving this reinsurance, when settled by the Company, shall be binding on the Reinsurers, which shall be bound to pay its proportion of such settlements promptly following receipt of proof of loss." TIG claimed that such language encompassed "any liability" arising under the Ranger Insurance policies.

In contrast, Swiss Reinsurance argued that the reinsurance certificates only contemplated reinsuring TIG (as successor to Ranger Insurance), not AEGIS. Swiss Reinsurance relied on the definition of "Company," which did not reference AEGIS. Further, Swiss Reinsurance contended that the certificates only covered claims settled by TIG, and that

claims settled by AEGIS to discharge its own liability were not within the scope of the reinsurance certificates.

The court concluded that both interpretations were reasonable and therefore that a question of material fact existed as to whether Swiss Reinsurance was obligated to pay under the certificates. The court stated that "what exactly constitutes 'liability assumed under the policy' by Ranger and, by way of succession, TIG is not immediately apparent and is not substantively defined by the Certificates' provisions."

COMMENTS

In denying the parties' cross-motions for summary judgment, the court considered certain extrinsic evidence, including that TIG was listed as one of the settling insurers in the underlying coal-ash litigation, a fact that supported TIG's assertion that AEGIS was settling on TIG's behalf and therefore that Swiss Reinsurance was liable for the portion of settlement assignable to TIG.

However, at the same time, the court also noted that TIG never established reserves for the Ranger Insurance Policies (a requirement under New York insurance law) and that AEGIS posted reserves for the full amount of the underlying settlement, facts indicating that AEGIS and TIG understood that TIG would not face liability for underlying claims against Duke. If TIG was not liable for claims arising from the Ranger Insurance policies, then Swiss Reinsurance would not be in breach of the certificates for refusing to remit payment to AEGIS.

California Court Rules That Liability Insurer Has No Duty To Defend Gun Accessory Manufacturer In Suit Arising From Mass Shooting

HOLDING

A California federal district court granted partial summary judgment to a liability insurer, ruling that injuries arising from a school shooting were not an "occurrence" under the policy and, therefore, the insurer had no duty to defend a suit against the manufacturer of gun accessories used in the shooting. *James River Ins. Co. v. SureFire, LLC*, No. 8:24-cv-01556 (C.D. Cal. Mar. 6, 2025).

BACKGROUND

SureFire, a manufacturer and seller of firearm accessories, was sued by victims of a school shooting. According to the complaint, the shooting was "the foreseeable and entirely preventable result of a chain of events initiated by SureFire." More specifically, the plaintiffs alleged that SureFire and other defendants "deceptively and unfairly marketed their assault rifles, rifle accessories, and ammunition in ways designed to appeal to the impulsive, risk-taking tendencies of civilian adolescent and post-adolescent males" and "this group's propensities for violent behavior." The suit asserted claims for common law negligence as well as violations of state false-advertising and consumer-protection statutes.

SureFire notified James River Insurance of the suits, which agreed to defend under a reservation of rights. James River Insurance then filed suit, seeking a declaration that it had no duty to defend or indemnify the underlying claims. The court granted James River Insurance's motion for partial summary judgment.

DECISION

James River Insurance's duty to defend turned on whether the underlying claims alleged an "occurrence," defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." As the court noted, California law requires that "the act itself" must have been accidental—"not the act's consequences." However, an accident may exist where "any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity."

Applying this legal standard, the court concluded that the suits against SureFire did not allege a covered occurrence. The court explained that, despite the suits having alleged a negligence cause of action, the factual allegations concerned deliberate misconduct rather than accidental behavior. The court explained that allegations relating to SureFire's negligent failure to implement basic protections regarding the sale of its products describe only deliberate marketing decisions, and not mistakes relating to its advertising activities.

The court rejected SureFire's assertion that a duty to defend arose because an "unexpected, independent, and unforeseen happening"—*i.e.*, the school shooting—constituted an occurrence, separate and apart from SureFire's marketing campaign. SureFire argued that the shooting was not the "normal intent" of its marketing strategy and was not "functionally inevitable and entirely foreseeable." The court disagreed, holding that the shooting was not an unforeseen or unexpected event, particularly given the underlying allegations that SureFire deliberately marketed its products to appeal to young men prone to violence.

COMMENTS

Central to the court's ruling was its reliance on decisions denying coverage for underlying opioid-related claims. *See AIU Ins. Co. v. McKesson Corp.*, 2024 U.S. App. LEXIS 1806 (9th Cir. Jan. 26, 2024); *Travelers Prop. Cas. Co. of Am. v. Actavis, Inc.*, 16 Cal. App. 5th 1026 (Cal. Ct. App. 2017). Likewise, in those cases, although the underlying complaints included negligence-based causes of action, the factual allegations described what the defendants "should have known" and thus "a foreseeable risk of harm" stemming from defendants' marketing actions. As such, the courts in those cases concluded that the suits were based on intentional conduct and expected consequences—not an occurrence or accident—and that the insurers had no duty to defend.

These decisions reinforce the principle that causes of action for negligence do not necessarily constitute allegations of accidental conduct for purposes of establishing an "occurrence" under liability policies. A court must evaluate the factual allegations, not the labels of the causes of action, in order to determine an insurer's duty to defend.

Alaska Supreme Court Rules That Pollution Exclusion In Property Policy Does Not Apply To Carbon Monoxide Claims

HOLDING

The Alaska Supreme Court ruled that a pollution exclusion in a property policy did not bar coverage for carbon-monoxide-related claims. *Est. of Wheeler v. Garrison Prop. & Cas. Ins. Co.*, 2025 Alas. LEXIS 32 (Alaska Feb. 28, 2025).

BACKGROUND

A coverage dispute arose after a tenant died of carbon monoxide poisoning. The tenant's family sued the homeowners who, in turn, notified their property insurer. The insurer denied coverage on the grounds that carbon monoxide was a "pollutant" within the meaning of a pollution exclusion in the policy. The homeowners signed a confession of judgment and assigned their right to proceed against their insurer to the tenant's family. In ensuing coverage litigation, both sides moved for summary judgment regarding application of the pollution exclusion.

A district court ruled in the insurer's favor, finding that the exclusion was unambiguous and, applied literally, encompassed the emission of carbon monoxide from an improperly installed water heater in the home. On appeal, the Ninth Circuit certified a question to the Alaska Supreme Court as to how the pollution exclusion should be interpreted under Alaska law: "Does the pollution exclusion in [the] homeowners insurance policy bar coverage for injury arising out of exposure to carbon monoxide emitted by an improperly installed home appliance?" The Alaska Supreme Court accepted certification.

DECISION

The Alaska Supreme Court answered "no," holding that the pollution exclusion did not apply.

As a preliminary matter, the court ruled that the question of law was not governed by *Whittier Props., Inc. v. Alaska Nat'l Ins. Co.*, 185 P.3d 84 (Alaska 2008), a decision relied upon by the district court. In *Whittier*, the court held that a pollution exclusion barred coverage for losses arising out of a gasoline leak from a gas station into surrounding soil and water. The Alaska Supreme Court explained that *Whittier* involved a different substance, a different factual context, and a third-party liability policy rather than a first-party property policy. Additionally, while the *Whittier* court ruled that the absence of the term "gasoline" in the exclusion did not create ambiguity, the Alaska Supreme Court in the instant case clarified that *Whittier* does not stand for the general proposition that "a literal reading of the pollution exclusion is definitive in all cases, even where other provisions create uncertainty."

The court then noted that, under Alaska law, consideration of an insured's reasonable expectations does not depend on a finding of ambiguity. However, "since most insureds develop an expectation that every loss will be covered," the reasonable expectations doctrine is limited by the policy language itself, relevant extrinsic evidence, and applicable case law.

Applying this framework, the court held that both parties' arguments were reasonable.

More specifically, the court deemed reasonable the insurer's contention that the exclusion, which applied to injuries arising out of the "discharge, dispersal, release, escape, seepage or migration of 'pollutants,'" was broad enough to encompass the emission of carbon monoxide from an appliance, particularly given that the definition of "pollutant" included "fumes." Nonetheless, the court reasoned that two other policy exclusions "had a significant effect on how a reasonable insured would interpret the pollution exclusion." Those exclusions barred coverage for claims arising out of lead-based products and asbestos. The court concluded that those exclusions, which expressly referenced other "common household 'pollutants,'" supported the policyholder's narrower interpretation that the pollution exclusion did not bar coverage for the carbon monoxide claim at issue.

COMMENTS

Courts across jurisdictions have reached differing conclusions as to whether a pollution exclusion encompasses claims arising from carbon monoxide exposure. As the Alaska Supreme Court noted, some courts have ruled that the exclusion is inapplicable to carbon monoxide claims and limited its application to "traditional environmental pollution," while other courts have applied a literal reading of the exclusion to find no coverage for such claims.

Ninth Circuit Affirms Dismissal Of Insured's Suit Against Property Insurer Based On Standing And Ripeness

HOLDING

The Ninth Circuit ruled that a California federal district court properly dismissed a suit against a property insurer, finding that the insured lacked standing to bring the suit and that the dispute as to the value of loss was not ripe. *50 Exch. Terrace LLC v. Mount Vernon Specialty Ins. Co.*, 129 F.4th 1186 (9th Cir. 2025).

BACKGROUND

The insured property sustained water damage after frozen pipes burst. The insurer, Mount Vernon Specialty Insurance, and the policyholder disagreed on the cost of the repairs. Mount Vernon paid its estimated value (less depreciation and a deductible) to the policyholder and also demanded appraisal pursuant to the terms of its policy. The policyholder then filed suit, alleging that Mount Vernon wrongfully withheld compensation pending the outcome of the appraisal.

A California federal district court dismissed the coverage suit, finding that the insured lacked standing under Article III and that the dispute was not ripe. The Ninth Circuit affirmed.

DECISION

The Ninth Circuit ruled that, when parties to an insurance policy disagree as to the value of a loss and the policy requires appraisal to resolve such disputes, an insured's claim for failure to pay a disputed amount is not ripe until the appraisal is completed. The court explained that, for a coverage action to be ripe, "it must present issues that are 'definite and

concrete, not hypothetical or abstract.'" Thus, absent an appraisal, any alleged injury is too speculative to create an actionable claim, the court held. With respect to Article III standing, the court explained that the claimant must suffer an "injury in fact," which "coincides squarely" with the ripeness determination.

COMMENTS

Many property policies include appraisal requirements, and such provisions are instrumental in assessing the value of a covered loss. The Ninth Circuit's ruling makes clear that, under California law, coverage suits are not ripe unless and until the appraisal process is complete.

Ninth Circuit Rules That District Court Erred In Finding That Amount In Controversy Is Determined By Insurance Policy Limit

HOLDING

Reversing a California federal district court decision, the Ninth Circuit ruled that there was an "arguable basis" that the amount in controversy for diversity jurisdiction in a declaratory judgment action was satisfied by potential liability in excess of policy limits. *Farmers Direct Prop. & Cas. Ins. Co. v. Perez*, 2025 U.S. App. LEXIS 5245 (9th Cir. Mar. 6, 2025).

BACKGROUND

The dispute arose out of an automobile accident between the insured, Perez, and a third party, Montez. When Montez sued Perez, Farmers Direct agreed to defend Perez pursuant to a policy issued to Perez's sister. Perez was uncooperative with counsel throughout discovery, and the court allowed Farmers Direct to intervene on behalf of Perez. Ultimately, the court entered a default judgment against Perez, who had essentially refused to comply with deposition and discovery orders or otherwise participate in his own defense.

Thereafter, Farmers Direct filed a declaratory judgment action in California federal district court, seeking a ruling that Perez breached the policy's cooperation clause and therefore that it no longer had a duty to defend or indemnify Perez in the underlying tort action. The court entered judgment in Farmers Direct's favor, declaring that it had no continuing duty to defend and owed no indemnity to Perez in connection with the underlying suit.

However, notwithstanding the declaratory judgment, Farmers Direct continued to defend the underlying suit, which ultimately resulted in a jury verdict awarding compensatory damages to Montez and a judgment against Perez in an amount exceeding the $25,000 policy limit. Farmers Direct paid the $25,000 policy limit.

Montez then filed a motion to intervene in Farmer Direct's declaratory judgment action and to vacate the judgment based on several grounds, including a lack of diversity jurisdiction. The district court granted the motion, finding a lack of jurisdiction based on an insufficient amount in controversy. In particular, the district court reasoned that the $75,000 statutory minimum was not met because the policy limit was $25,000. The Ninth Circuit reversed.

DECISION

The Ninth Circuit ruled that the district court erred in holding that the value of the underlying tort action was limited to the policy's limit. The court reasoned that Farmers Direct could ultimately be held liable for an amount in excess of that limit, particularly given Montez's allegations in the underlying complaint that he was entitled to "hundreds of millions of dollars in damages" and his pursuit of a bad faith claim against Farmers Direct.

In rejecting an insurance policy limit as the benchmark for the amount-in-controversy requirement for federal diversity jurisdiction, the court endorsed the following rule from the Fifth Circuit:

> We hold that where the claim under the policy exceeds the value of the policy limit, courts considering declaratory judgments should ask whether there is a legal possibility that the insurer could be subject to liability in excess of the policy limit. The party seeing diversity jurisdiction should establish this possibility by a preponderance of evidence.

Applying this standard, the court ruled that there was at least an "arguable basis" that the amount-in-controversy requirement was satisfied and therefore reversed the district court's ruling vacating the judgment.

The Ninth Circuit also ruled that the district court erred by failing to consider Farmers Direct's defense costs in its amount-in-controversy analysis. Farmers Direct had submitted evidence that it had already incurred hundreds of thousands of dollars in attorneys' fees—evidence that provided an independent basis for satisfaction of the amount in controversy.

COMMENTS

Notably, the Ninth Circuit clarified the scope of its earlier ruling in *Budget Rent-A-Car, Inc. v. Higashiguchi*, 109 F.3d 1471 (9th Cir. 1997). Contrary to Montez's assertion, that decision did not hold that a policy limit sets a cap on the value of an underlying tort action for purposes of establishing federal subject-matter jurisdiction. Rather, *Budget* held that an insurer's policy limit is "relevant" to determining the amount in controversy (but not necessarily controlling), and that "the amount in controversy is the value of the underlying potential tort action."

Simpson Thacher News

Bryce Friedman was inducted as a Fellow into the American College of Trial Lawyers ("ACTL") at the organization's national Spring Meeting on March 8. Founded in 1950, the ACTL is an invitation-only fellowship of exceptional trial lawyers from the United States and Canada and is comprised of litigators who have shown the highest standards of trial advocacy, ethical conduct, integrity, professionalism, and collegiality. Membership does not exceed 1% of the total lawyer population of any state or province. Bryce was also recently named Head of Simpson Thacher's Insurance Litigation Practice and will remain Co-Head of the Business Litigation Practice.

The Firm's Insurance Litigation Practice has been widely recognized as the premier practice representing clients in insurance and related financial services industries. It is top ranked by *Chambers USA* and *Legal 500 U.S.* and has been named *New York Law Journal*'s "Insurance Litigation Department of the Year" and *Benchmark Litigation*'s "National Insurance Firm of the Year" 15 times cumulatively, including in 2024 and 2025, respectively. In addition, Andy Frankel was shortlisted for "Insurance Litigator of the Year" by *Benchmark Litigation*.

Sarah Phillips spoke at the AIRROC Spring Membership Meeting on March 13 in New York. Sarah's panel, titled "Notable Insurance Coverage Cases," reviewed some of the largest and most prominent coverage cases from 2024 and discussed their significance to the runoff market and the broader insurance industry.

Simpson Thacher

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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Simpson Thacher Worldwide

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