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Insurance Law Alert

May 2021

In This Issue

Second Circuit Dismisses Privacy Suit, But Rules That Claimants Can Sue For Increased Risk Of Identity Theft From Data Breach

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Forgery Or Alteration Provision Does Not Cover Losses Arising From Fraudulent Wire Transfers, Says Pennsylvania Court

A Pennsylvania federal district court ruled that losses stemming from fraudulent wire transfers initiated by hackers were not covered by a forgery or alteration provision in a commercial liability policy. *Ryeco, LLC v. Selective Ins. Co.*, 2021 WL 1923028 (E.D. Pa. May 13, 2021). (Click here for full article)

Supreme Court Of Illinois Rules That Insurer Must Defend Biometric Information Privacy Act Suit

The Illinois Supreme Court ruled that an insurer must defend a suit alleging violations of the Biometric Information Privacy Act, finding that the underlying complaint alleged a publication of information in violation of the claimant's right to privacy and that a "violation of statutes" exclusion did not apply. *West Bend Mutual Ins. Co. v. Krishna Schaumburgh Tan, Inc.*, 2021 WL 2005464 (Ill. May 20, 2021). (Click here for full article)

Kentucky Court Rules That Insurer Has No Duty To Defend Opioid Suit

A Kentucky federal district court ruled that a general liability insurer had no duty to defend or indemnify opioid-related claims against a pharmaceutical distributor because the underlying complaint failed to allege damage "because of bodily injury." *Motorists Mutual Ins. Co. v. Quest Pharmaceuticals, Inc.*, 2021 WL 1794754 (W.D. Ky. May 5, 2021). (Click here for full article)

Bucking Trend, Three Federal Courts Deny Insurers' Motions To Dismiss COVID-Related Coverage Suits

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South Carolina Supreme Court Rules That Insurer May Depreciate Labor Costs In Calculating Actual Cash Value

The South Carolina Supreme Court ruled that where a property policy does not define "actual cash value," an insurer is entitled to depreciate the costs of embedded labor in the calculation. *Butler v. Travelers Home and Marine Ins. Co.*, 2021 WL 1900088 (S.C. May 12, 2021). (Click here for full article)

Eleventh Circuit Reverses Dismissal Of Negligent Procurement Claims Against Brokers, Notwithstanding Ruling That Policy Was Void

The Eleventh Circuit ruled that a Georgia district court improperly dismissed a policyholder's negligent procurement claims against insurance brokers, ruling that such claims were not precluded by a finding that the insurance policy was void ab initio. *Gen. Star Indem. Co. v. Triumph Hous. Mgmt., LLC,* 2021 WL 1921851 (11th Cir. May 13, 2021). (Click here for full article)

STB News Alert

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Cyber Alerts:

Second Circuit Dismisses Privacy Suit, But Rules That Claimants Can Sue For Increased Risk Of Identity Theft From Data Breach

The Second Circuit ruled that individuals have Article III standing to sue over the unauthorized release of their personal information, even if they have not yet been the victims of identity theft. Nevertheless, the court dismissed the class action suit seeking damages based on an "increased risk" of identity theft, finding that the plaintiffs had not met their burden of establishing injury-in-fact. *McMorris v. Carlos Lopez & Assocs., LLC,* 995 F.3d 295 (2d Cir. 2021).

An employee accidentally sent an email to approximately 65 other employees that included a spreadsheet containing sensitive personal information of more than 100 current and former employees. Thereafter, three employees filed a class action suit against the company, alleging negligence and statutory violations. While the complaint did not allege any instances of fraud or identity theft as a result of the email, it claimed that the employees were at an increased risk of identity theft and had incurred costs associated with the cancellation of credit cards and the purchase of credit monitoring services, among other things. A New York federal district court dismissed the suit based on a lack of Article III standing, finding that the plaintiffs had failed to allege any "concrete and particularized" injury. The Second Circuit affirmed.

Addressing this matter of first impression, the Second Circuit held that a plaintiff can establish standing based on a risk of future identity theft stemming from an unauthorized disclosure of personal information. It recognized that other federal circuit courts have held that actual misuse following a data breach is not necessary to establish standing. However, the court ruled that here, plaintiffs had not adequately alleged facts sufficient to establish standing based on an "increased risk" theory, noting that the complaint did not allege any "impending" injury or "substantial risk that the harm will occur." The court emphasized that the data-compromise was not the result of a targeted, purposeful act and that none of the employees' data had actually been misused.

Finally, the court ruled that costs incurred by the plaintiffs in taking measures to protect themselves from future identity theft did not constitute an injury-in-fact. The court explained that "where plaintiffs 'have not alleged a substantial risk of future identity theft, the time they spent protecting themselves against this speculative threat cannot create an injury.'"

Forgery Or Alteration Provision Does Not Cover Losses Arising From Fraudulent Wire Transfers, Says Pennsylvania Court

A Pennsylvania federal district court ruled that losses stemming from fraudulent wire transfers initiated by hackers were not covered by a forgery or alteration provision in a commercial liability policy. *Ryeco, LLC v. Selective Ins. Co.*, 2021 WL 1923028 (E.D. Pa. May 13, 2021).

Hackers accessed Ryeco's computer system and instructed the company's bank to wire transfer more than $1 million to the hackers' accounts. The hackers sent fraudulent emails and fraudulent wire transfer authorization forms that contained the signatures of the company's officers, which had presumably been copied from prior, legitimate wire transfer forms. Ryeco sought coverage from Selective Insurance under a policy provision that covered loss "resulting directly from 'forgery' or alteration of checks, drafts, promissory notes, or other similar written promises, orders or directions to pay a sum certain in 'money.'" Selective denied coverage and Ryeco sued, alleging breach of contract and bad faith. The court granted the insurer's summary judgment motion.

As the court noted, numerous other courts have rejected policyholders' attempts to

obtain coverage under forgery or alteration provisions for wire transfer losses stemming from phishing schemes or other incidents of cyber fraud. Those courts have reasoned that fraudulent emails that contain wire transfer instructions do not constitute a check, promissory note or other "similar written promise" to pay a sum certain. Ryeco argued that those cases were distinguishable because the fraudulent instructions at issue were conveyed in emails as well as official wire transfer authorization forms. The court rejected this assertion, explaining that the forms were "like an email" and not the type of negotiable instrument listed in the forgery and alteration provision.

In addition, the court emphasized that Ryeco declined fund transfer fraud coverage, which both parties conceded would have applied to the losses at issue. That provision expressly applied to written instructions "other than those described in the [forgery or alteration] provision."

Right To Privacy Alert:

Supreme Court Of Illinois Rules That Insurer Must Defend Biometric Information Privacy Act Suit

The Illinois Supreme Court ruled that an insurer must defend a suit alleging violations of the Biometric Information Privacy Act ("BIPA"), finding that the underlying complaint alleged a publication of information in violation of the claimant's right to privacy and that a "violation of statutes" exclusion did not apply. *West Bend Mutual Ins. Co. v. Krishna Schaumburgh Tan, Inc.*, 2021 WL 2005464 (Ill. May 20, 2021).

A tanning salon customer sued the salon alleging BIPA violations based on the company's alleged disclosure of the customer's fingerprints to a third-party vendor. West Bend sought a declaration that it had no duty to defend the suit. West Bend argued that there was no coverage under the policy's personal and advertising injury provision because the disclosure of personal information to a single party is not a "publication of material that violates a person's right of privacy," as required by the policy. Additionally, West Bend claimed that coverage was barred by a "violation of statutes" exclusion. An Illinois trial court rejected both assertions and granted the salon's summary judgment motion. An intermediate appellate court and the Illinois Supreme Court affirmed.

The Illinois Supreme Court ruled that the salon's sharing of biometric information with the vendor was a "publication" under the policy. The court explained that "publication" can reasonably mean communication to the general public at large or disclosure to a single party. Construing this ambiguity in favor of coverage, the court concluded that the salon's communication with a single vendor satisfied the publication requirement. The court further held that "right to privacy" includes the right to keep biometric identifiers (*e.g.*, fingerprints, retina scans, voiceprints) secret from disclosure to others.

The court rejected West Bend's assertion that a "violation of statutes" exclusion barred coverage. The exclusion applied to personal injury

> arising directly or indirectly out of any action or omission that violates . . . (1) The Telephone Consumer Protection Act . . . or (2) The CAN-SPAM Act of 2003 . . . or (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

West Bend argued that the phrase "other than" indicates that the exclusion applies to any statute that prohibits the communication of information. Dismissing this argument, the court held that the exclusion applies only to statutes that regulate methods of

communication, such as telephone calls, faxes and emails. The court concluded that the BIPA is not within this category of statutes because it regulates the collection, use and handling of biometric information, which the court deemed "fundamentally different" from the regulation of modes of communication.

Opioid Alert:

Kentucky Court Rules That Insurer Has No Duty To Defend Opioid Suit

A Kentucky federal district court ruled that a general liability insurer had no duty to defend or indemnify opioid-related claims against a pharmaceutical distributor because the underlying complaint failed to allege damage "because of bodily injury." *Motorists Mutual Ins. Co. v. Quest Pharmaceuticals, Inc.*, 2021 WL 1794754 (W.D. Ky. May 5, 2021).

Quest was sued in 77 lawsuits brought by cities, counties and private entities seeking to recover economic costs incurred due to Quest's allegedly improper distribution of opioids. Quest's insurer sought a declaration that its policies did not cover the underlying claims, which the court granted. The court ruled that the complaint did not seek damages because of bodily injury, rejecting Quest's assertion that the economic losses would not have been incurred without the bodily injury suffered by individuals who used opioids. The court distinguished cases involving policy language that requires damages "arising out of" bodily injury, noting that "arising out of" has been construed broadly under Kentucky law, whereas "because of bodily injury" has been construed to mean "for bodily injury." Applying this standard, the court concluded that the complaint did not allege damages for bodily injury because none of the underlying plaintiffs sought damages for any bodily injury they suffered.

COVID-19 Alert:

Bucking Trend, Three Federal Courts Deny Insurers' Motions To Dismiss COVID-Related Coverage Suits

While the majority of courts continue to dismiss claims seeking coverage for business losses incurred during government-mandated shutdowns, a few courts have allowed such claims to proceed.

In *Treo Salon, Inc. v. West Bend Mutual Ins. Co.*, 2021 WL 1854568 (S.D. Ill. May 10, 2021), an Illinois federal district court ruled that a putative class action complaint sufficiently alleged coverage under a Communicable Disease Business Income endorsement. The provision applied to loss incurred as a result of a suspension of operations "due to an outbreak of 'communicable disease' . . . at the insured premises." The insurer argued that the government shutdown was not "due to" a communicable disease at the insured premises, but rather was based on the COVID-19 pandemic in general. In denying the insurer's motion to dismiss, the court noted the absence of a factual record indicating whether or not the virus was actually present on the insured premises. The court also declined to rule on whether the endorsement was ambiguous.

An Alabama federal district court also denied an insurer's motion to dismiss a suit brought by several restaurants seeking coverage for business losses incurred in the wake of COVID-related shutdowns. *Serendipitous, LLC v. Cincinnati Ins. Co.*, 2021 WL 1816960 (N.D. Ala. May 6, 2021). The policy defined "loss" as "accidental physical loss or accidental physical damage." The court reasoned that use of the disjunctive "or" indicated that loss meant something other than damage. The court further explained that physical loss may be established when the insured "has lost possession of and been deprived of insured property." The court ruled that the restaurants sufficiently pled physical loss because the complaint alleged

that they were unable to use their premises and tables during the mandated closures and restrictions.

The Eleventh Circuit, applying Florida law, reached a contrary decision in *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 Fed. Appx. 868 (11th Cir. 2020) (*see* September 2020 Alert). However, the *Serendipitous* court deemed that decision non-binding and distinguishable. In particular, the court emphasized that *Mama Jo's* was decided on a summary judgment motion rather than a motion to dismiss, and that unlike the present case, the *Mama Jo's* complaint did not allege that employees tested positive for COVID-19.

Finally, a Texas federal district court denied an insurer's motion to dismiss, ruling that a movie theater sufficiently alleged a claim for coverage under an all risk policy. *Cinemark Holdings, Inc. v. Factory Mutual Ins. Co.*, 2021 WL 1851030 (E.D. Tex. May 5, 2021). The complaint alleged that more than 1700 Cinemark employees had tested positive for or were exposed to or displayed symptoms of COVID-19, forcing the company to close its theaters. Factory Mutual denied coverage on the basis of a contamination exclusion and the absence of alleged physical loss or damage to insured property.

In denying Factory Mutual's motion to dismiss, the court emphasized that the complaint alleged property damage based on the actual presence of the virus and altered air content. The court also noted that the policy expressly covered loss and damage caused by "communicable disease." The court acknowledged that another Texas federal district court recently dismissed COVID-19-related business loss claims in *Selery Fulfillment, Inc. v. Colony Ins. Co.*, 2021 WL 963742 (E.D. Tex. Mar. 15, 2021), but distinguished *Selery* on the bases that (i) the policyholder in that case did not allege that the virus entered the property and (ii) the governing policy did not include a communicable disease provision.

The *Cinemark* decision appears to be an outlier. A New Jersey federal district court recently granted Factory Mutual's motion to dismiss in *Ralph Lauren Corp. v. Factory Mutual Ins. Co.*, 2021 WL 1904739 (D.N.J. May 12, 2021), rejecting the arguments set forth in *Cinemark*. In particular, the court ruled that the alleged "presence" of the virus in or near the policyholder's stores did not constitute actual or imminent physical loss or damage to property. The court also ruled that the coverage claims were barred by the policy's contamination exclusion. Further, the court dismissed the policyholder's claim for coverage under the communicable disease provision based on the lack of actual (rather than suspected) viral presence at a covered location. Other federal district courts have likewise rejected policyholder arguments that coverage is triggered by the alleged presence of the COVID-19 virus and/or available under a communicable disease provision. *See Mohawk Gaming Enterprises, LLC v. Affiliated FM Ins. Co.*, 2021 WL 1419782 (N.D.N.Y. Apr. 15, 2021); *Out West Rest. Grp., Inc. v. Affiliated FM Ins. Co.*, 2021 WL 1056627 (N.D. Cal. Mar. 19, 2021).

Equitable Subrogation Alert:

Insurer Entitled To Recover Defense Payments From Another Insurer Following Policy Rescission, Says Third Circuit

The Third Circuit ruled that an insurer was entitled to reimbursement of defense costs it incurred prior to the rescission of its policy from an insurer that provided coverage to the same policyholder. *Berkley Assurance Co. v. Colony Ins. Co.,* 2021 WL 1625521 (3d Cir. Apr. 27, 2021).

The dispute arose from a building demolition that killed and injured several individuals. The building owner was insured under a policy issued by Colony, and was also listed as an additional insured under a policy issued by Berkley Assurance to the demolition company. Colony's policy contained an "other insurance" provision that made it secondary to any other insurance that provided coverage. When the injured victims and decedents' estates filed suit against the building owner, Berkley agreed to defend under a reservation of rights. While the underlying litigation was pending, Berkley sought a declaration that its policy was void ab initio based on misrepresentations in the application. A state court granted Berkley's motion, finding that rescission was warranted. Thereafter, Berkley sued Colony for equitable subrogation and unjust enrichment, seeking

payment of the defense costs it incurred before the Berkley policy was rescinded. A Pennsylvania federal district court granted Berkley's summary judgment motion and the Third Circuit affirmed.

Colony argued that Berkley was precluded from seeking equitable subrogation because Berkley had a legal duty to defend, or alternatively, because Berkley voluntarily paid the defense costs. The court rejected both assertions. The court explained that once Berkley's policy was void ab initio, the insurer was relieved of all rights and responsibilities, both prospectively and retroactively. As such, Berkley had no duty to defend the suit. In so ruling, the court distinguished Pennsylvania precedent which holds that an insurer is not entitled to reimbursement of defense costs incurred during the period in which a declaratory judgment action regarding the duty to defend is pending. In those cases, the Pennsylvania Supreme Court explained that allowing reimbursement "would amount to a retroactive erosion of the broad duty to defend." However, the same policy concerns are not raised where a policy is declared void from inception.

The Third Circuit also rejected Colony's contention that Berkley was barred from seeking equitable contribution because it acted as a "volunteer" in paying defense costs. The court explained that Berkley "was acting out of a concern that it would be subject to a bad faith suit" if it did not pay defense costs. Finally, the court rejected Colony's argument that the equitable subrogation claim failed because Colony never breached its duty to defend. The court stated that the "proper inquiry is whether someone else discharged an obligation for which Colony is primary liable" and that once the void ab initio order was issued, "Colony retroactively became the primary insurer from the date of loss."

Property Insurance Alert:

South Carolina Supreme Court Rules That Insurer May Depreciate Labor Costs In Calculating Actual Cash Value

Answering a certified question, the South Carolina Supreme Court ruled that where a property policy does not define "actual cash value" ("ACV"), an insurer is entitled to depreciate the costs of embedded labor in calculating ACV. *Butler v. Travelers Home and Marine Ins. Co.*, 2021 WL 1900088 (S.C. May 12, 2021).

The operative insurance policies provided replacement cost value coverage in the event of property damage. Additionally, the policies permitted the policyholder to receive ACV instead of replacement cost value if the policyholder opted not to immediately repair the damaged property. The policyholders opted for ACV coverage, which Travelers calculated by using replacement cost less depreciation. The policyholders alleged that Travelers improperly depreciated both materials and the labor component of the cost of repair or replacement. The court disagreed.

The court noted that "embedded labor components" reflect labor costs that are "no longer separable from the costs of materials" (*e.g.*, the cost of a new roof reflects both the materials and embedded labor costs of removing the old roof and installing the new one). The court therefore held that it is "impractical, if not impossible, to include depreciation for materials and not for labor to determine the ACV of the damaged property."

As reported in previous Alerts, courts across jurisdictions have issued mixed decisions as to whether labor costs may be depreciated in calculating ACV. *See* July/August, April, March 2020 Alerts, April 2019 Alert, March 2017 Alert. This month, the Illinois Supreme Court heard oral arguments on this issue in *Sproull v. State Farm Fire & Cas. Co.*, No. 126446 (Ill. May 19, 2021).

Broker Alert:

Eleventh Circuit Reverses Dismissal Of Negligent Procurement Claims Against Brokers, Notwithstanding Ruling That Policy Was Void

The Eleventh Circuit ruled that a Georgia district court improperly dismissed a policyholder's negligent procurement claims against insurance brokers, ruling that such claims were not precluded by a finding that the insurance policy was void ab initio. *Gen. Star Indem. Co. v. Triumph Hous. Mgmt., LLC*, 2021 WL 1921851 (11th Cir. May 13, 2021).

General Star Indemnity sought to rescind a policy issued to Triumph, a property management company, based on alleged misrepresentations in the application. Triumph filed a third-party complaint against two brokers, alleging negligent procurement. In particular, Triumph alleged that it requested blanket coverage for its structures, but instead was issued scheduled coverage. Triumph and General Star Indemnity reached a settlement, and in a consent order, the court dismissed all claims between those two parties and declared the policy void ab initio. The brokers moved to dismiss Triumph's third-party claims, which a Georgia district court granted. The Eleventh Circuit reversed.

The Eleventh Circuit rejected the brokers' argument that the appeal was moot based on the district court's order declaring the policy void ab initio. The court explained: "Whether [the brokers] procured inadequate coverage or no coverage at all, a live controversy remains as to whether they were negligent for failing to procure the coverage that Triumph requested." In addition, the court rejected the brokers' contention that Triumph's third-party claims must fail because there was no finding of liability against the first-party defendant and because third-party claims are necessarily derivative of first-party claims.

The Eleventh Circuit also ruled that Triumph sufficiently alleged its negligent procurement claims, notwithstanding its failure to read the policy. The court explained that while an insured's failure to exercise ordinary diligence typically precludes a negligent procurement claim, an exception exists where, as here, the insured allegedly did not receive a copy of the policy and thus could not assess any potential discrepancies between the coverage it requested and the coverage actually provided. In such instances, "the pivotal question is whether the remaining facts alleged in Triumph's third-party complaint support an inference that Triumph exercised ordinary diligence to find out the terms of the policy." Noting that the district court failed to consider that question, the Eleventh Circuit reversed the dismissal of the claims. The Eleventh Circuit also ruled that Triumph should be permitted to amend its third-party complaint to include allegations that it sought, but did not receive, information about the scope of coverage under the policy from the brokers after it was issued.

STB News Alert

Bryce Friedman and Daniel Feder authored an article published by the *New York Law Journal* titled, "Retroactive Insurance Coverage for COVID-19 Losses." The article examines the constitutional concerns relating to proposed New York legislation which would have retroactively rewritten commercial insurance policies to provide coverage to businesses interrupted by the spread of COVID-19 and government attempts to curtail it. The article also addresses the body of New York case law indicating that commercial property insurance policies do not provide insurance coverage for such business losses.

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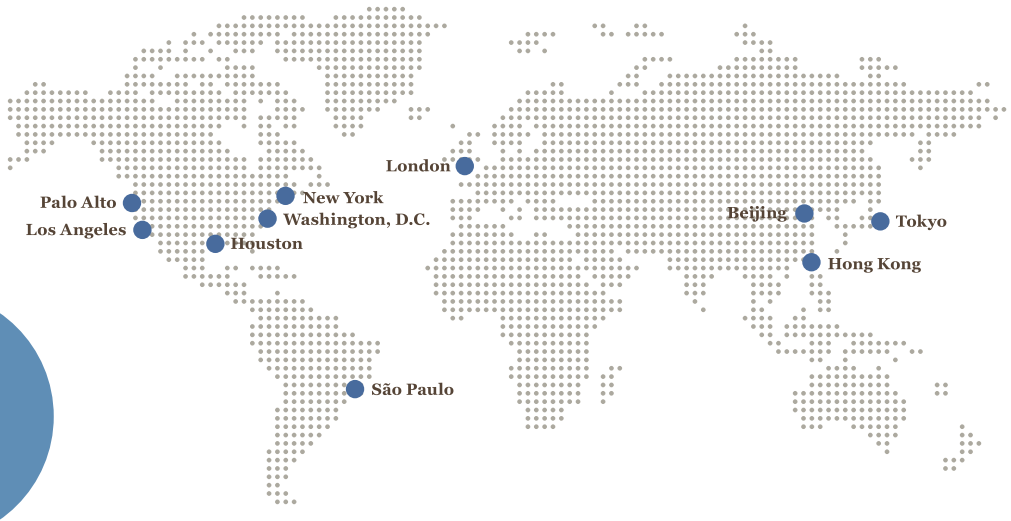

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