Simpson Thacher

Insurance Law Alert

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Click here for a jurisdictional chart that summarizes recently-issued decisions in this context.

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D&O Alert:

Delaware Supreme Court Rules That Appraisal Action Is Not A Covered "Securities Claim"

The Supreme Court of Delaware ruled that an appraisal action is not a covered "Securities Claim" and that D&O insurers have no duty to pay for pre-judgment interest and defense expenses incurred in that action. *In re Solera Ins. Coverage Appeals*, 2020 WL 6280593 (Del. Oct. 23, 2020).

A group of shareholders of Solera filed an appraisal action seeking determination of the fair value of their shares after Solera was acquired. The appraisal action found that the value of the petitioners' shares at the time of merger was actually lower than the merger price. Notwithstanding this positive result, Solera was required to pay statutory pre-judgment interest on the fair value of the shares. Solera also paid more than $13 million in attorneys' fees and other costs defending the appraisal action.

Solera's excess D&O insurers denied coverage, arguing that the appraisal action was not a "Securities Claim," defined as a claim "made against [Solera] for any actual or alleged violation of any federal, state or local statute, regulation, or rule or common law regulating securities." The insurers contended that the appraisal action did not allege any "violation" of law or any wrongdoing. As discussed in our September 2019 Alert, a Delaware trial court held that allegations of wrongdoing are not required by the policy language and that "violation" can include a demand for an appraisal, which is an allegation that a company violated stockholders' right to receive fair value for their shares in certain transactions. Additionally, the trial court ruled that even though Solera's payment of the fair value of the shares was not a covered loss, pre-judgment interest on that payment may be covered. However, the trial court declined to grant summary judgment in Solera's favor, noting factual disputes as to whether other provisions preclude coverage, whether Solera could have mitigated damages, and whether Solera actually paid the interest award.

Last month, the Delaware Supreme Court reversed the decision, ruling that the appraisal action is not a covered "Securities Claim." The court explained that an appraisal action does not involve a "violation" of law or regulation, as required by policy language. The court reasoned that "violation" must involve "some element of wrongdoing," whereas an appraisal action is a neutral remedy limited to the determination of the fair value of stock shares. As the court noted, this conclusion is supported by "an unbroken line of cases" holding that a statutory appraisal action "does not involve any inquiry into claims of wrongdoing."

"Physical Loss Or Damage" Alert:

Texas Court Dismisses Suit Based On Hurricane-Related Port Closures, Citing Lack Of Physical Damage

A Texas federal district court ruled that an insurer had no duty to cover business interruption losses resulting from Texas port closures prior to Hurricane Harvey, finding that the closures were not caused by "direct physical loss of or damage to" covered property. *Evanston Ins. Co. v. AmSpec Holding Corp.*, 2020 WL 6152190 (S.D. Tex. Oct. 20, 2020).

AmSpec, a testing and inspection company for ships along the Gulf Coast, allegedly incurred nearly $1 million in business losses and extra expenses because of port closures immediately prior to the landfall of Hurricane Harvey in August 2017. Evanston Insurance denied coverage, citing the absence of "direct physical loss of or damage to" any of the ports where AmSpec performed its services.

The court agreed and granted the insurer's summary judgment motion.

The policy's Civil Authority provision extended coverage to losses sustained while access to covered locations "is specifically denied by an order of civil authority." The provision further required the civil order to "be a result of direct physical loss of or damage to property." The parties disputed whether the port closures were "a result of direct physical loss of or damage to property, other than at the covered location." AmSpec argued that the provision requires only that physical damage "was happening elsewhere" and that the phrase "a result of" indicates a less stringent causal requirement than "due to" or other verbiage. The court rejected this assertion, stating that "[t]he general rule is that civil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property." (Citations omitted).

In addition, the court noted that port closures instituted in advance of storm arrival (based on wind conditions and estimated storm times) do not constitute direct physical damage. The court stated: "When, as here, there is no prior damage to consider and the Coast Guard bulletins only contain precautionary language, the causal link between any prior damage and the civil authority order is missing." The court further rejected AmSpec's contention that direct physical loss could be established by damage that occurred after the issuance of the civil authority orders and port closures.

Number Of Occurrences Alert:

Texas Court Rules That Multiple Cases Of Food Poisoning Over Four-Day Period Are Subject To A Single Occurrence Limit

A Texas federal district court ruled that 124 separate cases of food poisoning stemming from a single restaurant are subject to a single occurrence limit under a liability policy. *Travelers Cas. Ins. Co. of Am. v. Mediterranean Grill & Kabob Inc.*, 2020 WL 6536163 (W.D. Tex. Nov. 4, 2020).

Between August 29 and September 1, 2018, nearly 200 cases of food poisoning were reported by patrons of a restaurant. As a result, several lawsuits were filed against the restaurant, alleging negligent manufacturing and food preparation. Nearly 80 of the claims settled and Travelers offered the balance of its $1 million "per occurrence" limit to settle the remaining claims. The restaurant rejected the offer, and Travelers sought a declaration that the remaining claims were a single occurrence for purposes of applying the policy's per-occurrence limit. The court agreed and granted Travelers' summary judgment motion.

Applying a cause-based test, the court held that "only one cause gave rise to [the restaurant's] liability, and that is [the restaurant's] allegedly contaminated food." The court rejected the contention that multiple acts "such as a pause or interruption in business operations during the course of the negligent conduct," due to cleaning or the closing of business during overnight hours means that there were multiple occurrences. In so ruling, the court emphasized that the restaurant failed to point to any "intervening tort or independent negligence which interrupted the proximate and continuing cause of the Claimants' injuries." Similarly, the court dismissed the assertion that there were multiple occurrences because the parties did not know which particular food products were contaminated. The court noted that its ruling was supported by Texas cases holding that damages arising from an insured's manufacturing defects arise from a single occurrence, even where there are multiple incidents of damage.

Covid Alert:

Courts Across The Country Continue To Rule On Covid-Related Coverage Claims, With Substantial Majority Finding No Coverage

Case	Jurisdictional Law	Key Holdings and Notable Findings
Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London, No. 00375 (Pa. Ct. Comm. Pl. Oct. 26, 2020)	Pennsylvania	• Restaurant's coverage suit survives motion to dismiss. Accepting allegations as true, court concludes that dismissal would be premature given the "rapidly evolving" law relating to Covid-related insurance coverage.
Founder Inst. Inc. v. Hartford Fire Ins. Co., 2020 WL 6268539 (N.D. Cal. Oct. 22, 2020)	California	• Startup company's coverage suit dismissed because even "[a]ssuming—for argument's sake only—that the claim for loss of business income due to the shelter-in-place orders would otherwise be covered by Founder's insurance policy, the claim clearly falls within the virus exclusion." • Court rejects policyholder's attempt to "wriggle out of the exclusion by attaching a different label to its loss" in characterizing it as a loss due to respiratory droplets rather than a loss due to a virus. • In an "abundance of caution," court allows policyholder to re-plead, but deems it "unlikely that Founder will ever be able to state a claim," noting that "its theory of coverage appears frivolous."
Boxed Foods Co., LLC v. California Capital Ins. Co., 2020 WL 6271021 (N.D. Cal. Oct. 26, 2020)	California	• Restaurants' business income and civil authority claims dismissed because "Pathogenic Organisms Exclusion" bars coverage. Exclusion applies to "loss or damage caused by, resulting from, contributing to or made worse by the actual, alleged or threatened presence of any pathogenic organism, whether direct or indirect, proximate or remote, in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy." • Court rejects policyholders' assertion that exclusion is ambiguous or does not apply to civil authority coverage, noting that exclusion expressly applies to any loss directly or indirectly caused by a virus. • Court rules that discovery is unnecessary to determine the scope and validity of the exclusion because policyholders' proffered interpretations are unreasonable.
West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos., 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020).	California	• Hotels' coverage suit dismissed based on virus exclusion, which precludes coverage for loss or damage "caused directly or indirectly by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Exclusion is unambiguous and was conspicuously displayed in policy. • Court rejects application of "reasonable expectations" doctrine, noting that it "does not give courts a license to refuse to enforce contract terms based on one party's expectations." • "Direct physical loss of or damage to property," even if undefined in the policy, "plainly requires, at minimum, that the loss or damage be physical in nature." Therefore, "temporary loss of economically valuable use" of hotels due to government orders does not trigger coverage under policy. • Civil authority coverage unavailable for additional reason that policyholders failed to provide "sufficient non-conclusory allegations" regarding damage to nearby properties, and instead merely recited the policy language without specifying facts that could support recovery. • Court declines to grant leave to amend complaint, noting that amendment would be "futile."

Case	Jurisdictional Law	Key Holdings and Notable Findings
Vizza Wash, LP v. Nationwide Mut. Ins. Co., 2020 WL 6578417 (W.D. Tex. Oct. 26, 2020)	Texas	• Car wash company's coverage suit fails to state a claim because even assuming that claims are encompassed by business income or civil authority provisions, coverage is barred by virus exclusion. Exclusion applies to "loss or damage caused directly or indirectly by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease," "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." • Court rejects policyholder's assertion that exclusion does not apply because virus was not actually present at insured properties; policy language excludes loss even "indirectly" caused by a virus. • Court rejects policyholder's contention that exclusion is ambiguous, stating that "the fact that [Nationwide] could have used *even more* specific language does not automatically render ambiguous the language that [it] actually used." (Emphasis in original). • Court dismisses extra-contractual bad faith and statutory claim, explaining that such claims fail where, as here, the insurer has properly denied coverage. • Court also dismisses claims against insurance agent as a matter of law, citing absence of allegations that agent made any misrepresentations or omissions in order to induce purchase of the policy. • Leave to amend is denied because future attempts to cure defects would be "futile."
Uncork & Create LLC v. Cincinnati Ins. Co., 2020 WL 6436948 (S.D. W. Va. Nov. 2, 2020)	West Virginia	• Event planning company's coverage suit dismissed based on failure to allege "accidental physical loss or accidental physical damage." • Court distinguishes West Virginia case in which physical damage or loss was found notwithstanding absence of physical alteration to insured property, explaining that in that case, nearby rock fall made insured property uninhabitable due to physical threat, whereas here, Covid "has no effect on the physical premises of a business." • Court notes that "majority of courts to address the issue . . . have found that COVID-19 and governmental orders closing businesses to slow the spread of the virus do not cause physical damage or physical loss to insured property," and deems the reasoning of those cases to be persuasive. • Court rejects distinction based on whether a complaint alleges presence of virus on the premises in order to determine "physical loss or damage." *See Studio 417, Inc. v. Cincinnait Ins. Co.*, 2020 WL 4692385 (W.D. Mos. Aug. 12, 2020) (discussed in July/August 2020 Alert) and *Seifer v. IMT Ins. Co.*, 2020 WL 6120002 (D. Minn. Oct. 16, 2020) (discussed in October 2020 Alert). Court notes that even if complaint includes "artful pleading as to the likelihood of the presence of the virus" on insured property, the virus "does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property."

Case	Jurisdictional Law	Key Holdings and Notable Findings
Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co., 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020)	Florida	• Dentist's coverage suit dismissed for failure to allege "direct physical loss of or physical damage to Covered property." • Court observes that "[n]umerous other courts across the country have dismissed substantially similar COVID-19-related lawsuits at this stage for failing to plead actionable claims under the insurance policy." (Citing cases discussed in our September and October 2020 Alerts). • "Federal courts in Florida that have examined whether economic losses caused by COVID-19 business closures or suspensions constitute a 'direct physical loss' or 'physical harm' have rejected Plaintiffs' arguments." • Civil authority coverage unavailable for the additional reason that the complaint fails to allege that access to the insured premises was prohibited by order of civil authority. "Rather, Plaintiffs allege that they suspended or reduced their practice because two government orders required 'that non-emergent or elective dental care be postponed indefinitely.'" • Even if policyholder alleged facts to support coverage, a virus exclusion applies. Exclusion applies notwithstanding policyholder's assertion that loss was caused by government orders rather than virus itself.
Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am., 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020)	Mississippi	• Restaurant's coverage claims dismissed based on failure to allege "direct physical loss of or damage to property." Policyholder's "contention that loss of property reasonably includes a loss of usability is not sustainable." • Non-Covid cases from other jurisdictions that deem loss of use sufficient to trigger coverage are distinguishable because they involved a "pervasive, physical impact on the insured property for which each court concluded was tantamount to physical loss or damage." • Coverage is barred, in any event, by a virus exclusion because complaint expressly states that business was closed as a result of the Covid pandemic.
MAC Prop. Grp. LLC v. Selective Fire and Cas. Ins. Co., No. L-2629-20 (N.J. Super. Ct. Nov. 5, 2020)	New Jersey	• Bakery's business loss and civil authority coverage claims dismissed because virus exclusion bars coverage. Exclusion contains anti-concurrent causation provision, which excludes coverage "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." • In addition to virus exclusion, "Plaintiff points to no direct physical loss or damage to property which resulted in the order of civil authority."
Indep. Barbershop, LLC v. Twin City Fire Ins. Co., 2020 WL 6572428 (W.D. Tex. Nov. 4, 2020)	Texas	• Barbershop's Covid coverage suit survives motion to dismiss only with respect to one claim: potential coverage under a "Virus Endorsement" that allows for thirty days of coverage for business interruption if "loss or damage to property caused by . . . virus" causes a suspension of operations and if "Time Element Coverage applies." • Policyholder's argument that pandemic and government orders (rather than virus) caused the loss fails because exclusionary provision includes the following language: "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." • Court also rejected regulatory estoppel argument (*i.e.*, assertion that insurance industry misled state regulators by representing that Virus Endorsement was not an exclusion but rather a clarification of existing coverage), finding "no basis in Texas law for applying the doctrine of regulatory estoppel." • Court will determine class certification issue at a later time.

Case	Jurisdictional Law	Key Holdings and Notable Findings
Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co., 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020)	Hawaii	• Retail store's business interruption and civil authority coverage claims fail as a matter of law based on lack of "direct physical loss of or damage to" property. Court cites "overwhelming majority of courts" that have reached the same conclusion. • An "imminent threat" of contamination is insufficient to trigger coverage; "[t]here are no facts plausibly alleging an actual exposure at one or more Sand People stores, much less that an actual physical exposure caused them to close a particular store or set of stores." • Court rejects policyholder's assertion that loss of use of property or temporary "deprivation of the functionality of property" triggers coverage. • Civil authority coverage unavailable for additional reason that "preventative closure orders cannot support a causal link of direct physical loss of or damage to property."
DAB Dental PLLC v. Main St. Am. Prot. Ins. Co., No. 20-CA-5504 (Fla. Cir. Ct. Nov. 10, 2020)	Florida	• Dental practice's coverage suit dismissed. Allegations that presence of Covid particles at insured property rendered it uninhabitable or unusable do not constitute allegations of direct physical loss or damage; actual tangible or structural damage is required. • Even if allegations were sufficient to give rise to possibility of coverage, virus exclusion applies. Court rejects assertion that exclusion is inapplicable because loss was caused by executive order, rather than virus. "This is a narrow application of the Exclusion to the alleged facts which is not supported by a plain and reasonable reading of the language. . . . [T]he Executive Order would not have been issued had COVID-19 not created a public health concern necessitating the Order." • "A plain reading of the Policy language and a consideration of Florida law lead to the only reasonable interpretation that the mere presence of COVID-19 on business premises does not constitute a direct physical loss of or damage to property. As such, it is also not a Covered Cause of Loss and cannot serve as the basis for Civil Authority coverage."
Dime Fitness, LLC v. Markel Ins. Co., 2020 WL 6691467 (Fla. Cir. Ct. Nov. 10, 2020)	Florida	• Fitness company's coverage claims dismissed based on failure to allege direct physical loss. Business income loss and restricted access are not direct physical loss. • "[T]he Court must evaluate whether the admittedly pure economic loss alleged here meets the Policy definition of a 'covered cause of loss.' It does not. A 'covered cause of loss' is a 'risk of direct physical loss.' 'Direct physical loss' has been defined by other courts—the consensus of which is that 'direct physical loss' requires a 'physical alteration of the property.'" • Civil authority coverage fails for the additional reason that "the Executive Order was issued to address a public health crisis. There was no damage to other property which caused the issuance of the Executive Order. Nor was the Executive Order issued in response to a dangerous physical condition that caused property damage." • Court rules that in any event, coverage is barred by the virus exclusion. Policyholder's assertions that exclusion is inapplicable or limited by concurrent causation doctrine are without merit.

Case	Jurisdictional Law	Key Holdings and Notable Findings
N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co., 2020 WL 6501722 (D.N.J. Nov. 5, 2020)	New Jersey	• Restaurant's coverage suit dismissed based on virus exclusion. Anti-concurrent preamble to exclusion, which states that loss is excluded "regardless of any other cause or event that contributes concurrently or in any sequence to the loss," negates policyholder's assertion that loss was caused by executive order rather than virus. • Court rejects policyholder's argument that New Jersey law requires proximate causation for application of exclusionary language, holding that contractual language designed to avoid the efficient proximate causation doctrine is enforceable.
Mace Marine, Inc. v. Tokio Marine Specialty Ins. Co., No. 20-CA-120 (Fla. Cir. Ct. Oct. 9, 2020) *Horizon Dive Adventure, Inc. v. Tokio Marine Specialty Ins. Co.*, No. 20-CA-159 (Fla. Cir. Ct. Oct. 20, 2020)	Florida	• Two scuba and snorkeling companies' coverage suits dismissed in summary orders. Court states that "direct" and "physical" modify the term "loss" in the policy, and impose a requirement that "the damage be actual."
Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc., No. 20 STCV16681 (Cal. Super. Ct. Nov. 9, 2020)	California	• Restaurant's coverage suit dismissed for failure to allege "direct physical loss of or damage to property." "Plaintiff has alleged no facts suggesting Plaintiff's operations were suspended due to a physical alteration of insured property. . . . In addition, Plaintiff did not allege facts suggesting the Orders prohibited access to Plaintiff's premises as a result of damage to property within one mile as required for Civil Authority Coverage and Plaintiff did not allege facts suggesting its premises were not accessible due to the Orders." • Court rejects policyholder's contention that policy "can be reasonably construed to provide coverage for a loss resulting from Plaintiff's inability to use or access its property." Court distinguishes cases involving loss of use because those cases involved physical damage to adjacent property or dispossession of property, neither of which exist here. • "To the extent Plaintiff argues the term 'direct physical loss' must be read broadly to extend to coverage for when property is seized or rendered unusable for its intended purpose, regardless of whether the property itself is damaged, this argument is belied by the terms of the Policy itself, which directly reference physical damage." • Coverage is also barred by virus exclusion. Court rejects policyholder's assertion that "predominating cause" of loss were the government orders (rather than the virus).
Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co., 2020 WL 6699480 (D. Ariz. Nov. 13, 2020)	California, Idaho, Indiana, Maryland, Oregon, South Carolina, Tennessee, Texas, Virginia, West Virginia (Court applies the law of the "state which the parties understood was to be the principal location of the insured risk"; here, the insured risk for each Plaintiff is the state where the team resides)	• Minor League Baseball ("MLB") association's Covid-related coverage claims dismissed based on virus exclusion. Court rejects policyholders' assertions that losses were caused by factors other than the virus (*e.g.*, by government orders or by the MLB's failure to provide players for games). • Court also rejects regulatory estoppel argument, stating that the doctrine has been "rejected by virtually every other state and federal court to address the issue [other than New Jersey]." (Citations omitted).

Case	Jurisdictional Law	Key Holdings and Notable Findings
Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co., No. CV-20-932117 (Ohio Ct. Comm. Pl. Nov. 17, 2020)	Ohio	• Salons and Furniture stores' claims for business interruption, extra expense and civil authority coverage withstand motion to dismiss. • Court accepts as true for purposes of motion to dismiss policyholders' allegations that virus was physically present at insured property and caused damage to that property.
Hill & Stout PLLC v. Mut. of Enumclaw Ins. Co., No. 20-2-07925-1 (Wash. Super. Ct. Nov. 13, 2020)	Washington	• Dental office's coverage suit withstands motion to dismiss. • Court deems "physical loss of" ambiguous.
Brian Handel D.M.D., P.C. v. Allstate Ins. Co., 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020)	Pennsylvania	• Dental office's claims for business interruption and civil authority coverage dismissed based on failure to plead "direct physical loss of or damage to" property. • Court rejects policyholder's "loss of use" argument, noting that it would need to allege that the functionality of the property "was nearly eliminated or destroyed" or "was made useless or uninhabitable." Reduced operations or income do not meet this standard. • Civil authority coverage claim fails for additional reason that government orders limited (rather than prohibited) access to insured property. • Court rules that, in any event, coverage is barred by virus exclusion. • Court rejects policyholder's regulatory estoppel argument.
Graspa Consulting, Inc. v. United Nat'l Ins. Co., No. 20-23245 (S.D. Fla. Nov. 17, 2020)	Florida	• Restaurant entity's coverage suit dismissed based on failure to plead "direct physical loss of or damage to" property. • Under Florida law, "direct physical" modified both "loss" and "damage," which means that the "damage must be actual." Court states that "it is not plausible how the allegations in this case meet that threshold when Plaintiff's business merely suffered economic losses as opposed to anything tangible, actual, or physical."

Missouri Court Dismisses Complaint Alleging Overcharge Of Premiums During Covid

A Missouri federal district court dismissed a policyholder's suit against State Farm, alleging that the insurer overcharged premiums due to changes in business activity during the Covid pandemic. *Alissa's Flowers, Inc. v. State Farm Fire & Cas. Co.*, 2020 WL 6555048 (W.D. Mo. Oct. 22, 2020).

The policyholder's suit, which includes claims for breach of contract, breach of good faith and fair dealing, unjust enrichment and declaratory and injunctive relief, alleges that State Farm had an obligation to adjust insurance premiums in response to reduced business operations during the Covid pandemic. The complaint asserts that three provisions in the policy obligate State Farm to reduce premiums based on mandatory Covid-related business closures: (1) a provision that reserves State Farm's right to raise premiums; (2) a provision requiring State Farm to perform an audit during the policy period and return unearned premiums; and (3) a provision requiring State Farm to return any premium credit owed to policyholders.

State Farm argued that the complaint challenges its insurance rates and rating system, and must therefore be brought before the Missouri Department of Insurance ("MDI") in order to exhaust administrative remedies before filing in a court of law. The court agreed. First, the court rejected the policyholder's assertion that its claims challenge State Farm's premiums, not its rates, reasoning that allegations of premium overpayment are "in essence" a "challenge to State Farm's rates, rating plan, rating system and underwriting rules." Second, the court concluded that the policyholder was obligated to exhaust administrative remedies prior to suing in court. Missouri statutory law provides the MDI with the authority to review insurance rates of insurers doing business within the state and allows claimants to file a written complaint and request a hearing to challenge an insurer's rates. *See* Mo. Rev. *Stat.* §§ 379.321, 379.348. The court ruled that these administrative remedies must be exhausted prior to judicial action.

In so ruling, the court rejected the policyholder's contention that administrative remedies were "permissive" rather than mandatory. The court acknowledged that the statutory language indicates that "an insured *may* choose whether to avail itself of the complaint procedures set forth" therein. However, the court concluded that administrative exhaustion was required. The court therefore dismissed the complaint for lack of subject matter jurisdiction.

The policyholder has appealed this decision and similar suits alleging premium overcharge during the pandemic have been filed in other jurisdictions. We will keep you appraised of developments in this emerging area.

Pollution Exclusion Alerts:

Nebraska Supreme Court Rules That Pollution Exclusion In Property Policy Bars Coverage For Methamphetamine Vapor In Rental House

The Supreme Court of Nebraska ruled that a pollution and contamination exclusion applied to claims alleging property damage stemming from methamphetamine production or use within a rental property. *Kaiser v. Allstate Indem. Co.*, 307 Neb. 562 (Oct. 23, 2020). The court rejected the policyholder's assertion that the exclusion was ambiguous because terms such as "irritants" or "contaminants" were not defined. The court also dismissed the contention that a "sudden and accidental" exception applied to restore coverage, explaining that even if accidental, the damage occurred over a significant period of time, rather than abruptly. The court reasoned that the policyholder's argument that the methamphetamine vapors "quickly bonded to most surfaces throughout the rental house" was irrelevant because the

determinative issue is the "whole loss" resulting from the methamphetamine use, "not its component parts."

Pollution Exclusion Does Not Bar Coverage For Injuries Caused By Release Of Toxins From Fire Equipment, Says North Carolina Court

A North Carolina federal district court ruled that a pollution exclusion does not bar coverage for injuries stemming from the release of toxic foam from firefighting equipment. *Colony Ins. Co. v. Buckeye Fire Equip. Co.*, 2020 WL 6152381 (W.D.N.C. Oct. 20, 2020).

Hundreds of underlying cases against the policyholder alleged that its firefighting equipment products contained toxic substances, resulting in bodily injuries to firefighters and others. The suits alleged direct exposure to claimants as well as indirect exposure through the environment (*e.g.*, well water sources). Colony argued it had no duty to defend the suits based on a pollution exclusion that applies to injuries "which would not have happened in whole or in part but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of 'hazardous materials' at any time." The policyholder conceded that the exclusion bars coverage for the environmental exposure claims, but argued that Colony was obligated to defend the direct exposure claims.

The court granted the policyholder's summary judgment motion, ruling that under North Carolina precedent, the words "discharge, dispersal, seepage, migration, release, or escape" are "environmental terms of art" and that "policy exclusions using this language require traditional environmental pollution to deny coverage to an insured."

Kentucky Court Rules That Pollution Exclusion Bars Coverage For Criminal Claims Against Company And Executives Alleging Submission Of Fraudulent Dust Samples

A Kentucky federal district court ruled that a pollution exclusion barred coverage for a criminal investigation and charges against a company and its executives relating to an allegedly fraudulent submission of dust samples to a federal agency. *Barber v. Arch Ins. Co.*, 2020 WL 6087951 (W.D. Ky. Oct. 15, 2020).

Armstrong, a coal company, was obligated to submit dust samples to the Mine Safety and Health Administration. A federal criminal investigation and subsequent criminal actions alleged that Armstrong and its employees had submitted fraudulent dust samples. Arch denied coverage, arguing that a pollution exclusion applied, among other things. The court agreed and granted the insurer's summary judgment motion.

Armstrong argued that the mere presence of coal dust in the mine does not trigger the exclusion unless there is "actual or threatened discharge" of coal dust. Further, Armstrong claimed that the exclusion was inapplicable because the criminal charges were limited to fraudulent reporting of dust monitoring and samples and did not speak to the actual release of dust into the environment. The court rejected these assertions, stating that the exclusion not only excludes losses from the threatened or actual release of pollutants, but also for any claim "arising from, based upon, or attributable to any" direction or request "to test for" or "monitor" pollutants. In addition, the court rejected Armstrong's contention that coal dust is not a pollutant where, as here, it is confined inside the mine rather than dispersed into the environment.

Professional Services Alert:

"Professional Services" Coverage Extends To Printing Receipts At Self-Service Kiosks, Says California Court

A California federal district court ruled that professional services coverage extends to claims alleging that FedEx's self-service kiosks inadvertently printed receipts with customer credit card information. *FedEx Office & Print Serv., Inc. v. Continental Cas. Co.*, No. CV 20-4799 (C.D. Cal. Oct. 20, 2020).

FedEx uses self-service kiosks that offer various services, such as printing, scanning and copying. The kiosks are connected to a payment card scanner, which requires customers to scan their credit cards prior to use. In April 2017, a software update of the scanning devices inadvertently "unmasked" extra credit card digits, which were then printed on kiosk receipts in violation of federal statutory law. Thereafter, consumer class actions against FedEx alleged violations of the Fair and Accurate Transactions Act ("FACTA").

FedEx argued that the FACTA violations were "Wrongful Acts" resulting from "Professional Services" under its liability policy. Continental did not dispute the assertion of a "Wrongful Act," but argued that the FACTA actions are not covered because printing a receipt is not a "Professional Service." Continental cited cases that distinguish between the act of providing a substantive professional service unique to a particular business, and the "separate, administrative act of billing, which is common to all businesses." The court deemed those cases inapposite for two reasons. First, the Professional Service definition at issue listed a series of services, followed by the phrase "and services related thereto." The court held that this "modifying language" "substantially broadens the provision's scope" so as to encompass the printing of a receipt for services rendered. Second, the court emphasized the nature of the professional services provided by the FedEx kiosks, stating:

> the line between a billing matter and a rendered service becomes blurrier when the services at issue are not "the physical or intellectual acts of service one commonly associates with doctors or lawyers," but services are provided by a self-use, multi-function machine that operates only after swiping a credit card. . . . FedEx's process of printing a receipt is not merely an administrative task inherent to all businesses. Rather it is one part of an integrated process unique to FedEx's business model in the performance of providing professional services through a self-service, multi-function kiosk.

STB News Alert

The *New York Law Journal* selected Simpson Thacher as its 2020 Litigation Department of the Year in the Insurance category. In connection with this honor, Mary Beth Forshaw was featured in a Q&A profile in which she discussed the Department's numerous successes in significant insurance and reinsurance matters throughout the past year and highlighted the Firm's recent work on emerging and cutting-edge issues, including coverage litigation relating to the opioid epidemic and the Covid pandemic, among others. Click here to read the full article.

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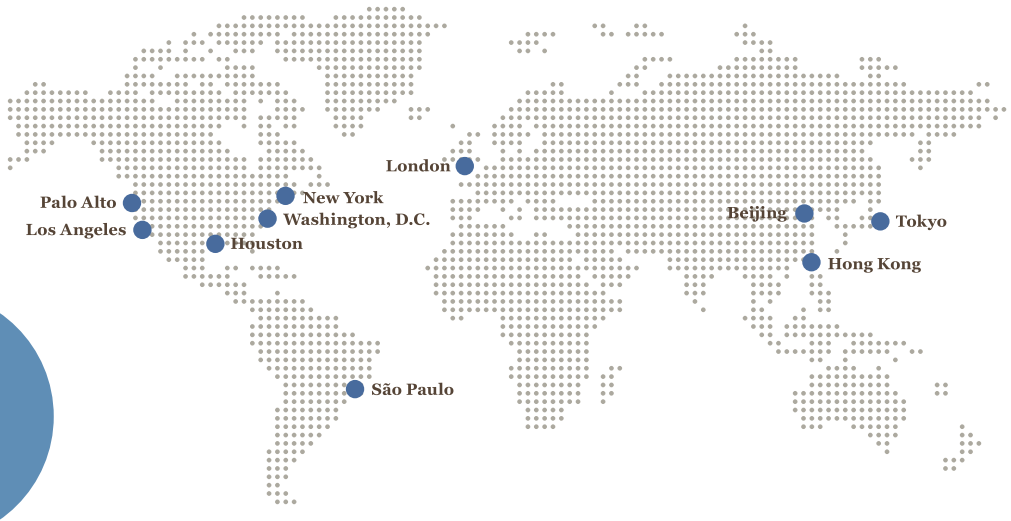

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