Simpson Thacher

Insurance Law Alert

October 2023

In This Issue

New York District Court Denies Motion To Compel Arbitration, Finding That Louisiana Law Reverse Preempts FAA And Convention

A New York district court denied an insurer's motion to compel arbitration and enjoin a state court action, ruling that Louisiana law reverse preempts the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards under the McCarran-Ferguson Act. *Certain Underwriters at Lloyd's, London v. Mpire Props., LLC*, 2023 U.S. Dist. LEXIS 175864 (S.D.N.Y. Sept. 28, 2023). (Click here for full article)

NYLJ Profiles Simpson Thacher as 2023 "Insurance Litigation Department of the Year"

– *Click here to learn more*

Deeming "Other Insurance" Clauses Irreconcilable, Eleventh Circuit Rules That Insurers Must Indemnify On Pro Rata Basis

Affirming a Georgia district court, the Eleventh Circuit ruled that "other insurance" clauses in two policies were irreconcilable and therefore that insurers' defense and indemnity should be allocated on a pro rata basis. *Nat'l Cas. Co. v. Georgia Sch. Bd. Assoc.*, 2023 U.S. App. LEXIS 24426 (11th Cir. Sept. 14, 2023). (Click here for full article)

Ohio Appellate Court Reverses Trial Court's Order Requiring Insurer To Produce Claim File Material In Bad Faith Action

An Ohio appellate court ruled that a trial court erred in granting a motion to compel the disclosure of an insurer's claim files, including material relating to the insurer's valuation of the claim. The appellate court noted that while such materials may be relevant to the bad faith claim against the insurer, the trial court's order requiring production prior to adjudication of the breach of contract claim was erroneous. *Ryan v. State Farm Mut. Auto. Ins. Co.*, 2023 Ohio App. LEXIS 3612 (Ohio. Ct. App. Oct. 13, 2023). (Click here for full article)

Reversing Trial Court, Kentucky Appellate Court Rules That Umbrella Policy Is Unambiguous And Does Not Mirror Underlying Primary Policy

A Kentucky appellate court ruled that a commercial umbrella policy was unambiguous and did not provide coverage for the underlying claims at issue, notwithstanding that the underlying primary policy did provide coverage. *Grange Ins. Co. v. Georgetown Chicken Coop, LLC*, 2023 Ky. App. Unpub. LEXIS 619 (Ky. Ct. App. Oct. 20, 2023). (Click here for full article)

Simpson Thacher News

Click here to learn more about the Firm's insurance-related honors and engagements.

New York District Court Denies Motion To Compel Arbitration, Finding That Louisiana Law Reverse Preempts FAA And Convention

HOLDING

A New York district court denied an insurer's motion to compel arbitration and enjoin a state court action, ruling that Louisiana law reverse preempts the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") under the McCarran-Ferguson Act. *Certain Underwriters at Lloyd's, London v. Mpire Props., LLC*, 2023 U.S. Dist. LEXIS 175864 (S.D.N.Y. Sept. 28, 2023).

BACKGROUND

Property owners filed claims with their insurers seeking reimbursement for storm-related damage. After the insurers paid $1.27 million, Mpire, which purchased the properties and the owners' rights, sued the domestic insurers in Louisiana state court seeking additional funds. Relying on an arbitration clause in the policies, the insurers moved to compel arbitration and enjoin the state court action pursuant to the FAA and the Convention.

DECISION

The court ruled that the Louisiana Insurance Code reverse preempts the FAA and the Convention pursuant to the McCarran-Ferguson Act. The McCarran-Ferguson Act establishes an exception to the general rule requiring federal preemption over state law where such state law regulates the business of insurance and the federal law does not specifically relate to insurance. The court held that the controlling state statue, La. Stat. Ann. Section 22:868, rendered the arbitration clauses unenforceable. Section 22:868 provides, among other things, that "[n]o insurance contract delivered or issued for delivery in this state . . . shall contain any condition, stipulation or agreement . . . (2) [d]epriving the courts of this state of the jurisdiction or venue of action against the insurer."

The insurers argued Section 22:868 does not prohibit arbitration because sub-part (D) of that provision states that "this Section does not prohibit a forum or venue selection clause in a policy form that is not subject to approval by the Department of Insurance." Rejecting this assertion, the court explained that arbitration clauses are jurisdictional, and not akin to forum or venue selection provisions.

As the court noted, another New York district court recently addressed this issue and reached the same conclusion. *See Certain Underwriters at Lloyd's, London v. 3131 Veterans Blvd. LLC*, 2023 U.S. Dist. LEXIS 144956 (S.D.N.Y. Aug. 15, 2023).

COMMENTS

The court acknowledged that under Fifth Circuit precedent, state law does not reverse preempt the Convention under the McCarran-Ferguson Act. However, as the court emphasized, the Second Circuit has reached a contrary conclusion, ruling that the Convention is not "self-executing" (*i.e.*, it requires an act of Congress, the FAA, for implementation) and therefore is subject to the same reverse-preemption as the FAA where, as here, state law specifically relates to the business of insurance. As discussed in previous Alerts, federal circuit courts are split on this particular issue.

Deeming "Other Insurance" Clauses Irreconcilable, Eleventh Circuit Rules That Insurers Must Indemnify On Pro Rata Basis

HOLDING

Affirming a Georgia district court, the Eleventh Circuit ruled that "other insurance" clauses in two policies were irreconcilable and therefore that insurers' defense and indemnity should be allocated on a pro rata basis. *Nat'l Cas. Co. v. Georgia Sch. Bd. Assoc.*, 2023 U.S. App. LEXIS 24426 (11th Cir. Sept. 14, 2023).

BACKGROUND

Several educators who were insured by both National Casualty and the Georgia School Board Association – Risk Management Fund (the "Fund") were named as defendants in a lawsuit. The insurers disputed their respective coverage obligations based on "other insurance" clauses in the policies. The provision in National Casualty's policy stated:

> This policy is specifically excess if the insured has other insurance of any kind whatsoever, whether primary or excess . . . . Other insurance includes, but is not limited to, insurance policies, state pools, and programs of self-insurance . . . In addition, [Liability Coverage] is specifically excess over coverage provided by EDUCATIONAL UNIT'S or school board's errors and omissions or general liability policies . . . and it is specifically excess over coverage provided by any policy of insurance which purports to be excess to a policy issued to the insured.

The Fund's "other insurance" clause stated: "If valid and collectible insurance is available to the Member for a loss covered by [the Fund] under any coverage parts within this Coverage Document, the obligations of [the Fund] are excess over the available and collectible insurance."

National Casualty sought a declaration that the Fund owed a primary duty to defend and indemnify the educator defendants. The Fund counterclaimed, seeking contribution from National Casualty for amounts paid to defend and indemnify the educators.

Ruling on the parties' cross motions for summary judgment and partial summary judgment, the district court concluded that the "other insurance" clauses conflicted and that defense and indemnity should be allocated on a pro rata basis. Thereafter, the district court certified to the Georgia Supreme Court the question of whether Georgia's irreconcilable clauses rule applied to the Fund, an entity created by statute and "entrusted with public funds," or was limited to commercial insurance companies. The Georgia Supreme Court ruled that "no law or public policy" prohibited application of the rule to the Fund.

DECISION

National Casualty argued that the Fund's "other insurance" clause was not implicated in the first place because National Casualty's policies were neither "available nor collectible." More specifically, National Casualty claimed that because its own "other insurance" clause rendered its coverage excess over all other coverages, it was not available or collectible as to the underlying claims. The Eleventh Circuit rejected this reasoning, stating that "National Casualty's policies are 'collectible' and 'available' because they'd pay if liability exceeded what the other insurance covered." National Casualty also contended that because its "other insurance" clause is more specific than that in the Fund's policy in that it expressly states that coverage is excess to any other coverage, its coverage should be "super excess." The court rejected this argument as well, noting that Georgia law does not endorse an rule of interpretation in this context based on levels of specificity in policy language.

COMMENTS

When a conflict exists between "other insurance" clauses in policies that concurrently insure the same risk, the rights and obligations depend primarily on the specific policy language at issue. As the Eleventh Circuit emphasized, where two "other insurance" clauses are both excess in nature, most courts do not endorse a rule under which a more specific clause governs a more general clause, and instead find them mutually repugnant. Additionally, while some jurisdictions require insurers to contribute in equal shares where two excess clauses are deemed irreconcilable, Georgia law endorses the majority rule in this context—pro rata allocation of defense and indemnity costs.

Ohio Appellate Court Reverses Trial Court's Order Requiring Insurer To Produce Claim File Material In Bad Faith Action

HOLDING

An Ohio appellate court ruled that a trial court erred in granting a motion to compel the disclosure of an insurer's claim files, including material relating to the insurer's valuation of the claim. The appellate court noted that while such materials may be relevant to the bad faith claim against the insurer, the trial court's order requiring production prior to adjudication of the breach of contract claim was erroneous. *Ryan v. State Farm Mut. Auto. Ins. Co.*, 2023 Ohio App. LEXIS 3612 (Ohio. Ct. App. Oct. 13, 2023).

BACKGROUND

After sustaining injuries in an automobile accident with an uninsured motorist, Ryan filed a claim for uninsured motorist ("UM") benefits to State Farm, his automobile insurer. State Farm offered Ryan approximately $15,000 to settle his UM claim, but he rejected the offer, asserting that it did not cover his medical expenses. Thereafter, Ryan sued State Farm alleging breach of contract based on "State Farm's failure to pay the $25,000 UM policy limit and bad faith in its [valuation of the claim]."

During discovery, Ryan sought production of State Farm's entire claim file. State Farm produced some materials, but held back others based on attorney-client privilege or protected work product. State Farm also argued that it was entitled to withhold certain non-privileged materials relating to the valuation of the claim while litigation of the coverage issue was pending on the basis that the production of such material would be prejudicial to State Farm in connection with the breach of contract claim. After conducting an *in camera* inspection, the trial court issued two rulings. First, it amended a prior decision and ordered bifurcation of the breach of contract and bad faith claims into two

separate stages. Second, it allowed State Farm to withhold materials protected by attorney-client privilege, but ordered State Farm to immediately produce any non-privileged materials and certain work-product material. The trial court acknowledged that requiring production of these materials might provide "insight into State Farm's defense of the value dispute in the breach of contract claim," but held that "any minimal prejudice that might occur to State Farm as a result of immediate disclosure is substantially outweighed by the interest of judicial economy served by not delaying discovery."

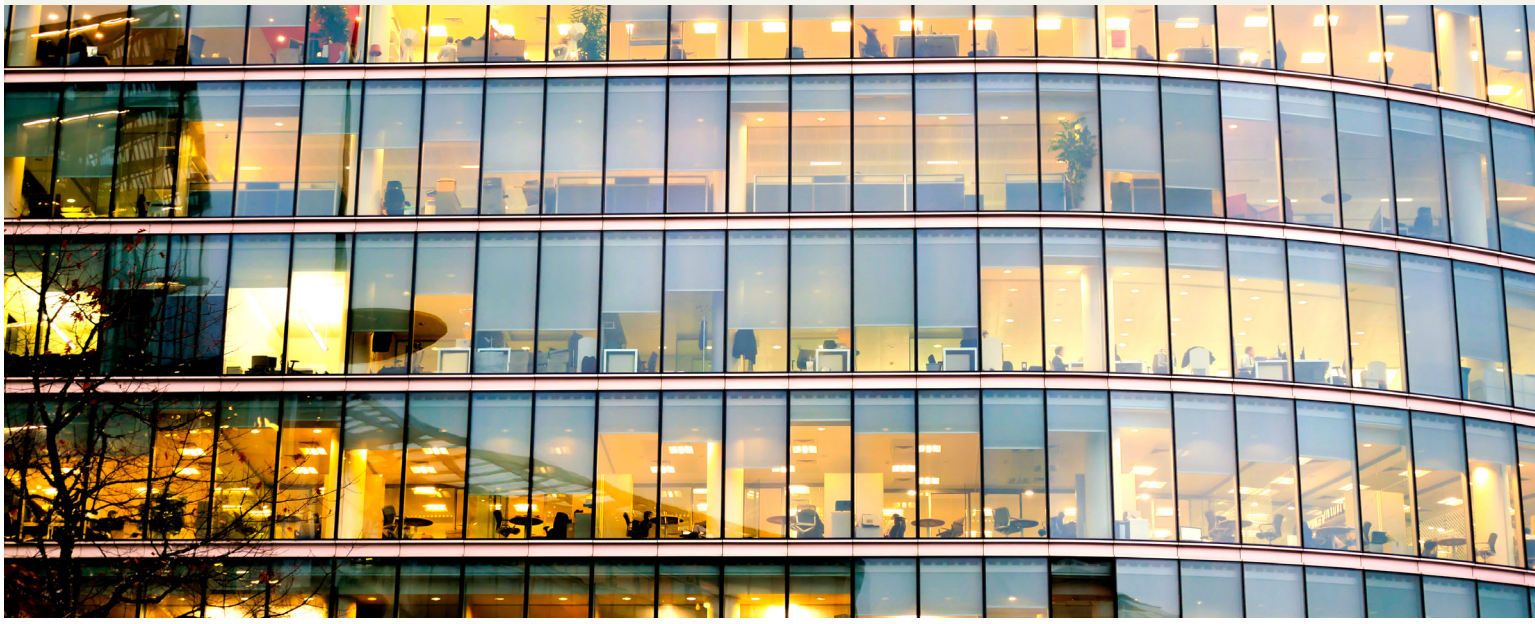
DECISION

The Ohio appellate court ruled that the trial court erred in ordering State Farm to produce work product material and confidential information, including its valuation of Ryan's claim, in advance of a trial in which the value of the claim was the primary issue to be litigated. The court agreed with State Farm's argument that "regardless of whether those documents constituted information protected as work product or by the attorney-client privilege, the materials should have been deemed protected from discovery so long as determination of the value of the underlying UM claim remained pending."

The court acknowledged the relevance of claim file material to the bad faith claim, and the potential right of a policyholder to discover such information in the context of a bad faith claim under Ohio law, but held that such discovery should be stayed pending the outcome of the coverage claim. As the court noted, requiring State Farm to divulge information pertaining to its evaluation and opinion of Ryan's claim prior to resolution of the breach of contract claim would "undoubtedly" affect State Farm's ability to defend the claim and render the bifurcation order "toothless."

COMMENTS

Parties frequently dispute the discoverability of claim file materials in coverage actions. *Ryan* illustrates that rulings in this context depend not only on whether material is privileged (a determination that turns on whether the material was created in anticipation of litigation as opposed to in the ordinary course of business), but also on the timing of such production. As the court noted, while much of the claim file materials were likely relevant and discoverable with respect to the bad faith claim, a discovery stay was warranted in order to avoid prejudice to the insurer while the breach of contract claim was still pending.



Reversing Trial Court, Kentucky Appellate Court Rules That Umbrella Policy Is Unambiguous And Does Not Mirror Underlying Primary Policy

HOLDING

A Kentucky appellate court ruled that a commercial umbrella policy was unambiguous and did not provide coverage for the underlying claims at issue, notwithstanding that the underlying primary policy did provide coverage. *Grange Ins. Co. v. Georgetown Chicken Coop, LLC*, 2023 Ky. App. Unpub. LEXIS 619 (Ky. Ct. App. Oct. 20, 2023).

BACKGROUND

The coverage dispute arose from a motor vehicle accident resulting in several fatalities. The decedents' estates sued Roosters, the bar that had served the driver alcohol prior to the accident. In turn, Roosters filed a third-party petition against Grange Insurance Company, which insured Roosters under a business owners' policy and a commercial umbrella policy. The parties did not dispute that the business owners' policy provided coverage pursuant to a liquor liability provision, but Grange sought a declaration of no coverage under the umbrella policy. The trial court granted Roosters' summary judgment motion, deeming the umbrella policy ambiguous and construing it in favor of coverage. The appellate court reversed.

DECISION

The appellate court ruled that the umbrella policy was unambiguous and did not provide coverage for the underlying claims. The body of the umbrella policy contained a liquor liability exclusion that included an exception "for liability arising from the business of the insured of serving alcohol." However, an endorsement to the umbrella policy, entitled "Liquor Liability Exclusion" modified that coverage part. The endorsement contained the same exclusionary language as that in the body of the policy, but also stated: "This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages." The endorsement also specified that it "replaced" the Liquor Liability Exclusion in the policy body.

The appellate court emphasized that use of the word "replace" indicated a clear intent to delete the entirety of the exclusion in the policy body, including the exception that would have operated to provide coverage. In so ruling, the court rejected Roosters' assertion that the endorsement was intended to supplement, rather than replace the exclusion in the policy body.

Having concluded that the endorsement language was operative and controlling, the court ruled that the umbrella policy was unambiguous in its exclusion of coverage for the underlying claims.

COMMENTS

The ruling reinforces the principle that umbrella coverage need not be construed to mirror primary coverage unless an intent to do so is reflected in policy language. Here, the umbrella policy stated that it followed primary coverage "unless otherwise directed by this insurance." As the court noted, the endorsement was precisely such an "otherwise direction." If parties intend umbrella coverage to be a "mirror image" of primary coverage, an express "broad as primary" provision can be used, the court noted.

Additionally, the ruling speaks to the limits of what can give rise to ambiguity. In deeming the umbrella policy ambiguous, the trial court relied, in part, on what it perceived to be the general intent and nature of umbrella coverage, stating that "when an insured purchases both an underlying and umbrella policy, the intent is for them to work in concert. There is no purpose for an umbrella policy if not to supplement the underlying policy if exhausted." Rejecting this reasoning, the appellate court emphasized that "general observation[s]" about umbrella policies do not give rise to ambiguity where the actual language of the policy is clear.

Simpson Thacher News

Simpson Thacher's Litigation Practice was profiled as the *New York Law Journal*'s 2023 "Insurance Litigation Department of the Year." The profile highlights the Firm's work at the forefront of significant insurance litigation across the country, ranging from environmental contamination litigation, to COVID-19-related disputes, to emerging challenges confronting the market. Andy Frankel, Head of the Firm's Insurance and Reinsurance Practice, spoke to *NYLJ* about what sets Simpson Thacher apart: "A hallmark of our litigation department is our ability to blend our collaborative nature and collective expertise to the benefit of clients."

Simpson Thacher was ranked in Tier 1 for its Insurance Practice by Euromoney's *Benchmark Litigation* 2024. Clients praised Simpson Thacher as being "strong advocates for their clients and worthy adversaries" in *Benchmark Litigation*'s guide. The Firm's "celebrated" Insurance Practice was described as keeping "apace with a series of engagements for a host of brand-name global carriers."

Lynn Neuner, Global Co-Chair of the Firm's Litigation Department, was selected for the sixth consecutive year by Euromoney's *Benchmark Litigation* as one of the "Top 100 Trial Lawyers." The list highlights elite trial attorneys in the United States who are selected based on client and peer review.

Laura Lin and Pierce MacConaghy authored a *Law360* article titled, "What Wis. High Court Ruling Means For Coverage Analysis," which discussed a recent Wisconsin Supreme Court majority decision overturning existing precedent on the economic loss doctrine and integrated systems analysis in a commercial general liability insurance dispute.

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.

Andrew T. Frankel
+1-212-455-3073
afrankel@stblaw.com

Bryce L. Friedman
+1-212-455-2235
bfriedman@stblaw.com

Michael J. Garvey
+1-212-455-7358
mgarvey@stblaw.com

Chet A. Kronenberg
+1-310-407-7557
ckronenberg@stblaw.com

Laura Lin
+1-650-251-5160
laura.lin@stblaw.com

Lynn K. Neuner
+1-212-455-2696
lneuner@stblaw.com

Joshua Polster
+1-212-455-2266
joshua.polster@stblaw.com

Tyler B. Robinson
+44-(0)20-7275-6118
trobinson@stblaw.com

George S. Wang
+1-212-455-2228
gwang@stblaw.com

Summer Craig
+1-212-455-3881
scraig@stblaw.com

Sarah E. Phillips
+1-212-455-2891
sarah.phillips@stblaw.com

Abigail W. Williams
+1-202-636-5569
abigail.williams@stblaw.com

This edition of the
Insurance Law Alert was prepared by
Bryce L. Friedman / +1-212-455-2235
bfriedman@stblaw.com
Joshua Polster / +1-212-455-2266
joshua.polster@stblaw.com and
Karen Cestari
kcestari@stblaw.com.

Simpson Thacher Worldwide

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

Brussels
Square de Meeus 1, Floor 7
B-1000 Brussels
Belgium
+32-472-99-42-26

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower A
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000