TROUTMAN SANDERS

D&O and Professional Liability

2015 | A Year In Review

2015 was another busy and interesting year for courts addressing directors and officers and professional liability insurance coverage issues. Thirty federal courts of appeals, nine state supreme courts, and dozens of other courts applying the law of 35 states, the District of Columbia, and Puerto Rico, issued noteworthy decisions this year involving numerous types of insurance policies. Among the more robust topics this year are notice, related claims, prior knowledge/known loss, and dishonest acts/personal profit exclusions. This year we also introduce a new "**Trending Topics**" segment which highlights notable cases in a developing area of insurance coverage law – this year, Cyber Liability. We hope that you find the following selection of case summaries helpful, as we focused on issues we believe will continue to be important in the directors and officers and professional liability arena in 2016 and beyond. (Please note: the cases are organized within each topic alphabetically by the state law applied).

In This Issue

Notice

Pa. Nat'l Mut. Cas. Ins. Co. v. J.F. Morgan Gen. Contractors, Inc., 79 F. Supp. 3d 1245 (N.D. Ala. 2015)

An insurer issued an occurrence-based commercial general liability policy to an insured which stated that notice of a claim should be given "as soon as practicable." Although the named insured delivered prompt notice of an occurrence to the insurer, the insurer argued that because the additional insured did not notify the insurer of the claim, the insurer could deny coverage. The court rejected this argument, holding that the policy only required the named insured to notify the insurer and thus the insured had complied with the policy's notice requirements.

Alaska Interstate Constr., LLC v. Crum & Forster Specialty Ins. Co., No. 3:14-CV-00126-RRB, 2015 U.S. Dist. LEXIS 156609 (D. Alaska Nov. 17, 2015)

The insured purchased coverage under an errors and omissions claims-made-and-reported policy. The initial policy had been extended to May 2013 and subsequently renewed to May 2015 in consecutive policies. The insured reported a claim made against it more than five months after learning of it in June 2013. The insured argued that it reported the claim

within the consecutive policy periods. In determining the meaning of "policy period," the court concluded that allowing the "policy period" to span beyond the initial policy and include every subsequent policy is not an equitable or reasonable interpretation, and thus the insured had failed to comply with the policy's notice provision.

Braden Partners, LP v. Twin City Fire Ins. Co., No. 14-CV-01689-JST (N.D. Cal. Apr. 3, 2015)

Coverage under a claims-made policy was not available for a *qui tam* complaint filed but not served on the insured. The court held that the complaint met the definition of "claim," but that such claim was not "first made" at any time because the policy provided that a claim would be deemed first made on the date that a summons or similar document was served on the insured.

Brenegan v. Fireman's Fund Ins. Co., No. B254760, 2015 Cal. App. Unpub. LEXIS 2022 (Mar. 23, 2015)

The insured had a commercial general liability policy that provided coverage for accidents that took place during the policy period and were reported to the insurer within one year of the date of the accident. The insurer claimed that the insured had not reported an accident until more than three years after the accident occurred. In determining whether the policy language created a claims-made or occurrence-based policy and if the notice-prejudice rule applied, the court held that the language constituted a claims-made requirement because it contained a reporting element that was essential to coverage. The court also declined to apply the notice-prejudice rule because it would materially alter the insurer's risk under the policy.

Centrix Fin., LLC v. Nat'l Union Fire Ins. Co. (In re Centrix Fin., LLC), No. 09-CV-01542-PAB-CBS, 2015 U.S. Dist. LEXIS 71122 (D. Colo. June 2, 2015)

An insurer's financial institution bond stated that the insured should provide notice of a loss at the earliest practicable moment, not to exceed 60 days after discovery of a loss. Where the insured failed to do so, the court first determined that the language in the bond was akin to that in claims-made insurance policies due to the existence of a date-certain notice requirement, creating a condition precedent to coverage. However, the court declined to apply Colorado's notice-prejudice rule to fidelity bonds (because specific public policy concerns prompting Colorado's adoption of the rule in certain contexts were not present) and granted the insurer's motion to exclude any evidence or argument that it did not suffer prejudice as a result of the late notice.

Tucker v. Am. Int'l Grp., Inc., No. 3:09-CV-1499 (CSH), 2015 U.S. Dist. LEXIS 9874 (D. Conn. Jan. 28, 2015)

The court interpreted the language of the insured's employment practices liability policy to plainly and unambiguously create a "claims first made" policy due to that language expressly appearing therein. The insurer thus had only agreed to cover liability under the policy if a claim was first made against the insured during the policy period. The court further held that a letter to a subdivision of the insured constituted a claim that was "first made" on the date of its delivery, which fell within the policy's coverage period.

Granite State Ins. Co. v. Clearwater Ins. Co., 599 F. App'x 16 (2d Cir. 2015)

Analyzing whether Illinois law requires a reinsurer to prove prejudice when it refuses to pay a claim for reinsurance coverage based on having received late notice of a claim, the Second Circuit held that the consensus drawn from federal and state court decisions interpreting Illinois reinsurance law allowed it to conclude that there was no such prejudice requirement.

Ill. State Bar Ass'n Mut. Ins. Co. v. Beeler Law, P.C., 2015 IL App (1st) 140790-U

The court held that coverage under a claims-made professional liability policy was precluded where the insured failed to comply with the policy's notice provision requiring it to provide a detailed notice and claim summary to the insurer. Rejecting the insured's argument that a cursory email of a potential claim satisfied the policy's condition precedent to coverage, the court stressed that the policy's more specific notice provisions controlled over any general and less stringent notice provisions, and that a formal claim was not reported until after the policy expired.

Ashland Hosp. Corp. v. RLI Ins. Co., No. 13-143-DLB-EBA, 2015 U.S. Dist. LEXIS 33775 (E.D. Ky. Mar. 17, 2015)

An insured purchased a directors and officers liability policy and an excess liability policy, both of which were claims-made policies. The primary policy required the insured to provide notice of any claim within 90 days after the expiration of the policy period. The court held that the excess policy followed form to the primary policy as to the notice requirement, and thus the excess insurer was not required to provide coverage for a claim that was reported nearly nine months after the expiration of the excess policy period. The court further predicted that the Kentucky Supreme Court would conclude that an insurer need not show prejudice under a claims-made-and-reported policy because doing so would effectively eliminate the benefit of the reporting requirement.

C.A. Jones Mgmt. Grp., LLC v. Scottsdale Indem. Co., No. 5:13-CV-00173-TBR, 2015 U.S. Dist. LEXIS 37575 (W.D. Ky. Mar. 25, 2015)

Canvassing unsettled Kentucky law on the issue of whether the notice-prejudice rule applies in the context of a claims-made policy, the district court sided with those opinions concluding that such a rule had no application given the unambiguous meaning of a claims-made policy. Accordingly, the court concluded that the Kentucky Supreme Court would exclude coverage for a claim not made and reported during the policy period notwithstanding the notice-prejudice rule.

Anco Insulations, Inc. v. Nat'l Union Fire Ins. Co., 787 F.3d 276 (5th Cir. 2015)

Under Louisiana law, an insurer was not required to show prejudice where timely notice was an express condition precedent to coverage. The Fifth Circuit held that the policy's requirement of immediate notice and its no-action clause requiring full compliance as a condition precedent to action against the insurer were sufficient to make the notice provision a condition precedent to coverage.

XL Specialty Ins. Co. v. Bollinger Shipyards, Inc., No. 12-2071, 2015 U.S. Dist. LEXIS 23633, (E.D. La. Feb. 26, 2015)

An insured's failure to provide timely notice of a claim precluded coverage under its claims-made directors and officers policies because Louisiana law dictates that reporting requirements are "strictly construed." The court rejected the insured's argument that, because the policy had been extended "year after year" by repeated renewals, the policies had "merged into one." Each policy was separate, and a renewal did not extend the policy period of the prior policy.

Cupps v. Torus Specialty Ins. Co., No. 14-615 Section "H," 2015 U.S. Dist. LEXIS 77750 (E.D. La. June 15, 2015)

Highlighting that under Louisiana law the rights of an injured party under a claims-made-and-reported policy did not vest at the time of the injury but at the time the claim was made, the court found that there was no coverage for legal malpractice under the insured's policy because a claim was not made against the insured until after the expiration of the policy and its extended reporting period.

McDowell Bldg., LLC v. Zurich Am. Ins. Co., No. RDB-12-2876, 2015 U.S. Dist. LEXIS 60350 (D. Md. May 7, 2015)

The insured was covered under a claims-made-and-reported architects and engineers professional liability policy, which required prompt notice of a claim no later than 60 days after the termination of the policy. The insured failed completely to notify the insurer of a suit filed against him. Applying the actual prejudice rule under Maryland law, the court found that because the insurer had lost tactical defense options due to the insured's failure to notify, this interference was sufficient to satisfy the actual prejudice standard and judgment was entered in favor of the insurer.

Michaels v. First USA Title, LLC, No. A14-0931, 2015 Minn. App. Unpub. LEXIS 323 (Apr. 6, 2015)

Despite a claims-made policy's special reporting provision, which converted the policy into an occurrence-based policy for claims arising out of previously reported wrongful acts, an insured's reporting of wrongful acts to the insurer nonetheless did not trigger coverage for a subsequent lawsuit because the insured failed to provide notice of the resulting claim "as soon as practicable." Specifically, the court found that the special

reporting provision "merely expanded the policy's limits by providing retroactive coverage for prior wrongful acts and the consequential, properly reported claims."

Phila. Consol. Holding Corp. v. LSi-Lowery Sys., 775 F.3d 1072 (8th Cir. 2015)

Under Missouri law, coverage was not available under either of two successive claims-made-and-reported policies for a lawsuit filed and reported during the policy period of the later policy. The court held that coverage was not available under the later policy because pre-suit communications included a demand for money such that the claim was first made during the policy period of the earlier policy. Coverage was not available under the earlier policy because the insured did not timely report the demand. No showing of prejudice was required.

Schleusner v. Cont'l Cas. Co., 102 F. Supp. 3d 1148 (D. Mont. 2015)

The court found that an insurer had no duty to defend or indemnify its insured under a claims-made-and-reported professional errors and omissions policy primarily because the claim did not occur until the insured received notice of the lawsuit as opposed to the date that the lawsuit was filed. Secondarily, the court held that the claim was untimely and did not trigger coverage because the claim was deemed made in the policy's extended reporting period, as opposed to the policy period itself.

Atl. Cas. Ins. Co. v. Greytak, 350 P.3d 63 (Mont. 2015)

Answering a certified question, the Montana Supreme Court held that an insurer who does not receive timely notice must demonstrate prejudice to avoid defense and indemnification duties. The policy at issue was a commercial general liability policy that required notice of an occurrence to be provided "as soon as practicable."

Kmart Corp. v. Footstar, Inc., 777 F.3d 923 (7th Cir. 2015)

Applying New Jersey and Illinois law, the Seventh Circuit held that the insured's failure to alert its insurers of a lawsuit until one-and-a-half years after the suit was filed did not preclude its ability to obtain coverage. Applying New Jersey law, the court found that an insurer must prove actual prejudice resulting from late notice by demonstrating that the case would have resulted in a different outcome had the insurer been involved earlier. Applying Illinois law, the court found that prejudice is a factor for consideration, and that, if the insurer had sufficient information to locate and defend a suit, this will militate against a waiver of coverage. The court found that the insurers could not demonstrate prejudice, that the insurers had actual knowledge within a few months of the suit being filed, and that a non-waiver clause in the policy was effective to prevent the insured from waiving its right to coverage.

Wausau Underwriters Ins. Co. v. Old Republic Gen. Ins. Co., No. 14-CV-3019 (JMF), 2015 U.S. Dist. LEXIS 103954 (S.D.N.Y. Aug. 7, 2015)

An insurer's argument that it was prejudiced by its inability to conduct pre-suit negotiations due to late notice of an occurrence under a general liability policy did not raise a triable issue of fact where the insurer offered no evidence as to why pre-suit negotiations would have been more effective than post-suit negotiations.

Nyack Manor Nursing Home v. Montpelier U.S. Ins. Co., Index No. 035154/2013 (N.Y. Sup. Ct. Mar. 16, 2015)

The court held that a policy's extended reporting period did not extend coverage to claims made after the expiration of the policy because there was another policy in effect that would apply to the claim. The second policy was claims-made, but by endorsement extended occurrence-based coverage for claims based on occurrences taking place during the period of the earlier policy.

Thames v. Evanston Ins. Co., No. 13-CV-425-PJC, 2015 U.S. Dist. LEXIS 155070 (N.D. Okla. Nov. 17, 2015)

An insurer properly denied coverage under a claims-made-and-reported professional liability policy where an insured failed to give notice of a lawsuit that arose out of the same facts as a related temporary restraining order ("TRO") action. The court held that, because the policy's claim-reporting provision required the insured to provide notice of "every" suit, the insured's providing notice of the TRO action was insufficient. The court further found that the insurer was prejudiced, as required by Oklahoma law, because the subsequent action proceeded to judgment before the insurer gained knowledge of it.

Berkley Reg'l Ins. Co. v. Phila. Indem. Ins. Co., 600 F. App'x 230 (5th Cir. 2015)

Applying Texas law, the Fifth Circuit found that the insured's attempt to satisfy the notice requirements of an occurrence-based umbrella policy by sending notice to the broker was insufficient. Although the policy permitted certain methods of indirect service, notice to the broker was not a permissible method. Further, the insurer was clearly prejudiced because it did not receive notice until after an adverse jury verdict was entered.

Corinth Investors Holdings, LLC v. Evanston Ins. Co., No. 4:13-CV-682, 2015 U.S. Dist. LEXIS 36273 (E.D. Tex. Mar. 24, 2015)

Two insurers provided claims-made professional liability policies to the same insured in successive years. The earlier insurer argued it did not have a duty to defend the underlying litigation because the pleadings did not specifically allege that the insured received notice of the claim during the coverage period, whereas the subsequent insurer argued that the pleadings established the potential for a claim made during the earlier insurer's policy period, and thus the earlier insurer had a duty to defend. The court agreed with the subsequent insurer, finding that the allegations in the complaint established the potential that the insured received notice of the claim during the earlier insurer's policy period.

Ill. Union Ins. Co. v. Sabre Holdings Corp., No. 02-14-00130-CV, 2015 Tex. App. LEXIS 6567 (June 25, 2015)

The court held that an excess insurer could not rely on the reporting requirements of an underlying primary policy to deny coverage due to late notice because a "non-follow form" endorsement to the excess policy could be reasonably interpreted to mean that the excess policy followed form to the definitions, exclusions, and limitations of the primary policy but not to its terms and conditions, and the reporting requirements in the primary policy were conditions.

Nicholas Petroleum, Inc. v. Mid-Continent Cas. Co., No. 05-13-01106-CV, 2015 Tex. App. LEXIS 7489 (July 21, 2015)

The insurer issued two claims-made pollution liability and environmental damage policies, which required notice of a claim as soon as practicable, but no later than 30 days after the receipt of a claim by the insured. The insured did not notify the insurer of an environmental claim against it until approximately two months after it was aware of the claim, and the insurer denied coverage. The court held that the notice requirement was a condition precedent to coverage and that the insured's failure to comply was a material breach. The court also refused to read a prejudice requirement into the policy, finding that the insurer was justified in denying coverage based on the breach alone.

E. Dillon & Co. v. Travelers Cas. & Sur. Co., No. 1:14CV00070, 2015 U.S. Dist. LEXIS 76295 (W.D. Va. June 12, 2015)

The court held that coverage was not available under an employment practices liability policy where the insured waited nearly two years to provide notice of an EEOC employment discrimination charge. Although the court noted that the insurer was prejudiced, it held that the lengthy delay was unreasonable as a matter of law and alone a sufficient reason to deny coverage.

Erie Ins. Prop. & Cas. Co. v. GC Perry Constr. Grp., Inc., No. 5:14-CV-15256, 2015 U.S. Dist. LEXIS 87579 (S.D. W.Va. July 7, 2015)

The court held that the question of whether a four-and-one-half-year delay in providing notice of a lawsuit under an occurrence-based commercial general liability policy constituted late notice was an issue of fact where the insured put forward several explanations for the delay, including its bankruptcy and dissolution. The court separately held that a statement of financial affairs related to the bankruptcy that previously was sent to the insurer did not constitute notice of the claim.

Travelers Indem. Co. v. U.S. Silica Co., No. 14-0343, 2015 W. Va. LEXIS 1105 (Nov. 10, 2015)

Under West Virginia law, a two-step inquiry determines whether late notice precludes coverage. The court first considers whether the delay was reasonable. If it was not reasonable, coverage is foreclosed. If the delay was reasonable, the burden shifts to the insurer to show prejudice from late notice.

Anderson v. Aul, 862 N.W. 2d 304 (Wis. 2015)

The Wisconsin Supreme Court held that Wisconsin's notice-prejudice statutes did not supersede a reporting requirement for claims-made-and-reported policies, and the insurer could therefore deny coverage without showing that it suffered prejudice when the insured failed to report a claim during the policy period. The court further determined that requiring the insurer to provide coverage after the end of the policy period would be *per se* prejudicial because it would expand the amount of coverage provided by the professional liability policy at issue.

Related Claims

Am. Cas. Co. of Reading v. Allen, No. 2:12-CV-2414, 2015 U.S. Dist. LEXIS 130979 (N.D. Ala. Sept. 29, 2015)

The court dismissed without prejudice an insurer's declaratory judgment action regarding a professional liability policy's related claims language, finding that the issue of whether underlying lawsuits against the insured were related had to await the determination of the cause of each underlying claimant's injury and, if so, whether the insured was liable. The insurer would be entitled to re-file its declaratory judgment action after the insured's liability was established in each underlying action.

Worthington Fed. Bank v. Everest Nat'l Ins. Co., No. 5:14-CV-0244, 2015 U.S. Dist. LEXIS 85888 (N.D. Ala. June 4, 2015)

The court held that an insurer had no obligations under a directors and officers liability policy because the underlying lawsuit against the insured contained allegations of wrongful acts that were interrelated to an earlier lawsuit filed against the insured – both lawsuits were shareholder derivative suits that the court determined shared a "common nexus of facts." Therefore, pursuant to the policy's related claims provision, the court determined that the underlying lawsuit was deemed first made prior to the applicable policy period.

Millennium Labs., Inc. v. Allied World Ins. Co., No. 12-CV2280, 2015 U.S. Dist. LEXIS 133534 (S.D. Cal. Sept. 30, 2015)

In granting an insured's motion for summary judgment, the court rejected an insurer's argument that earlier competitor/*qui tam* lawsuits and the subject underlying investigation by the U.S. Department of Justice ("DOJ") were related claims under a directors and officers liability policy, and thus constituted a single claim that fell outside the applicable policy period. The court found that there was no evidence that the DOJ investigation arose out of, resulted from or was the consequence of the same or related facts, circumstances, situations, transactions or events as the earlier lawsuits. The court noted that there may have been similar allegations between the earlier actions and the DOJ investigation, but that did not mean the investigation arose out of the earlier allegations.

Rancho Tehama Ass'n v. Fed. Ins. Co., No. 2:15-CV-00291, 2015 U.S. Dist. LEXIS 69999 (E.D. Cal. May 28, 2015)

In denying an insurer's motion to dismiss, the court found that that the issue of whether a demand letter and a subsequent underlying lawsuit constituted related claims under a directors and officers liability policy involved a factual inquiry that was premature for the court to decide on a motion to dismiss. The court reasoned that it would have to determine the scope of each claim in order to decide whether they were related, and the allegations and documents attached to the complaint did not provide the court with sufficient information to make such a determination.

Wesco Ins. Co. v. Regas, No. 14-C-716, 2015 U.S. Dist. LEXIS 13054 (N.D. Ill. Feb. 3, 2015)

An insured sought coverage for a lawsuit filed during the relevant policy period. The court determined that the insurer had no duty to defend because the lawsuit sufficiently related to another lawsuit against the insured that pre-dated the policy period, even though the two lawsuits contained some differences and pursued distinct legal remedies.

Synergy Law Grp., LLC v. Ironshore Specialty Ins. Co., 2015 Ill. App. (1st) 142070-U

The appellate court affirmed the trial court's determination that two lawsuits against an insured arising from a drafting error in a shareholder agreement constituted a single claim. The first lawsuit alleged that the insured was liable for legal malpractice, and the second lawsuit filed three months later alleged that the insured fraudulently transferred assets to avoid paying a judgment to the corporation's departing shareholder. The court held that both lawsuits constituted a single claim because they arose from the same initial drafting error.

W.C.& A.N Miller Dev. Co. v. Cont'l Cas. Co., No. 14-2327, 2015 U.S. App. LEXIS 22831 (4th Cir. Dec. 30, 2015)

Applying Maryland law, the Fourth Circuit affirmed the trial court's holding that a proceeding brought by a bankruptcy trustee and the subsequent lawsuit by the trustee to recover on the judgment determined in the first proceeding constituted interrelated wrongful acts because they involved common facts, a common transaction, and certain common circumstances.

Biochemics, Inc. v. Axis Reinsurance Co., 83 F. Supp. 3d 405 (D. Mass. 2015)

The court held that an SEC investigation did not arise during a directors and officers insurance policy's coverage period because the subpoenas issued to the insured related to the investigation and enforcement action, which was first made prior to the policy period. The court reasoned that the subpoenas were issued under the same formal order and investigated the same officers and company for the same pattern of security violations.

Templeton v. Catlin Specialty Ins. Co., 612 F. App'x 940 (10th Cir. 2015)

Applying New York law, the Tenth Circuit held that a retroactive date exclusion in an errors and omissions policy barred coverage for the insured broker's claim as to a particular transaction because it involved an interrelated wrongful act with another transaction, which took place before the retroactive date of the policy. The court noted that the policy defined "interrelated wrongful acts" broadly because it only required that the wrongful acts be "similar" or "connected by reason of any common fact, circumstance, situation, transaction, casualty, event, decision or policy." The court found that there were common facts that connected the two transactions and that the transactions involved the same conduct by the insured.

Nomura Holding Am., Inc. v. Fed. Ins. Co., No. 14-3789, 2015 U.S. App. LEXIS 18486 (2d Cir. Oct. 21, 2015)

Applying New York law, the Second Circuit affirmed a district court's holding that five underlying lawsuits filed during the policy periods of certain directors and officers liability policies were deemed to relate back to a securities class action first filed against the insured before the policies' inception under the policies' related claims provisions. The Second Circuit, however, found that, although not dispositive of the outcome of the case, the district court erred in employing a "factual nexus" test to determine whether the claims were the "same" or "substantially similar."

Darwin Nat'l Assur. Co. v. Westport Ins. Corp., No. 13-CV-02076, 2015 U.S. Dist. LEXIS 42550 (E.D.N.Y. Mar. 31, 2015)

The court held that an insurer had no duty to defend a policyholder after determining that a claim made in 2009 had a "sufficient factual nexus" to an action asserted in 1996 because the discrimination dispute in both instances involved the same property, the same types of complaints, and virtually the same parties.

Am. Cas. Co. of Reading v. Gelb, 132 A.D.3d 476 (N.Y. App. Div. 2015)

The court held that two proceedings filed two years apart constituted separate claims under directors and officers liability policies even though both lawsuits arose from the same merger. The court reasoned that the two lawsuits were categorically different and did not constitute one continuous claim because the lawsuit filed in 2007 by aggrieved shareholders alleged that the price per share of the company was set too low by the directors and officers, whereas the adversary proceeding filed in 2009 alleged that the price was too high, was unsupported by sustainable revenue projections, and required the company to undertake excessive leverage to consummate the sale.

Hale v. Travelers Cas. & Sur. Co. of Am., No. 3-14-1987, 2015 U.S. Dist. LEXIS 149687 (M.D. Tenn. Nov. 4, 2015)

The court held that pursuant to the terms of a professional liability policy, a lawsuit brought by the Attorney General of Tennessee (the "AG lawsuit") during the policy period and earlier claims brought against the insured by disgruntled customers before the policy incepted involved related wrongful acts and therefore were deemed a single claim falling outside the applicable policy period. Although the insured argued that the previously-filed customer complaints were meritless and comprised only a very small percentage of its custom-

ers, the court noted that these factors were irrelevant based on the policy's definition of "wrongful act." The court found that the claims shared a sufficient common nexus since the AG lawsuit was supported by at least 46 affidavits of the insured's customers with virtually identical allegations as those contained in the previously-filed customer complaints.

One James Place Condo Ass'n v. RSUI Grp., Inc., No. 15-294, 2015 U.S. Dist. LEXIS 161460 (D.N.J. Dec. 2, 2015)

The court held that a prior and pending litigation exclusion in a directors and officers liability policy, in addition to the policy's exclusion for claims relating to specific litigation, barred coverage for a second lawsuit that was related to an earlier-filed lawsuit that pre-dated the policy's inception. The court found that the initial lawsuit, in which several condominium unit owners sued the condominium operator and its board of directors for refusing to allow inspection of financial records, voting irregularities regarding capital expenditures, and failure to follow the governing laws arose out of the same facts as a subsequent lawsuit by unit owners alleging that the insureds were maintaining a for-profit rental business that was detrimental to the non-profit status of the condominium association.

Burks v. XL Specialty Ins. Co., No. 14-14-00740-CV, 2015 Tex. App. LEXIS 11610 (Nov. 10, 2015)

The court held that, pursuant to a directors and officers policy's interrelated claims provision, a claim made against the insured in a bankruptcy proceeding after the policy expired arguably related back to prior derivative shareholder lawsuits that were filed during the applicable policy period. Although the claimants in the derivative action and bankruptcy proceeding were not identical, the court denied summary judgment and found that, at the very least, a triable issue of fact existed regarding whether the claims were interrelated because the claimants served a similar purpose and alleged similar wrongful acts against the insured during the same time period.

Prior Knowledge, Known Loss, and Rescission

Scottsdale Indem. Co. v. Martinez, Inc., 615 F. App'x 549 (11th Cir. 2015)

Applying Alabama law, the Eleventh Circuit upheld the district court's determination that an insurer was entitled to rescind its business management indemnity policy, after the insured sought coverage for claims arising from an employee's embezzlement of the insured's funds, due to material misrepresentations in the insured's policy application. The court held that an employee's responses on the insurance application were material misrepresentations under the terms of Ala. Code § 27-14-7 because no issue of fact existed regarding whether an accounting firm conducted an annual audit or review that included a verification of securities and bank balances.

Alaska Interstate Constr., LLC v. Crum & Forster Specialty Ins. Co., No. 3:14-CV-00126-RRB, 2015 U.S. Dist. LEXIS 156609 (D. Alaska. Nov. 17, 2015)

An insurer was not liable for coverage under the terms of consecutively renewed claims-made-and-reported errors and omissions policies because a claim was made during the first policy period but was not reported until the second policy period. The court determined that the consecutively renewed policies constituted distinct insurance policies with distinct policy periods and granted summary judgment in the insurer's favor, concluding that the insured failed to report a claim made against it during the appropriate policy period and the policy's wrongful acts exclusion precluded coverage for the claim because the insured had knowledge of acts prior to the policy period that could reasonably give rise to a claim.

Cont'l Cas. Co. v. Evans, No. 2:13-CV-02379 (D. Ariz. Apr. 20, 2015)

The court, analyzing case law from multiple jurisdictions, ruled that a professional services liability policy did not provide coverage for underlying claims of common law fraud, securities fraud, or negligent misrepresentation. The court determined that the insured had a basis to believe that its actions or omissions "might reasonably be expected to be the basis of a claim" because a jury verdict established that the insured made materially untrue statements of fact and/or knowingly omitted material facts prior to the inception date of the policy.

Maxum Indem. Co. v. Drive W. Ins. Servs., Inc., No. 15-3199, 2015 U.S. App. LEXIS 20249 (6th Cir. Nov. 18, 2015)

The Sixth Circuit, applying California law, held that an insurer failed to meet its burden of demonstrating that the underlying claims were excluded from coverage under a professional errors and omissions liability policy due to the insured's prior knowledge of the conduct at issue and thus had a duty to defend the insured. The insurer failed to show that the insured was subjectively aware of the potential for a suit arising from the conduct of a "rogue" insurance agent who sold and collected premiums for policies that he lacked authority to sell.

Star Ins. Co. v. Sunwest Metals, Inc., No. SA CV 13-1930-DFM, 2015 U.S. Dist. LEXIS 77323 (C.D. Cal. June 15, 2015)

The court held that the insurer waived its right to rescind commercial lines policies based on allegations that the insured made material misrepresentations in the application because at the time of the application, the insurer's agents had information that "distinctly implied" that the representations made by the insured were false or inaccurate, yet failed to make inquiries about those facts. The court further noted that "numerous red flags" imposed upon the insurer a duty to investigate further, and that its failure to do so constituted a waiver of its right to rescind. However, the court held that the insurer did not act in bad faith because there was a genuine dispute whether the insured was entitled to policy benefits, and the insurer had a right to investigate whether it had a basis to rescind while also investigating the claims.

Genesis Ins. Co. v. Magma Design Automation, Inc., No. 5:06-CV-05526, 2015 U.S. Dist. LEXIS 88769 (N.D. Cal. July 8, 2015)

The court declined to apply California's "known loss" doctrine to preclude coverage under a directors and officers policy. The insurer argued that, at the time the relevant policy incepted, the insured knew or suspected that a future claim was likely to arise. The court rejected this argument, holding that California's "known loss" rule is only triggered if there is no contingency regarding the insured's liability in a future action. The court determined that the insured may have known that it was more probable than not that it would be liable in a future liability claim, but that such future liability had not been a certainty.

Crown Capital Sec., L.P. v. Endurance Am. Spec. Ins. Co., 186 Cal. Rptr. 3d 1 (Cal. Ct. App. 2015)

The court upheld summary judgment in favor of an insurer, finding that the insurer correctly refused to defend its insured based on an exclusion in a policy application precluding coverage for undisclosed facts known to the insured prior to the policy's effective date, which was incorporated into the terms of the policy. The court determined that the insured was aware of facts and circumstances that might result in a claim at the time the insured applied for professional liability coverage and that such awareness of the potential claims prior to the inception of the policy brought the claims within the terms of the exclusion.

Zurich Am. Ins. Co. v. Expedient Title, Inc., No. 3:11-CV-001633, 2015 U.S. Dist. LEXIS 167998 (D. Conn. Dec. 16, 2015)

The court declared an errors and omissions policy void *ab initio* because one of the insured's officers answered "no" to a question on a renewal application regarding whether the applicant had been involved in investigations by state or federal authorities and the answer to that question was material to the insurer's decision to issue the policy. This question was material and the answer was knowingly false because the insured had known that the officer, an attorney, was being investigated by a grievance committee of the state court system. The court was not persuaded by the insured's argument that it believed that the question related only to its business of title insurance.

Chicago Ins. Co. v. Paulson & Nace, PLLC, 783 F.3d 897 (D.C. Cir. 2015)

The court upheld the district court's summary judgment ruling in favor of the insurer and determined that legal malpractice claims were not covered under the terms of a professional liability policy due to the policy's "known risk" exclusion. The court determined that the insured law firm was on notice that it had committed a breach of professional conduct and/or should have foreseen a legal malpractice claim because at the time the firm applied for coverage, a suit it filed on behalf of a client was dismissed for failure to correctly caption a pleading; and a separate suit was dismissed on limitations grounds.

U.S. Liab. Ins. Co. v. Kelley Ventures, LLC, No. 14-62840-CIV, 2015 U.S. Dist. LEXIS 135619 (S.D. Fla. Sept. 30, 2015)

The court enforced the terms of a pending and prior litigation exclusion in a directors and officers liability policy and held that an insurer had no duty to defend or indemnify an insured. The terms of the exclusion precluded from coverage claims or demands in writing that the insured received before the policy's coverage began. The insured received a letter demanding certain distributions of funds prior to the inception date of the policy. The court rejected the insurer's alternate claim that it was entitled to rescission due to misrepresentations in the insurance application regarding the letter.

Synergy Law Grp., LLC v. Ironshore Spec. Ins. Co., 2015 IL App (1st) 142070-U (Mar. 24, 2015)

The court upheld the trial court's grant of summary judgment in favor of the insurer, determining that the insurer had no duty to defend or indemnify an insured under the terms of a lawyer's professional liability policy because the attorney at issue had prior knowledge of a drafting error in a shareholder agreement and of the possibility of a malpractice claim arising from the error. The court stated that when an attorney knows that he made an error in drafting a document for a client and such error leads to litigation against the client, the attorney has reason to know a malpractice claim might result from the error.

Ill. State Bar Ass'n Mut. Ins. Co. v. Law Office of Tuzzolino & Terpinas, 27 N.E.3d 67 (Ill. 2015)

Citing Section 154 of the Illinois Insurance Code, the Illinois Supreme Court affirmed the lower court's holding that an insurer could rescind a legal malpractice policy due to material misrepresentations contained in a renewal application. The court determined that the "innocent insured doctrine" should not apply when a court is addressing issues of rescission and contract formation.

Bar Plan Mut. Ins. Co. v. Likes Law Office, LLC, No. 02A03-1502-CT-65, 2015 Ind. App. LEXIS 680 (Oct. 15, 2015)

The court held that an insured was not entitled to coverage under the terms of a lawyer's professional liability policy because the attorney's failure to timely and correctly respond to interrogatories and the trial court's subsequent dismissal of the case could reasonably have been expected to trigger a malpractice claim. The attorney's failure to timely notify the insurer by disclosing facts related to the potential claim on a renewal application precluded coverage under the terms of an exclusion in the policy.

Gandor v. Torus Nat'l Ins. Co., No. 4:13-40132-TSH, 2015 U.S. Dist. LEXIS 140542 (D. Mass. Oct. 15, 2015)

The court granted an insurer's motion for summary judgment, holding that an endorsement to a claims-made professional liability policy precluding coverage for claims the insured knew or could have reasonably foreseen was applicable to the claim at issue. The court reasoned that the insured law firm had knowledge of a potential claim because prior to the inception date of the policy, an attorney at the law firm mishandled the real estate litigation matter at issue and submitted a letter describing his errors to a named partner of the firm and the partner responded regarding the conduct at issue.

McDowell Bldg., LLC v. Zurich Am. Ins. Co., No. RDB-12-2876, 2015 U.S. Dist. LEXIS 47904 (D. Md. Apr. 13, 2015)

The court denied an insurer's motion for summary judgment asserting that coverage under the terms of an architect's malpractice insurance policy was barred by operation of a prior claims or circumstances endorsement. The court refused to apply Maryland case law, and instead applied an objective standard to assess the applicability of "prior claims or circumstances" provisions. It determined that the language of the policy created a subjective knowledge standard and thus sufficient factual questions existed to preclude summary judgment in favor of the insured.

Innes v. St. Paul Fire & Marine Ins. Co., No. 12-234, 2015 U.S. Dist. LEXIS 121753 (D.N.J. Sept. 11, 2015)

The court held that the claims-made-and-reported lawyers professional liability policies at issue did not provide coverage for underlying legal malpractice claims. Under Third Circuit precedent applying New Jersey law, the court applied a subjective analysis to determine whether the insured had knowledge of a suit, act, error or omission. The court then applied an objective test to determine whether the suit, act error or omission might be expected to result in a claim or a suit. The court determined that a letter sent to the firm asserting malpractice,

seeking a return of fees, and threatening a legal action satisfied both prongs of the analysis.

Wesco Ins. Co. v. Luretha M. Stribling, LLC, No. 15-3594, 2015 U.S. Dist. LEXIS 121185 (D.N.J. Sept. 11, 2015)

The court denied the insured law firm's motion to dismiss an action for rescission of a lawyers professional liability policy because the insurer had met its burden to plead allegations that "plausibly give rise to an entitlement for relief" – it sufficiently alleged that the insured made false statements in the insurance application that materially affected the acceptance of the insurance risk. The court also rejected the argument that New Jersey laws precluding rescission of automobile and medical malpractice insurance policies, due to concerns regarding innocent third parties who might need to rely on such insurance, should be extended to legal malpractice policies.

Darwin Nat'l Assurance Co. v. Fahy Choi, LLC, No. 13-7197, 2015 U.S. Dist. LEXIS 169850 (D.N.J. Dec. 18, 2015)

The court granted an insurer's motion for summary judgment and held that a prior knowledge condition in the insuring agreement of a lawyers' professional liability policy could apply to bar coverage for a claim arising out of a breach of professional duty known to the insured prior to the inception of the policy, even where the policy at issue was the first and only policy issued to the insured law firm. It was a condition precedent to coverage that "no Insured had any basis . . . to believe that any Insured had breached a professional duty" for a "Claim" based on a "Wrongful Act" that occurred "prior to the inception date of the first policy issued by the Insurer if continuously renewed." Even though the condition included the language "if continuously renewed," the court rejected the insured's argument that because the policy was not renewed, the condition could not apply in any circumstances, reasoning that this would lead to the "absurd" result of having a condition that did not apply if an insurer issued only one policy to an insured.

DeMarco v. Stoddard, 223 N.J. 363 (2015)

The New Jersey Supreme Court held that an insurer had no duty to defend or indemnify an insured under the terms of a podiatrist's professional liability policy and was entitled to rescind the policy at issue. The court determined that the insured misrepresented the proportion of his practice generated in Rhode Island, which was a fact that was material to his eligibility for malpractice insurance.

Imperium Ins. Co. v. Porwich, No. A-4714-12T4, 2015 N.J. Super. Unpub. LEXIS 395 (App. Div. Feb. 27, 2015)

The appellate court reversed the trial court and held that an insurer was not obligated to provide defense and indemnity coverage for legal malpractice claims against a law firm under the terms of a professional liability policy. The court applied a pending and prior claims exclusion and determined that the conduct of one attorney practicing at a three-attorney firm was known prior to the policy's effective date. The court held that it was irrelevant that the primary partner at the firm who prepared and submitted the insurance application did not have personal knowledge of the facts giving rise to the claim at the time the application was submitted. The policy's "named insured" provision was deemed to include all three lawyers at the firm and thus knowledge of a prior claim by one attorney defeated coverage.

Navigators Ins. Co. v. Resnick Amsterdam Leshner, P.C., No. 14-5158, 2015 U.S. Dist. LEXIS 64385 (E.D. Pa. May 18, 2015)

An insurer had a duty to defend but not a duty to indemnify a public accounting firm under the terms of a claims-made-and-reported professional liability policy. Applying case law from the Third Circuit and Pennsylvania state courts, the court found that the insured could only be held liable in the underlying litigation if the fact finder determined that the insured disseminated the underlying plaintiffs' confidential information to a third-party prior to the inception of the policy. If the underlying court were to reach such a conclusion, the policy would not apply because the insured would have reasonably expected the conduct to be the basis of a claim prior to the inception of the policy.

Hale v. Travelers Cas. & Sur. Co., No. 3-14-1987, 2015 U.S. Dist. LEXIS 149687 (M.D. Tenn. Nov. 4, 2015)

Applying Sixth Circuit precedent, the court held that consumer complaints filed against the insured with the Better Business Bureau of Middle Tennessee and the Consumer Affairs Division of the Tennessee Department of Commerce and Insurance were sufficiently related to

a subsequent lawsuit filed by the Attorney General to be considered a single "claim" under the terms of the directors and officers liability policy at issue. The court determined that these consumer complaints were first made before the policy period and held that the lawsuit was not covered under the terms of the policy.

Prior Acts, Prior Notice, and Pending and Prior Litigation

Dobson v. Twin City Fire Ins. Co., 590 F. App'x 687 (9th Cir. 2015)

Applying California law, the Ninth Circuit held that neither the policy's prior notice exclusion nor the "claims-first-made" exclusion barred coverage because those exclusions applied only to claims based on or related to prior claims that were the subject of "any notice given under any other directors and officers, management liability, or similar insurance policy." The court determined that the prior actions were noticed under another insurance policy, and in those cases it was the insured business entity that was sued, so the notice would have been given under the entity's comprehensive general liability coverage. In the prior actions, the insureds were named as natural person representatives of the entity in one action, but were not sued themselves. Therefore, the court held that there was no prior notice.

Opus Bank v. Liberty Ins. Underwriters, Inc., 621 F. App'x 405 (9th Cir. 2015)

Applying California law, the Ninth Circuit found that the language of a policy's prior acts exclusion was unclear as to whether a "claim" constituted a single group of events or a divisible set of wrongful acts. During the policy period, one of the insured's executives resigned from her position after complaining of bank management practices, and her attorney sent a demand letter alleging fraudulent misrepresentations and retaliation during the policy period. The carrier denied coverage and contended that the exclusion must be construed as representing a single harm, and that any pre-policy acts barred coverage for the entire claim. The court rejected the carrier's position that coverage was barred by acts occurring outside the policy period, and held that because covered acts of retaliation occurred within the policy period, there was a duty to defend.

Carlson v. Century Sur. Co., 606 F. App'x 882 (9th Cir. 2015)

The Ninth Circuit, applying California law, held that an insurer did not have a duty to defend where the insured received notice of the claim at issue five months before the policy incepted. The Ninth Circuit refused the claimant's attempts on summary judgment to manufacture a dispute regarding the timing of the claim, highlighting that the claimant refused to concede the truth of the facts and had not adduced evidentiary support for its position.

Catlin Specialty Ins. Co. v. Nat'l Union Fire Ins. Co., No. CV 13-7594, 2015 U.S. Dist. LEXIS 134275 (C.D. Cal. Sept. 30, 2015)

The court held that a prior litigation exclusion in a directors and officers liability policy barred coverage for underlying claims, in part because the phrase "arising out of" in the exclusion was a "broad concept requiring only a 'slight connection' or an 'incidental relationship'" between the prior litigation and the excluded claim. The court held that under this test, the prior litigation, involving allegations that the insureds forced the sale of property after they performed a site visit and learned of the presence of various hazardous substances thereon, and the new claim, which was an action by the Housing Authority brought against the insureds as owners of the same site, and which alleged environmental contamination, were sufficiently connected as to trigger the prior litigation exclusion.

Crown Capital Sec., L.P. v. Endurance Am. Specialty Ins. Co., 235 Cal. App. 4th 1122 (2015)

The appellate court affirmed summary judgment in favor of an insurer that issued a professional liability policy to a securities firm, holding that all of the claims filed against the firm arose out of the same events and conduct – the insured's alleged failure to exercise due diligence before selling investments that were part of a Ponzi scheme – as a single claim that the firm disclosed in its application for insurance and therefore all of the related claims were excluded from coverage.

U.S. Liab. Ins. Co. v. Kelley Ventures, LLC, No. 14-62840, 2015 U.S. Dist. LEXIS 135619 (S.D. Fla. Sept. 30, 2015)

The court held that a prior and pending litigation exclusion barred coverage for claims under a directors and officers liability policy. The court found that a demand for distributions by the insured's limited liability partner that pre-dated the policy's inception satisfied the exclusion's language barring coverage for a claim or demand in writing that the insured received before the policy incepted. The court rejected the insured's argument that the claims "morphed" following the original demand letter, finding that even if there had been a change over time, the insured still had written notice of the demand, which was sufficient to exclude coverage under the policy's pending and prior litigation exclusion.

Direct Gen. Ins. Co. v. Houston Cas. Co., No. 14-20050, 2015 U.S. Dist. LEXIS 143847 (S.D. Fla. Sept. 30, 2015)

Applying Tennessee law, the court granted summary judgment to the insurers, holding that they had no duty to defend the insured against the underlying class actions and individual claims seeking damages for the underpayment of personal injury protection benefits. The court reasoned that the demands and lawsuit that pre-dated the policies, as well as the underlying lawsuits filed after the policy's inception, all constituted a single claim deemed made when the first such claim was made prior to the policy and, therefore, was excluded from coverage.

Becker v. Bar Plan Mut. Ins. Co., No. 113,291, 2015 Kan. App. Unpub. LEXIS 1114 (Dec. 23, 2015)

The court held that an insurer had no duty to cover a malpractice lawsuit against its insured because the insured attorney had knowledge of acts reasonably giving rise to the claim before the policy period began. Before the policy incepted, a client fired the attorney after learning that the attorney had failed to perfect the client's security for a loan, indicated that the attorney's work was substandard, and asked the attorney to put her carrier on notice. The attorney tendered the claim to the insurer when the client sent a demand letter several months later, but the court held that a reasonable attorney would have anticipated a claim upon the client's termination of services.

Bilyeu v. Nat'l Union Fire Ins. Co., No. 50,049-CA, 2015 La. App. LEXIS 1868 (Sept. 30, 2015)

The court held that neither the carrier's fiduciary policy nor its directors and officers liability policy provided coverage for ERISA claims asserted by the Department of Labor ("DOL") before the policies' continuity date. Relying on similar prior acts exclusions in each policy, the court found that a letter sent by the DOL stating that it was conducting an investigation was pending prior to the continuity date stated a claim, thus barring coverage.

Humane Soc'y of the U.S. v. Nat'l Union Fire Ins. Co., No. 13-1822, 2015 U.S. Dist. LEXIS 100003 (D. Md. July 30, 2015)

The court rejected an insurer's argument that a prior notice exclusion in a directors and officers liability policy barred coverage for the underlying claims and interpreted the provision to mean that notice of the claim under a previously issued policy had to have preceded notices to the issuing carrier. Because the insureds contended that notice was given to the issuing carrier and the preceding carriers at the same time, the court held that the issuing carrier failed to establish that it was entitled to summary judgment under the exclusion.

Dishonesty and Personal Profit Exclusions

Twin City Fire Ins. Co. v. CR Techs., Inc., 90 F. Supp. 3d 1320 (S.D. Fla. 2015)

After an insured was found liable for civil theft in a jury trial, an insurer denied coverage based upon the personal profit exclusion in its directors and officers liability policy. The court granted summary judgment in favor of the insurer in the resulting declaratory judgment action, holding that no coverage existed for personal profit to which the insured was not legally entitled, and the guilty verdict against the insured for civil theft meant that the exclusion squarely applied.

Fla. Lawyers Mut. Ins. Co. v. West (In re West), 530 B.R. 809 (Bankr. M.D. Fla. 2015)

In granting an insurer's motion for summary judgment on the applicability of a fraud exclusion contained in a lawyer's professional liability policy, the court found that the exclusion precluded coverage of an insured lawyer's claim for indemnification of a fee obtained from a client by fraudulent misrepresentation. The court disagreed with the underlying plaintiff's argument that the fraudulent or dishonest acts exclusion encompassed only criminal conduct and held that the fraudulently obtained fee was expressly excluded.

OneBeacon Am. Ins. Co. v. City of Zion, No. 12 C 4437, 2015 U.S. Dist. LEXIS 99438 (N.D. Ill. July 29, 2015)

The court found that a personal profit exclusion in an errors and omissions general liability policy did not apply to a complaint against the insured that alleged generalized "illegal profit motivations" and bribes. The court reasoned that because the underlying complaint did not allege any causes of action against the insured where illegal profit or gain was an essential element, the exclusion could not apply.

WellPoint, Inc. v. Nat'l Union Fire Ins. Co., 29 N.E.3d 716 (Ind. 2015), *opinion modified on other grounds on reh'g*, 38 N.E.3d 981 (Ind. 2015)

An insured health insurance company sought coverage under an errors and omissions liability policy for a claim alleging that the insured failed to pay claims in a timely manner. The insurer moved for summary judgment, arguing that the policy's dishonest acts exclusion applied to the claim. The Indiana Supreme Court, examining an exception to the exclusion, found that summary judgment was premature because the complaint prayed for both compensatory and punitive damages arising from the failure to provide professional services, and thus whether the exclusion applied required a factual determination.

Sundaram v. Coverys, No. 2:15-CV-00121, 2015 U.S. Dist. LEXIS 120520 (D. Me. Sept. 10, 2015)

The court granted an insured's motion for summary judgment in a coverage action involving a medical professional liability policy, finding that the policy's dishonest acts exclusion precluded coverage of a tortious interference with contract claim, but not a defamation claim against the insured. The court reasoned that, unlike the tortious interference claim, which required a showing of deliberate or intentional wrongdoing, defamation could be established by a showing of negligence, and because there was a possibility that the underlying plaintiff could establish negligent defamatory conduct on the part of the insured, the defamation claim was covered.

Empl'rs Mut. Cas. Co. v. Helicon Assocs., No. 322215, 2015 Mich. App. LEXIS 2238 (Dec. 1, 2015)

The appellate court affirmed the trial court's judgment that the policy's fraud or dishonesty exclusion applied to a consent decree entered into by an insured which admitted a state securities law violation. The insured argued that the exclusion required a full adjudication to apply, but the court disagreed, finding that once a consent decree was entered it became a court judgment when sanctioned by the court and that a consent decree acknowledging liability is treated the same as a judgment finding the insured liable.

Warehouse Wines & Spirits, Inc. v. Travelers Prop. Cas. Co., No. 13 CIV 5712, 2015 U.S. Dist. LEXIS 141722 (S.D.N.Y. Oct. 16, 2015)

An insured successfully argued that an exception to a dishonest acts exclusion applied to the theft of property by one of its hired transporters. The insured, a liquor wholesaler, used a warehouse and transportation company to store and transport its products. After the warehouse owner was convicted of grand larceny for stealing the insured's product, the wholesaler's insurer disclaimed coverage and asserted that the policy's dishonest acts exclusion applied to the loss. The court agreed with the insured, holding that an exception in the exclusion for property entrusted with a "carrier for hire" applied because the property was stolen by the owner of the company hired to transport its products.

Lewis & Stanzione v. St. Paul Fire & Marine Ins. Co., 2015 U.S. Dist. LEXIS 78259 (N.D.N.Y June 17, 2015)

In a declaratory judgment action concerning coverage pursuant to a lawyer's professional liability policy, the court granted summary judgment in favor of the insurer, finding that the policy's dishonest or fraudulent acts exclusion applied to a single fraud claim made against the insured. The court refused to accept the insured's invitation to view the allegations against it as alleging parts of potentially covered non-fraudulent claims when

the allegations as a whole alleged a single scheme to defraud a client.

Dupree v. Scottsdale Ins. Co., 129 A.D.3d 586 (N.Y. App. Div. 1st Dep't 2015)

The appellate court affirmed the trial court's grant of the insurer's motion to vacate an injunction pursuant to a directors and officers liability policy, which obligated the insurer to pay defense costs for an insured's appeal of a bank fraud conviction. The appellate court, relying on the policy's exclusion for acts of fraud, which was operable upon a final judgment against the insured, concluded that a final judgment included a conviction of the insured, whereupon the insurer's obligation to pay defense costs ceased.

J.P. Morgan Sec. Inc., v. Vigilant Ins. Co., 126 A.D.3d 76 (N.Y. App. Div. 1st Dep't 2015)

An insured sought indemnification under a professional liability policy for a settlement with the SEC through a consent decree concerning deceptive and late trading allegations. The insurer denied coverage pursuant to the dishonest acts exclusion in the applicable professional liability policy, which had a final adjudication requirement. The insurer argued that the consent decree as governed by the Administrative Procedures Act constituted a final adjudication. The court disagreed, finding that the SEC consent decree did not qualify as a final adjudication and noted that the express terms of the consent decree indicated that the insured did not admit to wrongdoing or liability, and the "adjudication" exclusion requirement required that the liability of the insured be "put beyond doubt."

Thames v. Evanston Ins. Co., No. 13-CV-425, 2015 U.S. Dist. LEXIS 155070 (N.D. Okla. Nov. 17, 2015)

The court, relying in part on the insured's repeated assertion of the Fifth Amendment privilege against self-incrimination, held that a misappropriation of funds exclusion in a professional liability policy applied to a claim by an underlying plaintiff for return of missing escrow funds for a home purchase. The court affirmed the denial of coverage by the insurer because, in addition to the lack of notice given by the insured to the insurer, the exclusion for a claim "based upon or arising out of" misappropriated funds squarely applied.

Navigators Ins. Co. v. Hamlin, 96 F. Supp. 3d 1181 (D. Or. 2015)

The court held that an accountant's professional liability policy excluded indemnification and defense under the policy's personal profit exclusion because the insured accountant was not legally entitled to the proceeds for which he sought coverage. The court agreed with the insurer that, in addition to the insured not acting within coverage for professional services, the accountant was no longer entitled to a payment by the insured's client after the insured defaulted on the payment and that it was inconsequential whether the original payment itself was illegal to be excluded under the personal profit exclusion.

Cigna Corp. v. Exec. Risk Indem., Inc., 111 A.3d 204 (Pa. Super. Ct. 2015)

A fraudulent or criminal acts exclusion precluded coverage under a professional liability policy for claims that the insured sent misleading ERISA notices to its employees, where the underlying litigation characterized the misleading notices as fraudulent.

TranSched Sys. v. Fed. Ins. Co., 67 F. Supp. 3d 523 (D.R.I. 2014)

A judgment creditor sued the judgment debtor's professional liability insurer, who disclaimed coverage of the underlying lawsuit and judgment, which established that the insured had deliberately misrepresented the terms of a software sale. The judgment creditor argued that the fraud exclusion could not apply because, even though the insured's employees may have committed deliberately fraudulent conduct, that conduct could not be imputed to the insured such that the exclusion would be triggered. The court agreed, noting that only certain high level employees could bind the insured with respect to the fraudulent conduct and held that the fraud exclusion did not apply.

Prot. Strategies, Inc. v. Starr Indem. & Liab. Co., 611 F. App'x 775 (4th Cir. 2015)

The Fourth Circuit, applying Virginia law, upheld the trial court's ruling that an insurer was entitled to recoup indemnification costs paid to the insured in light of the directors and officers liability policy's profit and fraud

exclusion because the insured's employees pled guilty to criminal and civil charges that they had defrauded the Small Business Administration's federal procurement program.

Church Mut. Ins. v. Ma'Afu, No. 2:13-CV-00672, 2015 U.S. Dist. LEXIS 103315 (D. Utah Aug. 5, 2015)

The court determined that a personal profit exclusion in a professional liability policy applied only after it was established that the insured actually received illegal personal profit. The court reasoned that mere allegations that the insured received personal profit were insufficient to invoke the personal profit exclusion and defeat the insurer's duty to defend.

Restitution, Disgorgement, and Damages

Dobson v. Twin City Fire Ins. Co., 590 F. App'x 687 (9th Cir. 2015)

Applying California law, the Ninth Circuit affirmed in part and reversed in part the trial court's grant of summary judgment, which found that the primary insurer properly denied coverage for the plaintiffs' claims, which were restitutionary in nature. The Ninth Circuit held that the insurer properly denied coverage to the extent the underlying plaintiffs' claims sought restitution for fraudulent transfers. The Ninth Circuit found that the policy did provide coverage for the plaintiffs' claims for breach of fiduciary duty, where plaintiffs sought damages, rather than specific restitution.

Ironshore Specialty Ins. Co. v. 23andMe, Inc., No. 14-CV-03286-BLF, 2015 U.S. Dist. LEXIS 64145 (N.D. Cal. May 14, 2015)

Under a professional liability policy, the court granted in part the insured's motion to stay the insurer's declaratory judgment action, noting that although the insurer cited several cases holding that California courts preclude coverage for the disgorgement of ill-gotten gains, it was unclear from the underlying pleadings that the underlying claimants sought only restitutionary damages.

Twin City Fire Ins. Co. v. CR Techs., Inc., 90 F. Supp. 3d 1320 (S.D. Fla. 2015)

In a case involving a directors and officers liability policy, the court granted summary judgment in the insurer's favor, holding that an underlying jury verdict against the insured for conversion and civil theft was not covered because as a matter of law, the policy's definition of "loss" did not include restoration of an ill-gotten gain, that the judgment for civil theft was not insurable as a matter of public policy, and that the treble damages portion of the award was expressly excluded from the policy's definition of "loss."

Wellpoint, Inc. v. Nat'l Union Fire. Ins. Co., 29 N.E.3d 716 (Ind. 2015) *opinion modified on other grounds on reh'g*, 38 N.E.3d 981 (Ind. 2015)

Where an appellant was self-insured for errors and omissions liability, but reinsured by multiple insurers, the appellate court reversed the trial court's grant of summary judgment in favor of the insurers, rejecting the insurers' argument that the underlying settlement was uninsurable as a matter of law because it was restitutionary and/or contractual in nature. The appellate court reasoned that, at the time of the settlement, the underlying contractual claims had been dismissed, and that the remaining underlying claims also sought damages that were not restitutionary in nature.

Burks v. XL Specialty Ins. Co., No. 14-14-00740-CV, 2015 Tex. App. LEXIS 11610 (Nov. 10, 2015)

In a case involving a directors and officers liability policy, where the underlying claimants sought restitution and disgorgement, the appellate court reversed the trial court's grant of summary judgment for an insurer, holding that, even if the policy did not provide coverage for restitution or disgorgement, the policy would still require the insurer to reimburse the insured for defense expenses, that there was an issue of fact as to whether the settlement of those complaints was for the settlement of restitution claims or damage claims, and that there is no public policy in Texas providing that settlements that are restitutionary in nature are uninsurable as a matter of law.

Insured Capacity

Burk & Reedy, LLP v. Am. Guarantee & Liab. Ins. Co., 89 F. Supp. 3d 1 (D.D.C. 2015)

An "Insured Capacity" exclusion applied to bar coverage for an insured attorney under a lawyer's professional liability policy because the underlying claim arose, at least in part, out of the attorney's capacity or status as a corporate representative of a company in which he held a controlling interest.

Langdale Co. v. Nat'l Union Fire Ins. Co., 609 F. App'x 578 (11th Cir. 2015)

The Eleventh Circuit, applying Georgia law, held that insured directors and officers were not entitled to coverage because their alleged misconduct was excluded from coverage, having been committed in a capacity other than as a corporate officer or director. The court found that because the claims against the insureds could not have existed independent of their alleged misconduct as trustees, those claims "arose out of" wrongful acts committed in their capacities as trustees and not in their capacities as directors and officers.

Law Offices of Zachary R. Greenhill P.C. v Liberty Ins. Underwriters, Inc., 128 A.D.3d 556 (N.Y. App. Div. 2015)

The court held that a lawyer's professional liability policy excluded coverage to the extent that the claims against the insured arose out of his activities conducted on behalf of entities in which he had an ownership interest. However, the court found that further discovery was necessary in order to determine the issue.

Insured v. Insured Exclusions

Sharp v. Essex Ins. Co.(In re C.M. Meiers Co., Inc.), 527 B.R. 388 (Bankr. C.D. Cal. 2015)

The court held that a claim by the trustee of an insured against another insured was not precluded from coverage under an insured v. insured exclusion barring coverage for all claims "by or on behalf of another Insured," where the policy's definition of "Insured" included the "legal representatives of each Insured."

Progressive Cas. Ins. Co. v. FDIC, 80 F. Supp. 3d 923 (N.D. Iowa 2015)

The court held that a lawsuit brought by the FDIC as a receiver for a failed insured bank was not excluded from coverage under an insured v. insured exclusion which eliminated coverage for claims brought "on behalf of the Company" because the policy's definition of "Company" did not include any reference to the FDIC or any receiver and because the suit, at least in part, was brought directly on behalf of the FDIC itself and not solely in its role "standing in the shoes" of the failed bank.

Kinsale Ins. Co. v. Georgia-Pacific, LLC, 795 F. 3d 452 (5th Cir. 2015)

The Fifth Circuit, applying Louisiana law, held that an indemnity lawsuit brought by one insured against another to determine liability for an underlying lawsuit resulting from a fire fell within the policy's insuring agreement for claims "because of 'property damage'" but was not excluded by the policy's insured vs. insured exclusion barring coverage for claims "for 'property damage' … by one insured against any other insured" because the lawsuit was for indemnity and not for "property damage."

Namer v. Scottsdale Ins. Co., No. 15-3263, 2015 U.S. Dist. LEXIS 156578 (E.D. La. Nov. 19, 2015)

The court held that a claim by an insured entity against its former director and officer based on breaches of duties owed in an insured capacity was precluded from coverage by virtue of an insured v. insured exclusion eliminating coverage for any Claim "brought or maintained by, on behalf of, or at the direction of any insured in any capacity."

Jerry's Enterprises, Inc. v. U.S. Specialty Ins. Co., No. 14-1951, 2015 U.S. Dist. LEXIS 126241 (D. Minn. Sept. 22, 2015)

The court held that an exclusion for claims "brought by or on behalf of, or in the name or right of … any Insured Person, unless such claim is … brought or maintained independently of, and without the solicitation, assistance or active participation of, the Insured Organization or any Insured Person" eliminated coverage for a lawsuit brought against the insured entity by its director and her

children even though the children were not Insured Persons and the director was partially suing in her capacity as a non-insured shareholder.

Intelligent Digital Sys., LLC v. Beazley Ins. Co., No. 12-CV-1209, 2015 U.S. Dist. LEXIS 82742 (E.D.N.Y. June 23, 2015)

Under Nevada law, a claim on behalf of a former director against insured persons was not precluded from coverage by an insured v. insured exclusion eliminating coverage for claims "by, on behalf of, or at the direction of an 'Insured'" where the policy defined "Insured" to mean "all persons who were, now are, or shall be duly elected or appointed directors…" because there was an ambiguity regarding whether the underlying plaintiff had been properly elected a director pursuant to the entity's bylaws.

St. Paul Guardian Ins. Co. v. Leopold, 622 F. App'x 27 (2d Cir. 2015)

The Second Circuit, applying New York law, held that a lawsuit brought on behalf of the insured city against its former Chief Administrative Officer, who also qualified as an insured, was precluded from coverage by an insured v. insured exclusion which barred coverage for claims "made or brought by, or on behalf of, any [Insured]."

Strong v. Prince, Yeates & Geldzahler, PC (In re Castle Arch Real Estate Inv. Co., LLC), No. AP 15-2007, 2015 Bankr. LEXIS 1985 (Bankr. D. Utah June 18, 2015)

The court held that a lawsuit brought by the debtor-in-possession, rather than a trustee, of one insured and against another insured was precluded from coverage under an insured v. insured exclusion because it did not fall under the exclusion's exception for claims "brought or maintained by or on behalf of a bankruptcy or insolvency receiver, trustee, examiner, conservator, liquidator, rehabilitator or creditors' committee of a Policyholder…."

Coverage for Contractual Liability

Ironshore Specialty Ins. Co. v. 23andMe, Inc., No. 14-cv-03286, 2015 U.S. Dist. LEXIS 64145 (N.D. Cal. May 14, 2015)

A stay of a coverage action was not appropriate as to an insurer's defense based upon a contractual liability exclusion because the question of whether the underlying claims against the insured arose out of contracts could be resolved as a matter of law without determining factual issues that could give rise to collateral estoppel against the insured in the underlying litigation.

AXIS Ins. Co. v. Inter/Media Time Buying Corp., No. CV 15-01380-DMG, 2015 U.S. Dist. LEXIS 77026 (C.D. Cal. June 8, 2015)

The court found that a contractual liability exclusion in a multimedia liability policy barred coverage for fraud and conspiracy claims against the insured because all of the allegations against the insured flowed from the insured's alleged contractual obligations.

Town of Monroe v. Discover Prop. & Cas. Ins. Co., No. FBCV126026835, 2015 Conn. Super. LEXIS 2086 (Aug. 11, 2015)

Where a public entity errors and omissions liability policy excluded coverage for claims arising out of, *inter alia*, "procurement contracts," but the policy did not define that term, the court relied on the common understanding of the term to hold that an underlying negligent misrepresentation claim stemming from the insured town's agreement to develop a telecommunications tower arose out of breach of contract, and therefore coverage was barred.

Bond Safeguard Ins. Co. v. Nat'l Union Fire Ins. Co., No. 14-15233, 2015 U.S. App. LEXIS 17471 (11th Cir. Oct. 5, 2015)

The Eleventh Circuit, applying Florida law, affirmed the district court's holding that the phrase "arising out of" in a contractual liability exclusion in a directors and officers liability policy was unambiguously broad and precluded coverage for tort claims that were intertwined with and were dependent upon the existence of contractual liability. Accordingly, the exclusion barred coverage for all claims arising out of defaults on bonds.

Altom Transp., Inc. v. Westchester Fire Ins. Co., 14-CV-9547, 2015 U.S. Dist. LEXIS 64397 (N.D. Ill. May 18, 2015)

The court held that an insurer had no duty to defend under the directors and officers coverage part of a private company management liability policy because underlying truckers' claims for improperly withholding

compensation owed under the insured's contracts were claims for breach of contract and subject to the policy's contractual liability exclusion.

OneBeacon Am. Ins. Co. v. City of Zion, No. 12 C 4437, 2015 U.S. Dist. LEXIS 99438 (N.D. Ill. July 29, 2015)

The court held that an insurer whose policy provided errors and omissions coverage had a duty to defend individual defendants in an underlying lawsuit but did not have a duty to defend the City in that matter. The sole breach of contract claim was brought against the City only. Because the underlying complaint alleged numerous wrongful acts against the individual defendants that were not necessarily related to the breach of contract claim, the insurer was required to defend the individual defendants.

Hartford Cas. Ins. Co. v. Karlin, Fleisher & Falkenberg, LLC, No. 14 C 2883, 2015 U.S. Dist. LEXIS 133162 (N.D. Ill. Sept. 30, 2015)

A policy providing employee benefits liability insurance only provided coverage for negligent acts, therefore the underlying action, which involved a claim for breach of contract, was not within the scope of the policy coverage.

PNY Techs., Inc. v. Twin City Fire Ins. Co., 607 F. App'x 155 (3rd Cir. 2015)

Under New Jersey law, an insurance policy's contract exclusion barred coverage for claims for breach of contract even though the insured argued that the contracts were unauthorized and invalid. Because the liability alleged in the underlying lawsuit related solely to loss under contracts, the contractual liability exclusion squarely applied.

Professional Services

Cases Addressing "Professional Services" in the Insuring Agreement

Ill. State Bar Ass'n Mut. Ins. Co. v. Coleman Law Firm, 2014 IL App (1st) 133518-U

The appellate court upheld the circuit court's grant of summary judgment in favor of an insurer who issued a professional liability policy to an insured law firm, agreeing that the term "professional services" in that policy referred to the practice of law, which did not include basic business practices such as billing and fee setting with clients. The insurer thus had no duty to defend the law firm in an action arising out of the firm's drafting of a retainer agreement.

Wellpoint, Inc. v. Nat'l Union Fire Ins. Co., 29 N.E.3d 716 (Ind. 2015) *opinion modified on other grounds on reh'g*, 38 N.E.3d 981 (Ind. 2015)

A self-insured health insurance company reinsured itself for professional liability. The Indiana Supreme Court disagreed with the reinsurer's argument that the health insurance company was not providing "professional services" when it allegedly acted improperly in connection with an unfair scheme to deny, delay, or diminish claim payments to its insureds. The court stated that the alleged scheme was "clearly" within the rendering of "claims handling" services provided by the company and thus covered by the errors and omissions liability policy.

N.J. Pub. Adjusters, Inc. v. Phila. Ins. Co., No. A-5835-11T2, 2015 N.J. Super. Unpub. LEXIS 1662 (App. Div. July 9, 2015)

The insured, an insurance adjustment company, agreed to help negotiate a homeowner's insurance settlement with a client and also oversee the home repair construction to follow the claim. The client sued, alleging that the adjustment company negligently hired and oversaw construction of the home after it had negotiated the settlement. The adjustment company's professional liability policy covered wrongful acts committed in the rendering of "professional services." Using the policy's definition of "professional services" and the New Jersey Public Adjusters' Licensing Act as its guide, the court held that there was no coverage for the claim for failure to hire and supervise the rebuilding of the client's house because the insured adjustment company was not acting as an "adjuster" by overseeing or managing the construction of a house.

Hanover Am. Ins. Co. v. Balfour, 594 F. App'x 526 (10th Cir. 2015)

An insured chiropractor argued that despite an absence of case law on the issue, Oklahoma statutes and regulations supported its interpretation that the phrase "professional services" in its professional liability policy included maintaining an office and conducting other management

functions, but the Tenth Circuit disagreed, holding that the broad reading of "professional services" the insured urged would impermissibly morph the policy into a commercial general liability policy.

Navigators Ins. Co. v. Hamlin, 96 F. Supp. 3d 1181 (D. Or. 2015)

A professional liability policy did not cover an insured certified public accountant's sale of promissory notes to a client because the insured was involved in the actual purchase or sale of investment products in exchange for the notes, as opposed to proffering covered "investment advice" to a client. The policy defined "professional services" to include only investment advice, not the actual purchase or sale of securities.

Zhuang v. Hanover Ins. Co., No. 15-CV-0481, 2015 U.S. Dist. LEXIS 118047 (W.D. Pa. Sept. 3, 2015)

The court found that an insurer breached its contract to provide lawyers professional liability insurance where the underlying plaintiff alleged that the insured law firm failed to advise him to obtain title insurance prior to a real estate transaction. The allegations against the attorney qualified as "professional services" under the insuring agreement even though "professional services" was defined not to include services "in relation to…real estate." The court held that there was nonetheless coverage because the attorney's insufficient advice leading to the malpractice claim was merely "tangential" to the real estate deal.

Med. Protective Co. v. Turner, No. 3:15-CV-0366, 2015 U.S. Dist. LEXIS 75390 (N.D. Tex. June 10, 2015)

A claims-made-and-reported professional liability policy's coverage for the rendering of "professional services" by a primary care doctor did not include sexual assault by the doctor, even if it arose out of, or was in connection with, an office visit for an examination.

Cases Addressing "Professional Services" Exclusions

Ambrosio v. Brit UW Ltd., 606 F. App'x 885 (9th Cir. 2015)

In reversing the district court, the Ninth Circuit (interpreting California law), found that a professional services exclusion did not bar claims brought by investors – as assignees of the insured's rights – in Financial Industry Regulatory Authority arbitration proceedings. The investors successfully argued that the exclusion should not apply by noting that after they had already invested their funds in a real estate venture with the insured, the insured encumbered the properties with an additional mortgage without their consent. The Ninth Circuit agreed and refused to apply the exclusion because the wrongful conduct was "tenuously connected" to the rendering of professional services.

Jamison v. Certain Underwriters at Lloyd's Under Policy No. B0146LDUSA0701030, 599 F. App'x 720 (9th Cir. 2015)

A directors, officers, and company liability policy excluded claims "for any act, error or omission in connection with the performance of any professional services by or on behalf of the Company for the benefit of any other entity or person." Applying California law, the Ninth Circuit affirmed the district court's holding and rejected the insureds' arguments that the exclusion did not apply to claims for acts "directly" as opposed to "indirectly" connected to professional services, or for acts relating to secondary as opposed to primary liability. The court interpreted the exclusion as plain and unambiguous, and held that the exclusion made no such distinctions argued by the insured and instead used the broad, unqualified language "in connection with" the performance of professional services (here, investment advice).

Begun v. Scottsdale Ins. Co., 613 F. App'x 643 (9th Cir. 2015)

Analyzing California law, the Ninth Circuit held that coverage was precluded under a professional services exclusion in a Business and Management Indemnity Insurance Policy because the underlying .action centered on the insured's failure to render payroll services, which qualified as "professional services" under California law.

Goldberg v. Nat'l Union Fire Ins. Co., No. 1:13-CV-21653, 2015 U.S. Dist. LEXIS 154138 (S.D. Fla. May 18, 2015)

The court held that a professional services exclusion barred coverage under an executive and organization liability policy for underlying allegations that the directors and officers of the insured were involved in a Ponzi scheme, which defrauded claimants of millions of dollars from their trust accounts. The court rejected the insured's argument that the exclusion applied severally, and instead found that the exclusion applied jointly to bar coverage for a claim even if just one officer was

alleged to have improperly performed professional services giving rise to the claim. Although "professional services" was not defined in the policy, the court found that various allegations of banking services constituted "professional services" and were performed *for others* sufficient to trigger the exclusion.

Great-West Life & Annuity Ins. Co. v. Am. Econ. Ins. Co., No. 2:11-CV-02082, 2015 U.S. Dist. LEXIS 3275 (D. Nev. Jan. 9, 2015)

The court found that a professional services exclusion in a commercial general liability policy was unambiguous and excluded coverage for, among other things, services which require specialized knowledge and training. The court determined that the role of the insured at issue in the underlying case – negligent supervision and quality assurance review of medical service providers – was "professional" because the insured used trained nurses and other specialized techniques to provide that service.

Rodriguez-Vicente v. Hogar Bella Union, Inc., 106 F. Supp. 3d 283 (D.P.R. 2015)

Where a policy excluded coverage for the rendering of "professional services" by an insured nursing home but did not define that term, the court held that the insured's employees were not providing "professional services" by simply providing food and other essential needs to the underlying plaintiff because those acts did not require professional or specialized knowledge.

LCS Corr. Servs., Inc. v. Lexington Ins. Co., 800 F. 3d 664 (5th Cir. 2015)

The Fifth Circuit found that, under both Texas and Louisiana law, a professional services exclusion barred coverage under a commercial umbrella liability policy for underlying allegations that the insured correctional services company negligently caused an inmate's death by not providing proper medications. Despite the insured's attempts to obtain coverage by pointing to an administrative policy regarding medications, the Fifth Circuit found that liability was ultimately due to failure to provide medications which triggered the professional services exclusion.

Independent Counsel

Argonaut Ins. Co. v. Elite Home Med. & Respiratory, Inc., 593 F. App'x 666 (9th Cir. 2015)

The Ninth Circuit, applying California law, found that an insured's right to independent counsel was not triggered because appointed counsel could not control the defense in a manner in favor of the insurer, and held that the insured breached the cooperation clause of the insurance policy because the insured was not entitled to independent counsel and refused to tender its defense of the underlying action to the insurer.

Hartford Cas. Ins. Co. v. J.R. Mktg., LLC, 61 Cal. 4th 988 (2015)

The Supreme Court of California held that a carrier could pursue a direct action against an insured's independent counsel to seek the reimbursement of defense fees that were allegedly unreasonable and unnecessary.

Centex Homes v. St. Paul Fire & Marine Ins. Co., 237 Cal. App. 4th 23 (2015)

The court held that the insured was not entitled to independent counsel where the insured could not establish that an actual conflict of interest existed. The court found that the insured's allegations that the insurer would manipulate experts to its advantage and that it would control and steer litigation were inconclusive and insufficient to establish a conflict of interest.

Mount Vernon Fire Ins. Co. v. VisionAid, Inc., 91 F. Supp. 3d 66 (D. Mass. 2015)

The court held that an insurer's refusal to provide for the costs associated with the insured's counterclaim and requiring the insured to hire its own counsel with respect to that counterclaim did not create a conflict of interest that would entitle the insured to independent counsel. The court also found it significant that the insurer had withdrawn its reservation of rights in defending the insured.

State Farm Mut. Auto. Ins. Co. v. Hansen, 357 P.3d 338 (Nev. 2015)

The Supreme Court of Nevada adopted California's approach and held that a reservation of rights does not create a *per se* conflict of interest that triggers an insured's right to independent counsel. Instead, courts must determine whether there is an actual conflict of interest on a case-by-case basis.

Advancement of Defense Costs

Worthington Fed. Bank v. Everest Nat'l Ins. Co., No. 5:14-CV-0244, 2015 U.S. Dist. LEXIS 85888 (N.D. Ala. June 4, 2015)

Where the court relied on a policy's interrelated wrongful acts provision to deny summary judgment to one insurer, which had sought a declaration that its claims-made policy did not respond to a claim made after the policy's expiration, the court accordingly held that a second insurer had no obligation to advance defense costs because summary judgment was denied vis-à-vis the first insurer.

FDIC v. Gálan-Álvarez, No. 12-1029, 2015 U.S. Dist. LEXIS 109555 (D.P.R. Aug. 17, 2015)

The court held that an insurer was not required to advance defense expenses under a Side-A policy where the insurer was already providing coverage under a management liability policy. The court also determined that the policies' mutually repugnant "other insurance" clauses were irrelevant because neither had been invoked to deny coverage to the directors and officers.

Burks v. XL Specialty Ins. Co., No. 14-14-00740-CV, 2015 Tex. App. LEXIS 11610 (Tex. App. Nov. 10, 2015)

The court denied summary judgment to an insurer seeking a declaration that it had no obligation to advance defense expenses under a directors and officers liability policy. The court determined that even if the underlying disgorgement sought was "uninsurable" under Texas law, the insurer failed to establish that the policy excluded the advancement of defense expenses based solely on policy's definition of "loss."

Allocation

Twin City Fire Ins. Co. v. Hartman, Simons & Wood, LLP, 609 F. App'x 972 (11th Cir. 2015)

The Eleventh Circuit, applying Georgia law, reversed the trial court's dismissal of the insurer's claim for allocation of a settlement on the basis that: (1) the insurer waived its claim to allocation by failing to properly reserve its rights before agreeing to pay its policy limits; and (2) the insurer waived its right to recoupment by making a voluntary payment. In reversing the district court's decision and remanding the case for further proceedings, the Eleventh Circuit ruled that the insurer was potentially entitled to an allocation/reimbursement of funds it expended to settle uncovered claims and noted that the trial court's reliance on the insured's affirmative defenses in dismissing the insurer's complaint was improper at the motion-to-dismiss stage.

Jerry's Enters., Inc. v. U.S. Specialty Ins. Co., No. 14-1951, 2015 U.S. Dist. LEXIS 126241 (D. Minn. Sept. 22, 2015)

Where a directors and officers liability policy contained an insured v. insured exclusion and permitted allocation if "Loss covered by this Policy and loss not covered by this Policy are both incurred in connection with a single Claim," and the underlying action involved one set of claims jointly brought by separate insured and non-insured plaintiffs, the court held that the insured could not allocate between covered and uncovered claims because no causes of action in the complaint involved entirely uncovered claims. Accordingly, the policy's allocation provision did not compel the insurer to provide coverage for certain claims that the insured argued were covered by the policy.

Charla G. Aldous, P.C. v. Darwin Nat'l Assur. Co., 92 F. Supp. 3d 555 (N.D. Tex. 2015), *amended by Charla G. Aldous, P.C. v. Darwin Nat'l Assur. Co.*, No. 3:13-CV-3310-L, 2015 U.S. Dist. LEXIS 53788 (N.D. Tex. Apr. 24, 2015)

In an insurance coverage action under a professional liability policy, the court ruled that the insurer's duty to defend an insured attorney against a former client's claims did not encompass any fees or costs that were incurred in prosecuting the affirmative fee claim against the former client. In agreeing to provide a defense to the insured, the insurer explained that it would only be

responsible for one-third of defense counsel's fees and expenses, which the insurer allocated to the defense of the former client's counterclaims. After the insured was awarded $532,381.93 for attorneys' fees and costs incurred in the defense of the counterclaim, the insurer sought reimbursement from the insured, which it refused. When the parties filed competing motions for summary judgment, the court ruled that the insurer was entitled to recovery for the fees and costs it expended in defense of the counterclaim but that summary judgment was not warranted because the insurer had not conclusively established the amount it was entitled to recover.

Recoupment of Defense Costs and Settlement Payments

Zurich Am. Ins. Co. v. Expedient Title, Inc., No. 11-1633, 2015 U.S. Dist. LEXIS 167998 (D. Conn. Dec. 16, 2015)

The court held that because an errors and omissions liability policy was void at inception for material misrepresentations and because an insurer reserved its right to reimbursement of defense costs, the insurer could recoup the amounts spent in defense of the underlying action.

Am. Econ. Ins. Co. v. Aspen Way Enters., No. 14-09, 2015 U.S. Dist. LEXIS 163082 (D. Mont. Dec. 4, 2015)

An insurer can recoup defense costs pursuant to a general liability policy if the insurer reserves its rights to do so in a timely fashion, even without the consent of the insured.

Maxum Indem. Co. v. A One Testing Labs., Inc., No. 14-4023, 2015 U.S. Dist. LEXIS 165756 (S.D.N.Y. Dec. 10, 2015)

The court ruled that after it was determined that an insurer had no coverage obligations pursuant to a general liability policy, it was entitled to recoup defense costs because it reserved its right to do so.

Gen. Star Indem. Co. v. Driven Sports, Inc., 80 F. Supp. 3d 442 (E.D.N.Y. 2015)

Construing New York law and a commercial lines policy, the court held that where the policy did not contain a right to recoupment and the insurer's reservation was unilateral and opposed by the insured, the insurer could not recoup defense costs.

Chiquita Brands Int'l, Inc. v. Nat'l Union Fire Ins. Co., 2015-Ohio-5477 (Ct. App. Dec. 30, 2015)

In a coverage action regarding a general liability policy, the trial court determined that the insurer had a duty to defend the insured. The trial court's ruling was overturned on appeal, and the appellate court found that the insurer could recoup defense costs when it had reserved its right to do so because its duty to defend obligation was extinguished by the appellate court's reversal.

Am. W. Home Ins. Co. v. Donnelly Distribution, Inc., No. 14-797, 2015 U.S. Dist. LEXIS 14357 (E.D. Pa. Feb. 6, 2015)

The court found that an insurer was entitled to seek reimbursement of a settlement payment under a commercial liability policy after it was determined that the settlement payment fell outside the scope of the policy's coverage. The court relied on the key fact that the insurer reserved its right to seek recoupment in the event of a finding of no coverage.

Prot. Strategies, Inc. v. Starr Indem. & Liab. Co., 611 F. App'x 775 (4th Cir. 2015)

Applying Virginia law, the Fourth Circuit affirmed the trial court's ruling that an insurer was entitled to recoupment of defense costs because the directors and officers liability policy at issue expressly provided for such a right.

Consent

One West Bank, FSB v. Houston Cas. Co., No. CV 14-00547 BRO (JCGx) (C.D. Cal. Mar. 9, 2015)

The court granted summary judgment to the insurer and enforced a voluntary payments/consent provision of a professional liability policy, finding that the insurer properly denied coverage for a settlement entered into by the insured without the insurer's prior knowledge or consent. The insured initially sought to tender the suit for coverage, but addressed its notice to the wrong individual, resulting in a claim not being opened by the insurer. The insured then executed a settlement term sheet without the knowledge or consent of the insurer, and for which the insurer subsequently denied coverage. The court rejected the insured's argument that the insurer's delay in acknowledging the claim or reserving rights excused it

from obtaining the insurer's consent prior to settling the claim, and rejected the argument that the insurer was estopped from relying on the policy's consent provision because it had not called the provision to the attention of the insured before the insured agreed to the settlement.

Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co., 297 Ga. 38 (2015), *aff'd by Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co.*, 790 F.3d 1252 (11th Cir. 2015)

The Supreme Court of Georgia, answering a certified question from the Eleventh Circuit, held that a federal district court did not err in dismissing the insured's complaint and finding that the insured could not sue an excess insurer for bad faith refusal to settle, where the insurer agreed to contribute no more than $1 million to the underlying settlement but the insured settled for $4.9 million without obtaining the insurer's consent. The court concluded that although insurers should not unreasonably withhold consent to settle, the plain language of the policy (which also contained a "no action" clause) precluded the insured from suing the insurer because it did not fulfill "the contractually agreed upon condition precedent" of obtaining the insurer's consent. Based on this holding, the Eleventh Circuit affirmed the district court's dismissal of the insured's complaint.

Stuckey v. Nat'l Union Fire Ins. Co., No. 15 Civ. 6639 (CM), 2015 U.S. Dist. LEXIS 126611 (S.D.N.Y. Sept. 17, 2015)

Where an insurer did not allow comprehensive settlement authority in a sexual harassment suit against an employee of the insured, preventing global settlement discussions, the court held that the insured was not entitled to an injunction giving it unlimited settlement authority because the insured had not offered any evidence of the insurer's bad faith with respect to a settlement, a settlement had not been negotiated, and allowing the insured to settle the case without the insurer could cause an extreme hardship on the insurer by contradicting the express terms of the policy requiring consent, and depriving the insurer of the benefit of its bargain.

Babcock & Wilcox Co. v. Am. Nuclear Insurers, No. 2 WAP 2014, 2015 Pa. LEXIS 1551 (Pa. July 21, 2015)

The Supreme Court of Pennsylvania reversed the decision of the intermediate appellate court and held that if an insurer breached its duty to settle while defending subject to a reservation of rights, and the insured accepted a reasonable settlement offer, even if the policy contained a consent to settlement/cooperation clause, the insured needed to demonstrate only that the insurer breached its duty by failing to consent to a settlement that was fair, reasonable, and non-collusive, rather than demonstrating bad faith by the insurer. The court found that an insured does not forfeit insurance coverage by settling a tort claim without the consent of its insurer, when the insurer defends the insured subject to a reservation of rights, even when asserting that the claims may not be covered by the policy.

Trending Topic: Cyber Liability

Columbia Cas. Co. v. Cottage Health Sys., No. 2:15-CV-03432, 2015 U.S. Dist. LEXIS 93456 (C.D. Cal. July 17, 2015)

An insurer sought a declaration that a "failure to follow minimum required practices" exclusion in a cyber insurance policy, which required the insured to continuously implement cyber security controls identified in the insurance application, barred coverage for over $4 million in costs related to the insured's data breach involving patient information. The court declined to hear the merits and, instead, dismissed the action without prejudice and ordered the parties to mediate pursuant to the policy's ADR provision.

Recall Total Info. Mgmt. Inc. v. Federal Ins. Co., 317 Conn. 46 (2015)

The Connecticut Supreme Court held that, because there was no evidence that unencrypted personal information contained on lost computer tapes was published or accessed by a third party, there was no "personal injury" – *i.e.*, no violation of a person's right of privacy – and thus there was no coverage under the insurers' commercial general liability or umbrella insurance policies. The court also agreed with the appellate court that merely triggering a data breach notification statute is "not a substitute for personal injury." The insurers thus

had no duty to indemnify the insured for the $6 million it spent to mitigate the data breach damages.

Doctors Direct Ins., Inc. v. Bochenek, 2015 IL App (1st) 142919

An insurer did not have to defend or indemnify its insured under a cyber claims endorsement to a professional liability policy for a federal class action lawsuit alleging that the insured's unsolicited text messages violated the Telephone Consumer Protection Act and the Illinois Consumer Fraud Act, because those statutes are not "associated with" the control or use of personally identifiable financial, credit or medical information, and thus the insured's text messages did not constitute a "Privacy Wrongful Act."

Evanston Ins. Co. v. Gene by Gene Ltd., No. 4:14-CV-1842, 2016 U.S. Dist. LEXIS 4534 (S.D. Tex. Jan. 6, 2016)

The court held that a professional liability insurer had to defend an insured DNA analysis company in a proposed class action suit accusing the insured of publishing test results on its website without permission, reasoning that the alleged privacy violation fell within the definition of "personal injury" in the insurer's policies, which included making public any material that violated someone's right to privacy. The court rejected the insurer's argument that the allegations triggered a policy exclusion for claims based on violations of the Telephone Consumer Protection Act and CAN-Spam Act of 2003, because the underlying suit involved allegations of violations of the Genetic Privacy Act, which does not concern unsolicited communications to consumers.

Travelers Prop. Cas. Co. v. Fed. Recovery Servs., Inc., 103 F. Supp. 3d 1297 (D. Utah 2015)

The court held that an insurer had no duty to defend the insured data processing companies in a suit alleging that they withheld customer information from the claimant because the underlying claims were not rooted in negligence as required by the insureds' technology errors and omissions liability policy. The court reasoned that the policy provided coverage for claims involving errors, omissions, or negligent acts, but the claimant alleged knowledge, willfulness, and malice.

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