



# **D&O and Professional Liability**

## **2010 | A Year In Review**

2010 was another active year for courts faced with issues involving directors and officers and other professional liability insurance policies, with at least ten federal circuit courts, nine state supreme courts and numerous other courts issuing decisions of note. Notice, particularly when it involves timeliness and claims-made policies, continues to be a heavily litigated topic, as does an insured's prior knowledge of facts and circumstances that could give rise to a claim. Dishonesty and personal profit exclusions, as well as the insured v. insured exclusion, have been addressed in several jurisdictions this year. Assessment of an insured's provision of professional services was the focus of numerous coverage cases. Courts also continued to scrutinize payment of defense costs, with issues of advancement, allocation and recoupment resulting in several noteworthy decisions. We have summarized a selection of the notable cases here and expect that these issues will continue to be important in the directors and officers and professional liability area in 2011 and beyond.

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### **NOTICE**

*Arrowood Indem. Co. v. Macon County Greyhound Park, Inc., No. 3:09-cv-812-MEF, 2010 U.S. Dist. LEXIS 127658 (M.D. Ala. Dec. 3, 2010)*

An insured's failure to provide notice of a claim to its excess commercial liability insurer until two weeks after a verdict was rendered in the underlying suit resulted in a forfeiture of coverage under the policy where the policy required notice "as soon as practicable" and the insured's failure to timely report the claim resulted in prejudice to the insurer.

*Emissions Tech., Inc. v. Twin City Fire Ins. Co., No. CV10-0393-PHX-NVW, 2010 U.S. Dist. LEXIS 117926 (D. Ariz. Nov. 4, 2010)*

A claims-made liability insurer was not required to demonstrate prejudice in order to deny coverage based on late notice where the insured failed to comply with the policy's requirement that the insured provide notice "as soon as practicable, but in no event later than sixty (60) days after the termination of the Policy Period."

*Dardanelle & Russellville Railroad, Inc. v. Certain Underwriters at Lloyd's, London*, 2010 Ark. App. 790, 2010 Ark. App. LEXIS 850, reh'g denied, No. CA 10-220, 2011 Ark. App. LEXIS 15 (Ark. Ct. App. Jan. 12, 2011)

Because a notice requirement defines the scope of coverage available under a claims-made policy and is a condition precedent to coverage, an insurer, under Arkansas law, is not required to demonstrate prejudice in order to deny coverage based on an insured's failure to provide timely notice of a claim.

*Fireman's Fund Ins. Co. v. Care Mgmt., Inc.*, No. 09-662, 2010 Ark. LEXIS 131 (Ark. March 14, 2010)

Where an insurance policy requires, as a condition precedent to coverage, that the insured provide notice of a claim as soon as practicable, an insurer need not demonstrate prejudice in order to deny coverage on the basis of late notice.

*Fireman's Fund Ins. Co. v. Care Mgmt., Inc.*, No. 1:08CV00056 JLH, 2010 U.S. Dist. LEXIS 33792 (E.D. Ark. Apr. 6, 2010)

An insured was not entitled to coverage for either of two related lawsuits where it failed to provide notice of the first lawsuit until more than two years after the lawsuit was filed.

*Genesis Ins. Co. v. Magma Design Automation, Inc.*, 386 F. App'x 728 (9th Cir. 2010)

Under California law, an insured's notice of circumstances to its directors and officers liability insurer did not constitute sufficient notice of a potential claim where the notice did not include certain information required by the policy. The insurer also had no duty to investigate the circumstances reported by the insured, and could not be charged with constructive notice of any facts the insurer would have discovered had it conducted an investigation.

*PIMG, Inc. v. Carolina Cas. Ins. Co.*, No. 09-CV-2022 BEN (CAB), 2010 U.S. Dist. LEXIS 21734 (S.D. Cal. March 3, 2010)

An insured was not entitled to coverage under a policy that required notice of claim no later than sixty days after the policy's expiration where the insured reported the claim to its broker, but the broker failed to notify the insurer until after the reporting deadline had expired. Based on the language of the notice provision, the policy was a claims-made-and-reported policy and the insurer, therefore, was not required to demonstrate prejudice in order to deny coverage for a claim that was not timely reported.

*Z.F. Micro Solutions, Inc. v. Certain Underwriters at Lloyd's London*, No. H034513, 2010 Cal. App. Unpub. LEXIS 6098 (Cal. Ct. App. Aug. 2, 2010)

An insured was not entitled to coverage under a claims-made-and-reported directors and officers liability policy where the insured failed to provide the insurer with written notice of a claim "as soon as practicable" and "in no event later than 60 days after the end of the [policy] [p]eriod," as required by the policy.

*Act Lending Corp. v. Mortgage Ins. Agency, Ltd.*, No. 09-60729-CIV-HUCK/O'SULLIVAN, 2010 U.S. Dist. LEXIS 12557 (S.D. Fla. Feb. 12, 2010)

An insured's notice of a claim after the expiration of a claims-made professional liability policy precluded coverage under the policy without regard to whether the insurer could demonstrate prejudice from the insured's delay in reporting. The insured's notice to its broker was not sufficient because there was no agency between the broker and the insurer.

*Fid. Nat'l Prop. & Cas. Co. v. Boardwalk Condo. Ass'n*, No. 3:07cv278/MCR/EMT, 2010 U.S. Dist. LEXIS 54623 (N.D. Fla. May 12, 2010)

Although an "amicable" demand letter constituted a claim under a claims-made policy, an insurer could not deny coverage for the claim based on late notice unless the insurer could establish prejudice from the insured's delay in reporting.

*Lankford v. State Farm Mut. Auto. Ins. Co.*, 703 S.E.2d 436 (Ga. Ct. App. 2010)

An insured's failure to provide notice of an accident for almost two years vitiated coverage under an automobile liability policy, even though another driver, who was insured by the same company, gave timely notice of the accident to the insurer.

*Fed. Ins. Co. v. Ill. Funeral Director's Ass'n*, No. 09 C 1634, 2010 U.S. Dist. LEXIS 129747 (N.D. Ill. Dec. 8, 2010)

An insured was not entitled to coverage under the directors and officers liability coverage section of a claims-made multi-lines policy for any of several related claims where the insured failed to give notice of the first claim for more than two years, which did not constitute notice "as soon as practicable."

*Safety Nat'l Cas. Corp. v. Village of Cahokia*, No. 3:09-cv-482-JPG-DGW, 2010 U.S. Dist. LEXIS 96813 (S.D. Ill. Sept. 15, 2010)

An insured was not entitled to coverage for a claim under an excess workers compensation policy where the insured failed to notify the excess insurer promptly

after becoming aware of the likelihood that the claim would exceed 50% of the self-insured retention.

*W. Am. Ins. Co. v. Yorkville Nat'l Bank*, 939 N.E.2d 288 (Ill. 2010)

An insured's 27-month delay in providing written notice of a claim was not unreasonable where the insured's agent advised the insured that the suit likely would not be covered under a commercial general liability policy and the insured tendered notice of the claim once it learned that the suit would be covered under the policy.

*Berglind v. Paintball Bus. Ass'n*, 930 N.E.2d 1036 (Ill. Ct. App. 2010)

Where a commercial general liability policy required notice of an occurrence as soon as practicable, an insured's 11-month delay in providing the requisite notice was not unreasonable, because no injury had immediately manifested, the insured was not a "sophisticated" insured, notice was provided to the insurer before an order of default was entered against the insured, and the court could not conclude that the insurer was prejudiced by the delay in reporting.

*Ashby v. Davidson*, 930 N.E.2d 53 (Ind. Ct. App. 2010), transfer granted and vacated by *O'Brien v. Davidson*, 49S04-1011-CV-635, 2010 Ind. LEXIS 769 (Ind. Nov. 10, 2010)

A claimant's notice of a claim to the insurer during the requisite policy period satisfied the reporting requirement under a claims-made lawyers professional liability policy. In reaching this conclusion, the court observed that the purpose behind the notice provision was to enable the carrier to investigate and defend claims in a timely manner. The court also recognized that notice by the insured was an "impossibility" where the insured "was running from the law as a result of the multi-state crime spree he had commenced upon abandoning his law practice."

*P.R. Mallory & Co., Inc. v. Am. Cas. Co. of Reading, Pa.*, 920 N.E.2d 736 (Ind. Ct. App. 2010)

The insured was not entitled to coverage under a commercial general liability policy where the insured had knowledge of an occurrence giving rise to liability long before it provided notice of the occurrence to its insurer, and the insured failed to rebut the presumption that its delay in reporting resulted in prejudice to the insurer.

*Farm Bureau Life Ins. Co. v. Chubb Custom Ins. Co.*, 780 N.W.2d 735 (Iowa 2010)

An insurer need not show prejudice in order to deny coverage on the basis of late notice where the insured

fails to comply with the notice provision of a claims-made professional liability policy.

*Bell v. Parry*, No. 10-CA-369, 2010 La. App. LEXIS 1623 (La. Ct. App. Nov. 23, 2010)

Where a medical malpractice policy only provided coverage for claims both first made and reported during the policy period, the insurer properly denied coverage for a claim that was not first made during the policy period.

*New Eng. Envt'l Techs. v. Am. Safety Risk Retention Group, Inc.*, 738 F. Supp. 2d 249 (D. Mass. 2010)

A 30-day extended reporting period in an environmental consultant's professional liability policy was ambiguous as to whether claims had to be both first made and reported during the 30-day reporting period in order for coverage to apply. The policy, therefore, would be construed to provide coverage for a claim that was made during the policy period but reported within 30 days after the policy's expiration.

*Podiatry Ins. Co. of Am. v. Povich*, 707 F. Supp. 2d 716, 724 (W.D. Mich. 2010)

A claims-made medical malpractice insurer was prejudiced by the insured's failure to report a claim until after a default judgment had been entered against the insured in an underlying case, even though the insurer still could have litigated the amount of damages caused by the insured's misconduct.

*Westport Ins. Corp. v. Al Bourdeau Ins. Servs.*, No. 287920, 2010 Mich. App. LEXIS 643 (Mich. Ct. App. Apr. 15, 2010)

An insured's delay in reporting a claim until more than eighteen months after the claim had been made, and after judgment was entered against the insured, violated a professional liability's requirement that notice be provided "as soon as practical."

*Capella Univ., Inc. v. Exec. Risk Specialty Ins. Co.*, 617 F.3d 1040 (8th Cir. 2010)

Under Minnesota law, a disability discrimination lawsuit filed against an insured university was a claim first made during the policy period of an educators' professional liability policy, even though the subject of the lawsuit also was the subject of three administrative complaints filed prior to the policy's inception. The court reasoned that the earlier proceedings were not formal administrative proceedings, and, therefore, did not trigger the policy's prior and pending litigation exclusion.



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*Chartis Specialty Ins. Co. v. Restoration Contractors, Inc., No. 10-1160 ADM/FLN, 2010 U.S. Dist. LEXIS 101177 (D. Minn. Sept. 27, 2010)*

Letters sent to the insured constituted a “claim” and, because notice of the claim was not given to the insurer during the relevant policy period, but instead was given at the time the lawsuit was filed during a later policy period, the insurer had no obligation to provide coverage for the lawsuit stemming from the unreported letters.

*Countryside Cooperative & Mich. Millers Mut. Ins. Co. v. The Harry A. Koch Co., 790 N.W.2d 873 (Neb. 2010)*

An insurer need not show prejudice in order to deny coverage on the basis of late notice where the policy requires that a claim be both made and reported during the policy period or an extended reporting period in order for coverage to apply.

*Westchester Fire Ins. Co. v. Mendez, No. 2:05-CV-01417-PMP-RJJ, 2010 U.S. Dist. LEXIS 66273 (D. Nev. July 1, 2010)*

An insurer properly denied coverage under an airport owners and operators general liability policy requiring notice of occurrences and claims “as soon as practicable,” where the insured failed to notify the insurer of the accident in question for over a year and a half, failed to cooperate in the insurer’s investigation, and failed to notify the insurer of the resulting lawsuit against the insured.

*Modern Techs. Group, Inc. v. Twin City Fire Ins. Co., No. 09-3393, 2010 U.S. Dist. LEXIS 104326 (D.N.J. Sept. 30, 2010)*

A professional liability insurer was not obligated to establish prejudice in order to deny coverage based on late notice where the policy incorporated a claims-made reporting endorsement, which required notice of claim no later than 60 days after the policy’s expiration.

*Russoniello v. Twin City Fire Ins. Co., No. 09-452 (PGS), 2010 U.S. Dist. LEXIS 50015 (D.N.J. May 20, 2010)*

A letter sent to an insured lawyer constituted a claim under a lawyers professional liability policy where the letter demanded money and claimed legal malpractice on the part of the insured. The insurer, however, had no obligation to provide coverage for the claim because the insured failed to report the claim within the time frame specified in the policy.

*Century 21 Frontier v. Arch Ins. Group, No. 2:10-cv-1997, 2010 U.S. Dist. LEXIS 112588 (D.N.J. Oct. 21, 2010)*

A claims-made errors and omissions policy did not provide coverage for a claim that was not first made during the policy period.

*JPMorgan Chase & Co. v. Travelers Indem. Co., 897 N.Y.S.2d 405 (N.Y. App. Div. 2010)*

Under a claims-made multi-lines policy, an insured’s electronic notice of circumstances, which identified claims that likely would arise out of certain specified conduct, was valid where the insurer never indicated to the insured that the notice was insufficient.

*Penn Traffic Co. v. Nat’l Union Fire Ins. Co., 914 N.Y.S.2d 534 (App. Div. Dec. 30, 2010)*

A claims-made-and-reported directors and officers liability policy did not provide coverage for a claim that the insured failed to report to the insurer until almost two years after the policy expired. The insured also could not invoke a notice of different circumstances previously reported to the insurer as a basis for restoring coverage for the claim that was not timely reported.

*Rockland Exposition, Inc. v. Great Am. Assurance Co., No. 09-CV-5148, 2010 U.S. Dist. LEXIS 103267 (S.D.N.Y. Sept. 29, 2010)*

An insured’s three-month delay in providing written notice of a claim under a commercial general liability policy that incepted prior to January 17, 2009 did not constitute notice “as soon as practicable” and, therefore, precluded coverage under the policy, regardless of whether the insurer suffered prejudice as a result of the untimely notice. For policies issued in New York on or after January 17, 2009, however, a prejudice requirement would apply.

*Essex Ins. Co. v. Liberty Mut. Ins. Co., No. 10-1078, 2010 U.S. Dist. LEXIS 124069 (E.D. Pa. Nov. 23, 2010)*

The clear and unambiguous language of a commercial general liability policy required notification of claims and occurrences by the insured, and did not permit notice from a third party on behalf of the insured.

*McMillen Eng’g Inc. v. Travelers Indem. Co., No. 07-1084, 2010 U.S. Dist. LEXIS 103474 (W.D. Pa. Sept. 30, 2010)*

A demand that an insured engineering firm perform or finance repairs was not a “claim,” as defined in an architects and engineers professional liability policy, because the demand did not allege negligence on the part of the insured.

*Rodriguez v. Hosp. Metropolitano Cabo Rojo, No. 08-1788 (PG), 2010 U.S. Dist. LEXIS 13748 (D.P.R. Feb. 17, 2010)*

An insurer was entitled to dismissal of an insured physician’s coverage complaint where the third party claim for which the insured sought coverage was filed after the expiration of the claims-made policy period.

*Berenyi, Inc. v. Landmark Am. Ins. Co.*, No. 2:09-CV-01556, 2010 U.S. Dist. LEXIS 3018 (D.S.C. Jan. 14, 2010)

A letter provided to an insured civil engineer noting a flood plain error was not a claim made prior to the inception of the policy when the letter was not addressed to the insured and there was no evidence a demand was made on the insured for money or services before the policy commenced.

*Julio & Sons Co. v. Travelers Cas. & Sur. Co. of Am.*, 684 F. Supp. 2d 330 (S.D.N.Y. 2010)

Under Texas law, a claims-made professional liability policy did not provide coverage for a claim that was not reported to the insurer until seven months after the policy expired.

*Evanston Ins. Co. v. Keeway Am., LLC*, No. 3:09-CV-1115-M, 2010 U.S. Dist. LEXIS 66072 (N.D. Tex. June 29, 2010)

Noting that it was resolving an unsettled question of Texas law, the court held that an insurer was required to demonstrate prejudice before denying coverage on the basis of late notice under a claims-made policy that required notice "as soon as practicable," even where the insured did not give notice of the claim until after the policy expired.

*St. Paul Fire & Marine Ins. Co. v. Metro. Real Estate, LLC*, No. 2:09-cv-238, 2010 U.S. Dist. LEXIS 104172 (D. Utah Sept. 29, 2010)

The reporting requirements of a professional liability policy were ambiguous where the policy reasonably could be interpreted to require reporting of any claim within the policy period, or to require reporting only of those claims for a covered loss during the policy period.

*Westport Ins. v. Ray Quinney & Nebeker*, No. 2:07-CV-236-TC, 2010 U.S. Dist. LEXIS 60772 (D. Utah June 18, 2010)

An issue of fact existed as to whether an insurer was equitably estopped from enforcing a notice provision in a professional liability policy where the insured presented evidence showing that it had been instructed by the insurer on numerous prior occasions that written notice of potential claims was not required.

*Westport Ins. Corp. v. Markham Group, Inc. PS*, No. 10-35075, 2010 U.S. App. LEXIS 23683 (9th Cir. Nov. 17, 2010)

Under Washington law, the notice-prejudice rule is not applicable to claims-made-and-reported policies.

*Columbia Cnty. Credit Union v. Chicago Title Ins. Co.*, No. 09-5290 RJB, 2010 U.S. Dist. LEXIS 12624 (W.D. Wash. Feb. 12, 2010)

Issues of fact existed as to when an insured should have provided notice of a claim under a lender's title insurance policy, and as to whether the insurer suffered prejudice as a result of the insured's allegedly late notice.

*Westport Ins. Co. v. Appleton Papers Inc.*, 787 N.W.2d 894 (Wis. Ct. App.), review denied, 791 N.W.2d 66 (Wis. 2010)

Under Wisconsin law, when a commercial general liability policy requires notice of an "occurrence covered hereunder," an insured has no duty to give notice of an uninsured occurrence. As such, the insured's failure to notify the insurer of environmental cleanup costs incurred by the insured did not violate the policy's notice provision because, at the time, Wisconsin law provided that environmental cleanup costs were not "damages."

*Barr v. Wolter Bros. Builders, Inc.*, 785 N.W.2d 688 (Wis. Ct. App. 2010)

A commercial general liability insurer properly denied coverage for a claim that the insured failed to report within the time prescribed by the policy where the delay in reporting resulted in prejudice to the insurer because, by the time the insurer received notice, it was too late to amend pleadings, file dispositive motions, complete discovery, serve trial exhibits, participate in mediation, name witnesses or provide expert reports in the underlying litigation.

## RELATED CLAIMS

*Prof'l Solutions Ins. Co. v. Mohrlang*, 363 Fed. App'x 650 (10th Cir. Jan. 29, 2010)

Under Colorado law, two claims by different claimants against a single attorney were not related and, therefore, were subject to separate per claim limits of liability under a professional liability policy where one claim alleged negligence by the insured in structuring a corporate stock sale and the second claim accused the insured of making misrepresentations in connection with a deed of trust encumbering certain assets of the same corporation.



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*Singh v. Prof'l Underwriters Liab. Ins. Co., No. 05C-04-228 WCC, 2010 Del. Super. LEXIS 392 (Del. Sup. Ct. June 14, 2010)*

An action accusing an insured physician of medical malpractice was not related to a later action filed by the physician's professional liability insurer against the physician's insurance broker alleging that the broker provided false information on the physician's application for the policy, even though the broker ultimately impled the insured physician into the later action based on the insured's alleged failure to advise the broker of the circumstances underlying the medical malpractice lawsuit.

*Vozzcom, Inc. v. Great Am. Ins. Co. of New York, 374 Fed. App'x 906 (11th Cir. March 31, 2010)*

Under Florida law, an action by an insured's former employee for failure to pay overtime was related to two previous actions by former employees for failure to pay overtime, because all three employees did the same job at approximately the same time and alleged similar wrongdoing by the insured.

*Fed. Ins. Co. v. Ill. Funeral Director's Ass'n, No. 09-C-1634, 2010 U.S. Dist. LEXIS 129747 (N.D. Ill. Dec. 8, 2010)*

A letter from a state regulatory office, various civil suits, and grand jury subpoenas constituted related claims under the directors and officers liability coverage section of a multi-lines policy where each claim was based on the insured's alleged underfunding of a burial trust and payment of excessive management fees in connection with the trust.

*Uhlich Children's Advantage Network v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 929 N.E.2d 531 (Ill. Ct. App. 2010)*

An employment discrimination lawsuit filed against an officer of the insured entity was not related to an EEOC charge filed by the claimant during a prior policy period because the officer was not named as a respondent in the EEOC proceeding, and the directors and officers liability policy at issue did not contain any language deeming claims based on related wrongful acts to be one claim first made at the earliest date on which the first of any of the related claims was made.

*Cont'l Cas. Co. v. Howard Hoffmann & Assoc., No. 08-CH-25568, slip op. (Ill. Cir. Ct., Cook Cty. March 10, 2010)*

Coverage under a lawyers professional liability policy for multiple malpractice actions against multiple insureds was limited to a single per claim limit of liability where each of the actions arose out of the insureds' failure to supervise a paralegal who engaged in a single embezzlement scheme.

*Passaic Valley Sewerage Comm. v. St. Paul Fire & Marine Ins. Co., No. A-3674-07T3, 2010 N.J. Super. Unpub. LEXIS 475 (N.J. Sup. Ct. App. Div. March 8, 2010)*

A public entity liability insurer had no obligation to pay costs incurred by the insured to defend a counterclaim filed during the insurer's policy period where the allegations of wrongdoing contained in the counterclaim represented a continuation of the same wrongdoing alleged in a suit brought three years earlier against the insured by the same claimant.

*Hrobuchak v. Fed. Ins. Co., No. 3:10-CV-481, 2010 U.S. Dist. LEXIS 112189 (M.D. Pa. Oct. 21, 2010)*

The court could not conclude, at the pleading stage, that an unlawful debt collection practices action filed against the insured during the policy period was related to pre-policy debt collection practices litigation involving misconduct by different attorneys, in different states, at different times, and affecting different plaintiffs.

*Bryan Bros., Inc. v. Cont'l Cas. Co., 704 F. Supp. 2d 537 (E.D. Va. 2010)*

A lawsuit filed during the policy period based on an employee's alleged embezzlement scheme was not covered under an accountant's professional liability policy where the theft underlying the lawsuit was interrelated to other acts of embezzlement that commenced prior to the policy's inception.

## PRIOR KNOWLEDGE, KNOWN LOSS AND RESCISSION

*Prof'l Asset Strategies v. Cont'l Cas. Co., No. 2:09-CV-1238, 2010 U.S. Dist. LEXIS 115923 (N.D. Ala. Aug. 27, 2010)*

Applying an objective standard, a prior knowledge carve-out in the insuring agreement of an investment advisor's professional liability policy precluded coverage for claims asserted against the insured by a client whose money had been stolen, because a reasonable investment advisor would have expected that his misappropriation of client funds might result in a claim against his employer.

*Evanston Ins. Co. v. Hearthstone of Sun City, LLC, Nos. CV-08-1632-PHX-FJM and CV-09-0109-PHX-MHM, 2010 U.S. Dist. LEXIS 139003 (D. Ariz. Jan. 28, 2010)*

Noting that the issue presented a "close question," the court held that a request for medical records was not necessarily sufficient to put a health care provider on

notice of a potential professional liability claim against it, even where the insured listed the request on a “possible claim reporting log” submitted by the insured to multiple insurers before the inception of the policy in question.

*In re Sonic Blue Inc.*, No. C 09-4853 JF, 2010 U.S. Dist. LEXIS 49593 (N.D. Cal. May 19, 2010)

An insurer effectuated rescission of a directors and officers liability policy when it filed a rescission action, with the subsequent coverage litigation merely confirming the validity of the rescission. The court further held that the insured’s bankruptcy plan administrator was entitled to the return of the policy premium less any benefits that had been conferred on the insured prior to rescission.

*Cont'l Cas. Co. v. Olmer*, No. 3:08-CV-805 (CFD), 2010 U.S. Dist. LEXIS 82360 (D. Conn. Aug. 10, 2010)

A material issue of fact existed regarding whether the insured knowingly made a misrepresentation on his application for professional liability insurance when he answered “no” to a question about whether there were claims pending against him. The court held that the fact that the insured filed an answer in a lawsuit in which he had been named as a defendant one month prior to completing the policy application was not dispositive of his state of mind at the time he completed the application.

*Maher & Williams v. ACE Am. Ins. Co.*, No. 3:08-CV-1191 (JBA), 2010 U.S. Dist. LEXIS 91934 (D. Conn. Sept. 3, 2010)

Applying a mixed subjective/objective standard, a prior knowledge exclusion did not preclude coverage for malpractice claims against an insured law firm because a former partner’s actual but undisclosed knowledge of his own wrongful conduct could not be imputed to the other partners who had no actual knowledge of the misconduct at issue.

*Ross v. Cont'l Cas. Co.*, 393 F. App'x 726 (D.C. Cir. 2010) (per curiam)

Applying a mixed subjective/objective test, a professional liability insurer properly denied coverage for a claim alleging malpractice based on the entry of a \$900,000 default judgment in a case handled by the insured. The court found that the insured had failed to disclose in his application for the policy that he was in the midst of appealing the default judgment in question, which resulted from his failure to file an answer on his client’s behalf.

*Am. Guar. & Liab. Ins. Co. v. Cascoe*, No. 09-61168-CIV-COHN-SELTZER, 2010 U.S. Dist. LEXIS 50705 (S.D. Fla. May 15, 2010)

Fact issues precluded summary judgment on the issue of whether a prior knowledge carve-out in the insuring agreement of a lawyers professional liability policy precluded coverage for a claim that a firm employee stole escrowed client funds, because the insurer did not establish as a matter of law that either of the firm’s two lawyers had a basis to believe, when submitting their application for the policy, that one of them had breached a professional duty or that their employee was committing fraud.

*Nourachi v. First Am. Title Ins. Co.*, 44 So.3d 602 (Fla. Ct. App. 2010)

A party who did not rely on a title insurance company to advise it of encumbrances prior to acquiring title to a piece of property could not recover under its title insurance policy for a material defect in title of which the insured had actual knowledge and which it failed to disclose to the insurer at the time it applied for the policy in question.

*C. Ingram Co. v. Phila. Indem. Ins. Co.*, 694 S.E.2d 181 (Ga. Ct. App. 2010)

A prior knowledge exclusion barred coverage under a professional liability policy for a claim by a former client against an insured law firm where the client had warned the firm, prior to the policy’s inception, that he would assert a legal malpractice claim against it.

*Valiant Ins. Co. v. Jawich*, No. 09-C-950, 2010 U.S. Dist. LEXIS 104693 (N.D. Ill. Sept. 30, 2010)

A question of fact precluded summary judgment in a rescission action filed by a professional liability insurer where the insurer failed to establish that the insured’s nondisclosure of a claim in his policy application materially affected the risk accepted by the insurer in issuing the policy.

*Fed. Ins. Co. v. Ill. Funeral Director's Ass'n*, No. 09-C-1634, 2010 U.S. Dist. LEXIS 129747 (N.D. Ill. Dec. 8, 2010)

The known loss doctrine precluded coverage under a directors and officers liability policy for a lawsuit and subpoena served on an insured entity where the insured had received letters from a governmental entity indicating that the insured owed money to a burial trust fund, which should have put it on notice of the



possibility of future claims, particularly given that the insured sought to increase the limits of its directors and officers liability coverage after receiving the letters in question.

*Cont'l Cas. Co. v. Law Offices of Melbourne Mills, Jr., PLLC*, No. 5:06-272-JMH, 2010 U.S. Dist. LEXIS 26711 (E.D. Ky. March 15, 2010)

An insurer was entitled to rescission of a lawyers professional liability policy where an insured lawyer misrepresented that no bar complaints had been filed against him, even though he knew, prior to submitting his application for the policy, that he had been the subject of a citizen complaint.

*Great Am. Ins. Co. v. GeoStar Corp.*, Nos. 09-12488-BC, 09-12608-BC, and 09-14306-BC, 2010 U.S. Dist. LEXIS 20258 (E.D. Mich. March 5, 2010)

An excess directors and officers liability insurer's rescission action was dismissed because a severability provision contained in the primary policy required the insurer to plead facts establishing that each individual insured had knowledge of alleged misrepresentations contained in the policy application.

*Axis Ins. Co. v. Innovation Ventures, LLC*, No. 08-CV-15298, 2010 U.S. Dist. LEXIS 78559 (E.D. Mich. Aug. 4, 2010)

A question of fact existed regarding whether misrepresentations in an application for a multi-media liability policy, made in response to questions about recent lawsuits and the scope of the insured's business, were "material," because testimony from the underwriter did not directly address the question of materiality, and it was unclear from the record whether disclosure of any lawsuits against the insured would have caused the insurer to reject the application or charge a higher premium.

*Nat'l Cas. Co. v. Franklin County, Miss.*, 718 F. Supp. 2d 785 (S.D. Miss. 2010)

A prior knowledge exclusion did not bar coverage for a civil rights claim under a law enforcement liability policy issued to a local government where the county employees whose knowledge purportedly triggered the exclusion left their county employment in the 1960s, no current county employees possessed the same knowledge, and, even if they did, such knowledge would not have caused a reasonable person to expect that the county might face a claim several decades after the events in question had occurred.

*Navigators Specialty Ins. Co. v. Scarinci & Hollenbeck, LLC*, No. 09-4317 (WHW), 2010 U.S. Dist. LEXIS 47124 (D.N.J. May 12, 2010)

A prior knowledge exclusion barred coverage under a lawyers professional liability policy for a lawsuit filed against the insured law firm where, prior to the policy's inception, the claimants accused the law firm of committing fraud and improperly withholding documents responsive to discovery requests in another lawsuit.

*Murphy v. Allied World Assur. Co., Inc.*, 370 Fed. App'x 193, Nos. 09-1362-bk(L) and 09-1365-cv(Con), 2010 U.S. App. LEXIS 5915 (2d Cir. March 23, 2010)

Under New York law, prior knowledge exclusions in excess directors and officers liability policies barred coverage for all insureds where any insured had knowledge of facts and circumstances that might give rise to a claim, despite a severability provision in the primary policy.

*Gluck v. Exec. Risk Indem., Inc.*, 680 F. Supp. 2d 406 (E.D.N.Y. 2010)

An exclusion for claims arising from certain facts if the insured failed to disclose them in response to questions on the policy application excluded coverage for claims tendered by a non-profit corporation under its directors, officers and trustees liability policy. The renewal application asked if the insured had entered into any settlement agreements with the government, and the non-profit corporation failed to disclose a closing agreement it had entered into with the IRS, whereby the non-profit was required to enact certain governance reforms. Because the underlying suits clearly arose from the IRS closing agreement, the exclusion applied.

*Care Risk Retention Group v. Martin*, No. CA-23749, 2010 Ohio App. LEXIS 5124 (Ohio Ct. App. Dec. 10, 2010)

A doctor's answers to questions in an application for professional liability insurance regarding whether he had knowledge or information of any potential claim that might be brought against him were representations, rather than warranties, because the answers were statements of personal opinions, not statements of fact.

*Harris Thermal Transfer Prods., Inc. v. James River Ins. Co.*, No. CV 09-718-PK, 2010 U.S. Dist. LEXIS 72673 (D. Or. July 19, 2010)

A prior knowledge exclusion precluded coverage for a customer's counterclaim under a professional liability policy issued to a design and manufacturing firm where, prior to the inception of the policy, the insured had

received letters from the customer contending that there were substantial defects and errors in the insured's work, and that the customer had suffered extensive and actual consequential damages as a result.

*McMillen Eng'g, Inc. v. Travelers Indem. Co., 744 F. Supp. 2d 416 (W.D. Pa. 2010)*

Under a mixed subjective/objective standard, prior knowledge exclusions in both an architects and engineers professional liability policy and the insured's application for the policy precluded coverage for a claim arising out of the insured's provision of general engineering services where the insured was aware, before the policy inception, of prior demands and suits related to the claim in question.

*Westchester Surplus Lines Ins. Co. v. Safe Auto Ins. Group, Inc., No. 3:09-cv-1744, 2010 U.S. Dist. LEXIS 64788 (M.D. Pa. June 30, 2010)*

An insured automobile insurance company was entitled to dismissal of an insurer's rescission claim, in which the insurer accused the insured of making material misrepresentations in its application for a management protection insurance policy and a higher limits warranty by failing to disclose information about a potential bad faith claim. The court held that the application did not ask the insured to divulge any specific or potential claims against it, and that the insured was justified in answering "no" to a question about whether it knew of circumstances that could result in a future claim exhausting the \$2 million policy limits, despite the insured's objective knowledge of a potential bad faith claim that could exceed \$100,000 in damages.

*Berenyi, Inc. v. Landmark Am. Ins. Co., No. 2:09-cv-01556-pmd, 2010 U.S. Dist. LEXIS 3018 (D.S.C. Jan. 14, 2010)*

A prior knowledge exclusion did not vitiate a professional liability insurer's duty to defend, even though the insurer showed that the insured engineering firm first learned, two years before a negligence claim was filed against it, that it had erroneously designated a hotel as being in a flood zone on a survey it prepared. The court determined that the insured did not know that litigation would be forthcoming when it first learned of the error, and the insurer failed to identify specific facts demonstrating that the insured should have expected litigation to arise based on the error.

*Bryan Bros., Inc. v. Cont'l Cas. Co., 704 F. Supp. 2d 537 (E.D. Va. 2010)*

A prior knowledge carve-out in the insuring agreement of an accountant's professional liability policy precluded

coverage for claims based on a series of employee thefts where each of the thefts at issue was part of a continuous embezzlement scheme that commenced prior to the policy's inception.

*Sheinbaum v. Am. Cas. Co., No. 09-273 (CKK), 2010 U.S. Dist. LEXIS 105014 (D.D.C. Oct. 1, 2010)*

Under Virginia law, an insurer could not rescind a nurse's professional liability policy based on the insured's representation in her policy application that she was a "registered nurse," where the insured was not a registered nurse in the United States, but was a registered nurse in Denmark.

*Carolina Cas. Ins. Co. v. Ott, No. C09-5540 RJB, 2010 U.S. Dist. LEXIS 44933 (W.D. Wash. May 7, 2010)*

A prior knowledge limitation in a lawyers professional liability policy applied as a matter of law where it was undisputed that, prior to the policy's inception, the lawyer's former clients accused him of wrongdoing for failing to prosecute their claim, the former clients had filed a grievance with the lawyer's bar association, and the lawyer, in response to the grievance, had submitted two fabricated letters to the bar that purportedly were sent by him to the former clients.

*Westport Ins. Corp. v. Markham Group Inc., 403 F. App'x 264 (9th Cir. 2010)*

Under Washington law, a prior knowledge exclusion unambiguously precluded coverage for a legal malpractice claim under a lawyers professional liability policy where, prior to the effective date of the policy, the insureds were aware that their error had led to a dismissal of their client's case with prejudice, and that they had been sanctioned for filing a baseless claim without proper investigation.

## PRIOR ACTS, PRIOR NOTICE, AND PENDING AND PRIOR LITIGATION EXCLUSIONS

*Evanston Ins. Co. v. Hearthstone of Sun City, LLC, No. CV-08-1632, 2010 U.S. Dist. LEXIS 46062 (D. Ariz. April 8, 2010)*

A prior acts exclusion precluded coverage under a general and professional liability policy for a lawsuit filed against the insured during the policy period where the incident underlying the suit was listed in "possible claim reporting log" submitted to a previous insurer.



*Property I.D. Corp. v. Greenwich Ins. Co.*, 377 F. App'x 648 (9th Cir. 2010)

Under California law, a pending and prior litigation exclusion barred coverage for a lawsuit that was related to a cross-complaint previously filed by the claimant, because both the current lawsuit and the prior cross-complaint were based on a former employee's establishment of a rival business after leaving the insured company.

*Hilb Rogal & Hobbs Ins. Servs. of Cal., Inc. v. Indian Harbor Ins. Co.*, 379 F. App'x 609 (9th Cir. 2010)

Under California law, a pending and prior litigation exclusion barred coverage under a professional liability policy for a lawsuit that related to a prior lawsuit alleging that the insured failed to obtain workers' compensation coverage for one of its clients.

*Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057 (Del. 2010)

An endorsement specifying a retention for matters relating to an ongoing governmental investigation did not render a prior acts exclusion in a directors and officers liability policy ambiguous, and the exclusion operated to bar coverage for criminal indictments filed against insured directors and officers where the acts underlying those indictments occurred before the prior acts date. The policy's prior notice exclusion also barred coverage for the indictments at issue because the exclusion applied where notice had been provided to any insurer, not just an insurer in the same tower of insurance.

*Acosta, Inc. v. Nat'l Union Fire Ins. Co.*, 39 So. 3d 565 (Fla. Ct. App. 2010)

A prior or pending litigation exclusion precluded coverage under a directors and officers liability policy for a lawsuit filed against the insured entity by the creditors' committee of one of the insured entity's bankrupt competitors where both the committee's lawsuit and a prior lawsuit filed by the insured's competitor accused the insured of misappropriating the competitor's assets.

*Vozzcom, Inc. v. XL Specialty Ins. Co.*, No. 10-60213, 2010 U.S. Dist. LEXIS 38313 (S.D. Fla. April 19, 2010)

Prior notice and prior or pending litigation exclusions did not entitle a professional liability insurer to dismissal, at the pleading stage, of an action filed by the insured entity to establish coverage for wage and hour claims asserted by two employees during the policy period, even though both employees sought to be included as plaintiffs in a wage and hour class action that previously had been filed against the insured before the policy inception.

*Cox Commc'n, Inc. v. Nat'l Union Fire Ins. Co.*, 708 F. Supp. 2d 1322 (N.D. Ga. 2010), *reconsideration denied*, No. 09-CV-410, 2010 U.S. Dist. LEXIS 130072 (N.D. Ga. Dec. 7, 2010)

A prior notice exclusion applying to "any Claim which has been reported . . . under any policy of which this policy is a renewal or replacement or which it may succeed in time" was ambiguous and would be interpreted to apply only to claims that were the subject of notice given under a policy previously issued to the insured.

*Community Bank v. Progressive Cas. Ins. Co.*, No. 1:08-CV-1443, 2010 U.S. Dist. LEXIS 75608 (S.D. Ind. July 27, 2010)

A prior notice exclusion precluded coverage for claims accusing an insured bank of making misrepresentations in connection with a commercial real estate loan where a prior lawsuit involving the same loan made to the same borrower on the same real estate project previously had been reported to another insurer.

*Capella Univ., Inc. v. Executive Risk Specialty Ins. Co.*, 617 F.3d 1040 (8th Cir. 2010)

Under Minnesota law, an exclusion for "any Claim . . . arising from . . . any . . . formal administrative or regulatory proceeding . . . against any Insured on or prior to" the policy's pending or prior proceeding date did not bar coverage for a disability discrimination lawsuit brought by one of the insured entity's former students, because a prior proceeding brought by the U.S. Department of Education based on the same student's complaints was not sufficiently "formal" and, therefore, did not trigger the referenced exclusion.

*Byrd & Assocs., PLLC v. Evanston Ins. Co.*, 378 F. App'x 391 (5th Cir. 2010)

Under Mississippi law, a prior acts exclusion was not inconsistent with the insuring agreement of a professional liability policy because, although the policy potentially provided coverage for claims based on wrongful acts occurring prior to the policy's inception, coverage expressly was excluded if the acts occurred before the date specified in the prior acts exclusion.

*Berenyi, Inc. v. Landmark Am. Ins. Co.*, No. 2:09-CV-01556, 2010 U.S. Dist. LEXIS 3018 (D.S.C. Jan. 14, 2010)

A professional liability insurer was obligated to provide a defense to an insured engineering firm in connection with a lawsuit accusing the insured of committing negligence both before and after the policy's retroactive date where at least some of the allegedly negligent acts post-dating the retroactive date were unrelated to alleged wrongdoing occurring before that date.

## DISHONESTY, PERSONAL PROFIT AND INTENTIONAL ACTS EXCLUSIONS

*Wilshire Ins. Co. v. S.A.*, 227 P.3d 504 (Ariz. Ct. App. 2010)

A criminal act exclusion precluded coverage under a commercial general liability policy for a claim alleging false imprisonment by the insured, even though the policy provided coverage for false imprisonment, where there was no dispute that the insured had purposefully committed misconduct, rather than simply committing an intentional act that unintentionally resulted in wrongful conduct.

*Cont'l Cas. Co. v. Olmer*, No. 3:08-cv-805 (CFD), 2010 U.S. Dist. LEXIS 82360 (D. Conn. Aug. 10, 2010)

A question of fact existed as to whether payments by the Client Security Fund Committee, which were made to reimburse clients for their attorney's dishonest conduct, were "regulatory rulings" that would satisfy an adjudication requirement contained in a professional liability policy's exclusion for dishonest conduct.

*Stinker Stores, Inc. v. Nationwide Agribusiness Ins. & Order Co.*, No. CV 08-370-LMB, 2010 U.S. Dist. LEXIS 31643 (D. Idaho March 31, 2010)

A question of fact existed as to whether a dishonesty exclusion in an employee benefit liability endorsement to a commercial general liability policy precluded coverage for claims brought by former employees of various insured entities alleging improper termination of a predecessor's deferred compensation plan.

*Am. Family Mut. Inc. Co. v. Bower*, No. 1:07 CV 254, 2010 U.S. Dist. LEXIS 118567 (N.D. Ind. Nov. 5, 2010)

An exclusion for sexual molestation, intentional injury and violation of law did not bar coverage under a homeowner's policy for the negligent acts of two parents whose son sexually molested a child at the insureds' home where the claimant did not allege that the insureds' actions were anything but negligent.

*Manganella v. Evanston Ins. Co.*, Case No. 09-11264-RGS, 2010 U.S. Dist. LEXIS 113608 (D. Mass. Oct. 26, 2010)

An intentional acts exclusion in an employment practices liability policy barred coverage for a charge of discrimination asserted in an administrative proceeding because an arbitrator's finding in an earlier proceeding that the president of the insured entity willfully had failed to comply with the entity's sexual harassment policy was conclusive and operated as collateral estoppel in the later discrimination proceeding.

*Nat'l Cas. Co. v. Franklin County*, 718 F. Supp. 2d 785 (S.D. Miss. 2010)

A deliberate acts exclusion contained in a law enforcement liability policy did not preclude coverage for alleged statutory violations by the insured county because the exclusion only applied to civil and criminal charges filed against an insured "if the charges result in an obligation to pay damages, a plea of guilty, a verdict of guilty, a sentence or plea of no contest," and the underlying complaint did not allege a civil judgment against, a criminal plea by, or any conviction of, an insured.

*Am. Home Assur. Co. v. Pope*, 591 F.3d 992 (8th Cir. 2010)

Under Missouri law, a professional liability policy's exclusion for knowingly wrongful acts was ambiguous and would be interpreted to exclude coverage only where the insured intended the consequences of his wrongful act. Applying this standard, the insurer could not rely on the exclusion as a basis for denying coverage for a claim that an insured psychologist improperly failed to warn authorities that an abusive caretaker likely would continue to abuse a child after the abuser stopped attending therapy.

*Allstate Ins. Co. v. Campbell*, No. 2009-2358, 2010 Ohio LEXIS 3292, slip op. (Ohio Dec. 30, 2010), reconsideration denied, 2011 Ohio LEXIS 492 (March 2, 2011)

Although not limited to cases of sexual molestation and homicide, the doctrine of inferred intent did not apply to intentional act exclusions contained in homeowner's liability policies where a prank by teenage boys and the harm caused by the prank were not intrinsically tied so that the harm necessarily resulted from the prank. The Supreme Court of Ohio remanded case to the trial court to determine whether the boys intended or expected the harm that resulted from their intentional acts.

*Minn. Lawyers Mut. Ins. Co. v. Mazullo*, No. 09-830, 2010 U.S. Dist. LEXIS 39046 (E.D. Pa. April 20, 2010)

An exclusion in a lawyers professional liability policy for "any claim for damages arising out of the dishonest, criminal, malicious or deliberately fraudulent, act, error, or omission of the insured" precluded coverage in its entirety for a complaint alleging intentional misrepresentation and fraud against an insured attorney.



**TROUTMAN  
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*Gen. Star Indem. Co., Inc. v. Mid-Atlantic Youth Servs. Corp.*, No. 3:10-CV-0511, 2010 U.S. Dist. LEXIS 101551 (M.D. Pa. Sept. 27, 2010), *reconsideration denied*, 2010 U.S. LEXIS 126180 (M.D. Pa. November 30, 2010)

An insurer did not have a duty to defend or indemnify its insured under a liability insurance policy for a scheme through which the insured provided judges with kickbacks to sentence juveniles to detention centers because the scheme triggered two policy exclusions for knowingly violating the rights of another and for criminal acts.

*Hrobuchak v. Fed. Ins. Co.*, No. 3:10-CV-481, 2010 U.S. Dist. LEXIS 112189 (M.D. Pa. Oct. 21, 2010), *reconsideration denied*, 2010 U.S. Dist. LEXIS 131441 (M.D. Pa. Dec. 13, 2010)

A professional liability policy's exclusion for claims based on unfair trade practices precluded coverage for a claim alleging violations of Pennsylvania's Unfair Trade Practices Act. The policy's exclusion for fraud and willful violations of a statute, however, did not bar coverage for alleged violations of the Fair Debt Collection Practices Act because the allegations did not involve fraud or willful misconduct.

*Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562 (5th Cir. 2010); No. H-09-3712, 2010 U.S. Dist. Lexis 108920 (S.D. Tex. Oct. 13, 2010)

In the context of a preliminary injunction hearing for the payment of defense costs, the court determined that, under Texas law, there was a substantial likelihood that an insurer could demonstrate by a preponderance of the evidence that each insured "in fact" committed money laundering within the meaning of the money laundering exclusion in a directors and officers liability policy. The insurer, therefore, did not have to advance defense costs pending a final resolution of the underlying litigation.

*N. Seattle Cnty. C. Found. v. Great Am. E&S Ins. Co.*, No. C09-635 RAJ, 2010 U.S. Dist. LEXIS 17905 (W.D. Wash. March 1, 2010)

Under a professional liability policy, a "personal profit or advantage" exclusion precluded coverage for a claim against a credit counseling company alleging violations of the Georgia Debt Adjusting Act, which prohibits a debt adjuster from collecting fees of more than 7.5% of each customer's debt. The claim for excessive fees charged unambiguously was a claim for "personal profit, or advantage to which [the] Insured was not legally entitled."

## RESTITUTION, DISGORGEMENT AND DAMAGES

*Desert Mountain Props. Ltd. P'ship v. Liberty Mut. Fire Ins. Co.*, 236 P.3d 421 (Ariz. Ct. App. 2010)

A commercial general liability policy covered expenses an insured real estate developer incurred in repairing property damage to homes caused by soil settlement because such expenses were "damages," which is commonly defined to mean "the estimated money equivalent for detriment or injury sustained."

*TriTech Software Sys. v. U.S. Specialty Ins. Co.*, No. 10-00094, 2010 U.S. Dist. Lexis 132245 (C.D. Cal. Dec. 13, 2010)

The settlement of claims for unpaid overtime constituted the payment of "wages," which specifically were excluded from the definition of "Loss," and, therefore, were not covered under the directors and officers liability policy at issue.

*Am. Guar. & Liab. Ins. Co. v. Cascoe*, No. 09-61168, 2010 U.S. Dist. LEXIS 50705 (S.D. Fla. May 15, 2010)

A judgment against an insured law firm in the amount of client deposits that were misappropriated by a firm employee from the firm's escrow account constituted "damages" and, thus, was recoverable under the firm's professional liability policy, because the firm was not required simply to return money to its clients, but to compensate the clients for money they lost.

*Southwest Ga. Fin. Corp. v. Colonial Am. Cas. & Sur. Co.*, 397 Fed. App'x 563 (11th Cir. 2010)

Under Georgia law, a directors and officers liability policy did not provide coverage for payments made by an insured bank to settle claims asserted by other banks to whom the insured had sold interests in two loans made to a real estate developer who later defaulted on the loans, because the insured's settlement payments were merely a return of unpaid loan balances due to the investing banks and, therefore, were not "loss," which was defined in the policy to exclude "any principal, interest or other monies paid, accrued or due as a result of any loan, lease or extension of credit."

*Aon Corp. v. Certain Underwriters at Lloyd's of London*, No. 06 CH 16852 (Ill. Cir. Ct. Dec. 3, 2010)

Under Illinois law, an insurance broker's professional liability policies did not provide defense or indemnity coverage for claims arising out of the broker's alleged receipt of, or eligibility to receive, contingent commissions, because such claims sought disgorgement

into a constructive trust and injunctive relief, which were solely restitutionary in nature. In addition, under New York law, the same policies did not provide coverage for defense costs incurred in connection with similar claims asserted by the Attorneys General of multiple states, because such claims sought only uninsurable disgorgement.

*Cont'l Cas. Co. v. Donald T. Bertucci, Ltd.*, 926 N.E.2d 833 (Ill. App. Ct. 2010)

A lawyers professional liability policy did not provide coverage for an underlying lawsuit seeking the return of fees because the lawsuit did not allege "damages" within the meaning of the policy.

*Ryerson, Inc. v. Fed. Ins. Co.*, No. 09-4173, slip op. (N.D. Ill. Sept. 30, 2010)

The settlement of a lawsuit alleging material misrepresentations and concealment of information in the sale of the insured's subsidiary was not insurable "Loss" under a directors and officers liability policy because the settlement represented a price adjustment to account for the inflated purchase price the claimant paid for the subsidiary and, therefore, was uninsurable restitution for which the policy did not provide coverage.

*Houston Cas. Co. v. Sprint Nextel Corp.*, No. 09-1387, 2010 U.S. Dist. LEXIS 124302 (E.D. Va. Nov. 22, 2010)

Under Kansas law, the settlement of shareholder class actions alleging breaches of fiduciary duties in connection with setting the conversion ratio for the recombination of two tracking stocks was not uninsurable as a matter of law. The court rejected the argument that the settlement was in satisfaction of "a preexisting corporate obligation," explaining that "[t]he mere existence of generalized obligations to follow the law and honor one's fiduciary duty does not render uninsurable a lawsuit alleging that corporate directors failed to do so."

*Indian Harbor Ins. Co. v. Bestcomp, Inc.*, No. 09-7327, 2010 U.S. Dist. LEXIS 139252 (E.D. La. Nov. 12, 2010)

A medical service provider's errors and omissions policy did not provide coverage for amounts arising from claims against it for failure to comply with statutory notice requirements when applying discounts to workers' compensation medical bills, because the amounts paid were not compensatory sums and were punitive in nature and, therefore, were not "damages" under the policy. The insurer, however, still had a duty to defend and, therefore, was required to indemnify the insured for claims expenses incurred in defending the case.

*Fin. Res. Network, Inc. v. Brown & Brown, Inc.*, No. 09-11315, 2010 U.S. Dist. LEXIS 122358 (D. Mass. Nov. 18, 2010)

A life insurance agent's errors and omissions policy did not cover claims for rescission of certain life insurance policies, or the return of commissions on such policies, because rescission was a claim for non-pecuniary relief expressly excluded from the definition of damages. The "return or withdrawal of fees, commissions or brokerages charges" was excluded from the definition of damages, and a return of commissions was uninsurable disgorgement.

*Genzyme Corp. v. Fed. Ins. Co.*, 622 F.3d 62 (1st Cir. 2010)

Under Massachusetts law, a settlement of a shareholder class action arising out of the insured company's invocation of a share exchange was not uninsurable restitution by the corporation; however, claims against the corporation (although not against the individual directors and officers) were barred by the "Bump-Up Provision," which excluded coverage for the organization's payment of "allegedly inadequate or excessive consideration in connection with its purchase of securities issued by [it]."

*U.S. Bank Nat'l Ass'n v. Fed. Ins. Co.*, No. 10-0266, 2010 U.S. Dist. LEXIS 105553 (W.D. Mo. Oct. 4, 2010)

The settlement of claims against an officer of the insured entity was not covered "Loss" under a directors and officers liability policy where the settlement contractually exempted the officer from collection of a resulting judgment, the insured assigned his rights to policy proceeds to the claimants, and the policy provided coverage only for sums the officer became "legally obligated to pay" for which he has not been "absolved from payment."

*Passaic Valley Sewerage Comm'r v. St. Paul Fire & Marine Ins. Co.*, No. A-3674-07T3, 2010 N.J. Super. Unpub. LEXIS 475 (N.J. Super. Ct. App. Div. March 8, 2010)

A claims-made policy issued to a state-run sewage management company did not cover amounts paid by the insured to settle claims arising out of its alleged abuse of regulatory authority over a third party and unfair competition in connection with such activity, because the settlement did not require the insured to pay any "money damages," which the policy defined unambiguously to mean "monetary compensation for past harms and injuries."



**TROUTMAN  
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***Neal-Pettit v. Lahman*, 928 N.E.2d 421 (Ohio 2010)**

An award of attorneys' fees against the insured qualified as recoverable "damages" under an automobile insurance policy, even though the fee award was derived from an award of punitive damages, which was not insurable under Ohio law, because the fee award also stemmed from the underlying bodily injury suffered by the claimant.

***City of Myrtle Beach v. United Nat'l Ins. Co.*, No. 08-01183, 2010 U.S. Dist. LEXIS 95285 (D.S.C. Sept. 13, 2010)**

A commercial general liability policy covered defense expenses incurred in defending claims for injunctive relief stemming from alleged discrimination and civil rights violations because such expenses constituted "damages" under the policy where the injunctive relief was directly tied to claims for compensatory damages and the policy did not expressly exclude expenses incurred in defending equitable claims.

***Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. US Bank Nat'l Assoc.*, 597 F.3d 298 (5th Cir. 2010)**

Under Texas law, a former officer's return of severance payments to the insured entity after the insured's bankruptcy estate found the payments to be fraudulent transfers constituted uninsurable restitution and was not "Loss" under the entity's directors and officers liability policy.

***Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, 709 F. Supp. 2d 432 (E.D. Va. 2010)**

A commercial general liability policy did not cover costs associated with the insured's remediation of defective Chinese-manufactured drywall in the homes of purchasers because the insured voluntarily instituted the remediation plan in the absence of a lawsuit or regulatory action and, therefore, costs to remediate did not constitute "damages" under the policy in question.

***Republic Franklin Ins. Co. v. Albemarle County Sch. Bd.*, No. 10-00007, 2010 U.S. Dist. LEXIS 130974 (W.D. Va. July 23, 2010)**

Claims for unpaid wages under the Fair Labor Standards Act and pursuant to contract were not covered under an educator's professional liability policy because failure to pay appropriate wages was not a "Wrongful Act" under the policy, and because the remedies sought were not "Loss" under the policy, were restitutive in nature, and did not constitute damages.

## **INSURED CAPACITY**

***Yocum v. St. Paul Mercury Ins. Co.*, No. 5:09-CV-00123-WRW, 2010 U.S. Dist. LEXIS 52814 (E.D. Ark. May 27, 2010)**

Where a directors and officers liability policy only provided coverage for Management Practices Acts, and the definition of that term specifically excluded coverage for dual capacity claims, the conduct of insureds who were acting in a dual capacity did not constitute Management Practices Acts within the meaning of the policy.

***Goerner v. Axis Reinsurance Co.*, No. 09-55385, 2010 U.S. App. LEXIS 21624 (9th Cir. Oct. 20, 2010)**

Under California law, a directors and officers liability insurer was obligated to defend the president of the insured corporation where claims reasonably could be interpreted as being asserted against him in his capacity as an officer of the insured corporation, even if the underlying complaint contained no specific reference to the insured's position with the company.

***Wolfes v. Burlington Ins. Co.*, Nos. C-07-00696 RMW and C-07-04657 RMW, 2010 U.S. Dist. LEXIS 21753 (N.D. Cal. March 10, 2010)**

A commercial general liability insurer had no duty to defend a former director and officer of the insured entity where the conduct giving rise to the claim was not within the scope of the individual's duties as an insured person.

***Doe v. North River Ins. Co.*, 719 F. Supp. 2d 1352 (M.D. Fla. 2010)**

A commercial general liability policy did not provide coverage for a child molestation claim asserted against an insured police officer where the police officer was not acting in an insured capacity at the time of the molestation.

***Trice, Geary & Myers, LLC v. Camico Mut. Ins. Co.*, No. WDQ-09-2754, 2010 U.S. Dist. LEXIS 28541 (D. Md. March 25, 2010)**

An exclusion in an accountant's professional liability policy for activities undertaken by the insured in his capacity as an insurance agent, rather than as an accountant, operated to bar coverage for a claim alleging improprieties in the insured's sale of insurance products to an accounting client.

## INSURED V. INSURED EXCLUSIONS

*TriTech Software Sys. v. U.S. Specialty Ins. Co.*, No. 10-00094-R (VBKx), 2010 U.S. Dist. LEXIS 132245 (C.D. Cal. Dec. 13, 2010)

An insurer had no duty to defend a wage and hour lawsuit brought by a former employee under a directors and officers liability policy containing an “insured versus insured” exclusion. An exception to the exclusion for claims brought by former executives and for “Workplace Torts” did not apply because labor law violations do not qualify as “Workplace Torts,” and the claimant never had served as an executive of the insured entity.

*Strategic Capital Bancorp Inc. v. St. Paul Mercury Ins. Co.*, 723 F. Supp. 2d 1053 (C.D. Ill. 2010), reconsideration denied, No. 2:10-2062, 2010 U.S. Dist. LEXIS 77478 (C.D. Ill. July 30, 2010)

A directors and officers liability insurer had no duty to defend claims asserted by an insured person acting in her capacity as a trustee where the policy contained an “insured versus insured” exclusion that precluded coverage for suits brought by an insured “in any capacity.”

*Strategic Capital Bancorp Inc. v. St. Paul Mercury Ins. Co.*, No. 2:10-2062, 2010 U.S. Dist. LEXIS 121160 (C.D. Ill. October 20, 2010)

An “insured versus insured” exclusion precluded coverage in its entirety for a claim asserted on behalf of both insured and uninsured parties, notwithstanding the inclusion of an allocation provision in the directors and officers liability policy at issue.

*Medford v. Lavergne*, No. 1:08-00804, 2010 U.S. Dist. LEXIS 31646 (W.D. La. March 31, 2010)

An “insured versus insured” exclusion barred coverage under a directors and officers liability policy for a lawsuit filed by a former officer, who qualified as a “Manager” of the insured entity, where the lawsuit did not trigger an exception for claims made by an insured “who is not a past or present Manager.”

*Thomas Eng'g Co., Inc. v. Twin City Fire Ins. Co.*, No. 10-902 (RHK/JJK), 2010 U.S. Dist. LEXIS 127481 (D. Minn. Dec. 2, 2010)

A directors and officers liability insurer had no duty to defend claims brought by an insured managing director in his capacity as a trustee and derivative claimant where an “insured versus insured” exclusion precluded coverage under the policy for suits brought by an insured “in any capacity.”

*Ideal Dev. Corp. v. U.S. Liab. Ins. Co.*, No. 10-772 (PAM/RLE), slip op. (D. Minn. July 13, 2010)

An “insured versus insured” exclusion precluded coverage for a shareholder derivative lawsuit and various claims asserted by a member of the insured entity’s board of directors in his capacity as principal of an uninsured entity because all of the relevant matters were brought by or at the behest of the same board member.

*U.S. Bank Nat'l Ass'n v. Fed. Ins. Co.*, No. 10-cv-0266-W-HFS, 2010 U.S. Dist. LEXIS 105553 (W.D. Mo. Oct. 4, 2010)

An “insured versus insured” exclusion did not bar coverage for a lawsuit brought by the trustee of a creditors’ trust where an exception to the exclusion for claims asserted by a “bankruptcy trustee” or a “trustee . . . or similar official appointed by the court in any . . . proceeding . . . to liquidate the Insured Organization” was ambiguous as to whether it encompassed claims made by a trustee who was selected pursuant to a corporate restructuring plan and approved by the bankruptcy court.

*Julio & Sons Co. v. Travelers Cas. & Sur. Co. of Am.*, 684 F. Supp. 2d 330 (S.D.N.Y. 2010)

Applying Texas law, an exception to an “insured versus insured exclusion” for claims “maintained independently of, and without the assistance, participation or intervention of any Insured” did not apply where both of the named plaintiffs qualified as insureds under the policy, and did not render coverage illusory because derivative actions often are brought by stakeholders who are not insureds.

*Macey v. Carolina Cas. Ins. Co.*, No. 08-6067-cv, 2010 U.S. App. LEXIS 13326 (2d Cir. June 30, 2010)

Under Virginia law, a directors and officers liability policy was ambiguous as to whether an “insured versus insured” exclusion precluded coverage for a lawsuit brought by shareholders of a predecessor to the insured entity, and, therefore, would be construed to provide coverage for the shareholder claim.

## COVERAGE FOR CONTRACTUAL LIABILITY

*Am. Legacy Found. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 623 F.3d 135 (3d Cir. 2010)

Under Delaware law, a breach of contract exclusion in a not-for-profit individual and organization liability policy barred coverage for a suit based on a contract



entered into before the insured organization existed where the insured adopted the terms of the contract. The “escape clause” in the exclusion allowing coverage for liability that would have existed in the absence of the contract did not apply because, although the underlying claimant could have pursued claims for libel or slander, the allegations made against the insured were based solely on alleged breaches of contract.

*Parish v. United States Liab. Ins. Co.*, No. 10-CV-00219-REB, 2010 U.S. Dist. LEXIS 136765 (D. Idaho Dec. 28, 2010)

An employment practices liability policy did not cover claims that the insured employer failed to pay commissions owed to an employee under an employment contract.

*Radianse, Inc. v. Twin City Fire Ins. Co.*, No. 10-10120-RGS, 2010 U.S. Dist. LEXIS 106778 (D. Mass. Oct. 6, 2010)

Contract exclusions in a directors and officers liability policy and an employment practices liability policy precluded defense coverage for a lawsuit alleging tortious interference with contractual relations, inducement of breach of contract, and violations of the Massachusetts Fair Business Practices Statute because, even though the insured was not a contracting party and the claims were based on tort law, the exclusion was sufficiently broad to preclude coverage for the claim in question.

*UnitedHealth Group Inc. v. Columbia Cas. Co.*, No. 05-CV-1289 (PJS/SRN), 2010 U.S. Dist. LEXIS 3457 (D. Minn. Jan. 19, 2010)

A managed care professional liability policy’s insuring clause unambiguously provided coverage for breach of contract claims, thereby overriding the general “business risk” doctrine that posits that professional liability policies ordinarily do not cover such claims, but the policy’s blanket billing exclusion nevertheless excluded coverage for a lawsuit alleging that the insured failed to pay service providers the full amount owed under contract.

*Permasteelisa CS Corp. v. Columbia Cas. Co.*, 377 Fed. App’x 260 (3d Cir. 2010)

A contractor’s professional liability policy did not provide coverage for amounts the contractor paid, pursuant to a contract, to fix certain defects it caused because, under New Jersey law, the policy phrase “legally obligated to pay” required entry of a final judgment against the insured and the contractor paid the amounts in question before any such judgment had been entered.

*Gilbert Texas Constr., L.P. v. Underwriters at Lloyd’s London*, 327 S.W.3d 118 (Tex. 2010)

An exclusion in a commercial general liability policy barring coverage for property damage “for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement,” except for damages for which the insured would have been liable in the absence of the contract or agreement, precluded coverage for a contractor’s settlement of a breach of contract claim after tort claims against it were dismissed.

*Republic Franklin Ins. Co. v. Albemarle County Sch. Bd.*, No. 3:10-CV-00007, 2010 U.S. Dist. LEXIS 130974 (W.D. Va. July 23, 2010)

An educator’s liability policy did not cover a lawsuit alleging that the insured school district failed to pay wages as required by contract and federal law because the district’s failure to meet its pre-existing contractual obligations was not a “Wrongful Act,” and the back wages were not “Loss,” as those terms were defined in the policy.

## PROFESSIONAL SERVICES

*Prof’l Asset Strategies v. Cont’l Cas. Co.*, No. 2:09-cv-1238-AKK, 2010 U.S. Dist. LEXIS 115923 (N.D. Ala. Aug. 27, 2010)

An insured’s theft of client funds was within the performance of professional services under an investment company’s professional liability policy.

*Associated Cnty. Bancorp, Inc. v. The Travelers Cos. Inc.*, No. 3:09-CV-1357, 2010 U.S. Dist. LEXIS 34799 (D. Conn. Apr. 7, 2010)

A professional services exclusion in a directors and officers liability policy precluded coverage for claims asserted by customers against a bank in connection with a fraudulent scheme perpetrated by Bernard Madoff, particularly where the insured bank had purchased a separate professional liability policy.

*Colony Ins. Co. v. Suncoast Med. Clinic, LLC*, 726 F. Supp. 2d 1369 (M.D. Fla. 2010)

A professional services exclusion in a commercial general liability policy barred coverage for negligence claims arising out of the insured medical clinic’s alleged failure to have in place adequate policies, procedures, staff and assistive technology to ensure performance of diagnostic tests and appropriate communication between medical personnel, all of which were integral to the rendering of medical services and required medical skill.

*Atl. Marine Fla., LLC v. Evanston Ins. Co.*, 721 F. Supp. 2d 1244 (M.D. Fla. 2010)

A professional services exclusion in a commercial general liability policy barred coverage for claims alleging negligent construction and design of a watertight door where the claimant referenced activities specifically named in the exclusion.

*Appel v. Lexington Ins. Co.*, 29 So. 3d 377 (Fla. Ct. App. 2010)

A general liability policy that provided professional liability coverage for errors in connection with selling and installing alarm systems did not provide coverage for claims alleging that the insured entity failed to identify a Ponzi scheme orchestrated by the entity's president.

*Cont'l Cas. Co. v. Bertucci*, 926 N.E.2d 833 (Ill. Ct. App. 2010)

A lawyers professional liability policy did not provide coverage for disputes related to the insured's wrongful retention of fees because the policy's definition of professional services covered only legal services, which specifically did not include fee disputes.

*Neighborhood Hous. Servs. of Am. v. Ridley*, No. 1:08-CV-182, 2010 U.S. Dist. LEXIS 102842 (N.D. Ind. Sept. 24, 2010)

A professional services exclusion precluded coverage under a directors and officers liability policy for a claim alleging that an insured mortgage loan servicer breached a loan servicing agreement by, among other things, failing to maintain accurate records, converting amounts owed under various loans, and allowing loans purchased by the claimant to go into default.

*Scottsdale Ins. Co. v. Nat H. Sandler*, M.D., No. 09-5674, 2010 U.S. App. LEXIS 12787 (6th Cir. June 21, 2010)

Under Kentucky law, a psychiatrist's professional liability policy did not provide coverage for negligence claims arising out of a prescription written to an individual who was not a patient of the insured's clinic because the treatment was outside the scope of the insured's employment and, therefore, did not constitute professional services within the meaning of the policy.

*Fin. Resources Network, Inc. v. Brown & Brown, Inc.*, No. 09-11315-MBB, 2010 U.S. Dist. LEXIS 122358 (D. Mass. Nov. 18, 2010)

An errors and omissions insurer was obligated to provide coverage for a claim accusing multiple insureds of failing to pay a portion of an employee's salary where the alleged wrongdoing involved "decisions regarding

contribution levels and tax free payments into a profit sharing plan," and the policy covered professional services relating to "Profit Sharing Plans" and "Financial Planning Activities."

*Welch Foods, Inc. v. Nat'l Union Fire Ins. Co.*, No. 09-12087-RWZ, 2010 U.S. Dist. LEXIS 110004 (D. Mass. Oct. 1, 2010)

An insured was not entitled to coverage under the professional services section of a multi-lines liability policy for false advertising claims asserted by a competitor because, although the policy defined "professional services" to include "promotional and marketing services," professional liability coverage generally is not designed to provide protection against claims by an insured's competitors.

*Lansing Cnty. Coll. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 1:09-CV-111, 2010 U.S. Dist. LEXIS 17696 (W.D. Mich. March 1, 2010)

A professional services exclusion in a not-for-profit protector policy precluded coverage for a Section 1983 claim accusing campus police officers of wrongful arrest.

*Great Am. Ins. Co. v. Geostar Corp.*, No. 09-12488-BC, 2010 U.S. Dist. LEXIS 20258 (E.D. Mich. March 5, 2010)

A professional services exclusion in a directors and officers liability policy would not bar coverage in its entirety for claims alleging negligence in the insured's operation of and selling shares in a thoroughbred mare-leasing program, because the claims not only allege misconduct in the insured's provision of professional tax and investment advice to claimants, but also alleged misconduct in the operation of the insured's business, which is a covered risk under directors and officers liability policies.

*Western Nat'l Mut. Ins. Co. v. Structural Restoration, Inc.*, No. A09-1598, 2010 Minn. App. Unpub. LEXIS 406 (Minn. Ct. App. May 4, 2010), *review denied*, 2010 Minn. LEXIS 411 (Minn. Ct. App. July 20, 2010)

A professional services exclusion in a commercial general liability policy barred coverage for a claim based on inspection activities in connection with the concrete restoration of a grain silo because the experience necessary for concrete restoration inspections requires specialized skill or knowledge.



TROUTMAN  
SANDERS

*Cairo Marine Servs., Inc. v. Homeland Ins. Co.*, No. 4:09CV1492CDP, 2010 U.S. Dist. LEXIS 96019 (E.D. Mo. Sept. 15, 2010)

A professional services exclusion in a commercial general liability policy barred coverage for a third party claim alleging that the insured failed to properly inspect a malfunctioning crane.

*Navigators Specialty Ins. Co. v. Scarinci & Hollenbeck, LLC*, No. 09-4317, 2010 U.S. Dist. LEXIS 47124 (D.N.J. May 12, 2010)

Claims against an insured law firm implicated professional services within the meaning of a lawyers professional liability policy because, even though the claimants were not clients of the insured firm, the claims were based on the firm's alleged participation in a scheme with its clients, who were foreclosing on the claimants' property, to steal property and rental income, conceal negligence, damage property and prevent the claimants from retaining ownership of the property.

*Cont'l Cas. Co. v. JBS Constr. Mgmt., Inc.*, No. 09 Civ. 6697 (JSR), 2010 U.S. Dist. LEXIS 85467 (S.D.N.Y. July 30, 2010)

A professional liability policy that defined professional services to include activities undertaken as a "construction manager" provided coverage for negligence claims relating to a construction accident because, even though the insured was not designated as an official construction manager for the project, its responsibilities under the construction agreement included those that were managerial in nature.

*Cohen v. Med. Malpractice Ins. Pool of N.Y. State*, No. 114857/06, 2010 N.Y. Misc. LEXIS 1689 (N.Y. Sup. Ct. Apr. 5, 2010)

A genetic counselor did not qualify for coverage under a medical professional liability policy because the counselor's activities did not constitute medical or surgical examination or treatment.

*Advanced Integrative Wellness LLC v. Merchants Ins. Group*, No. 6346/08, 2010 N.Y. Misc. LEXIS 2654 (N.Y. Sup. Ct. March 19, 2010)

A professional services exclusion in a commercial general liability policy precluded coverage for a claim alleging injuries from a cellulite reduction treatment performed by the insured, even if the alleged injuries also related to the design of a syringe used during the treatment in question.

*McCarthy v. State Farm Fire & Cas. Co.*, No. 10-334-ST, 2010 U.S. Dist. LEXIS 107114 (D. Or. Oct. 5, 2010)

A lawsuit filed against a veterinarian for employment-related practices, including alleged verbal abuse of staff, disparagement of other doctors and staff, and failure "to perform his medical service responsibilities in a competent and professional manner," did not constitute a "veterinary incident" and, therefore, did not trigger coverage under the veterinarian's professional liability policy, because the lawsuit arose from conduct that related only to the business aspects of operating a veterinary practice.

*Chancellor Props., Inc. v. Houston Cas. Co.*, No. 09-4514, 2010 U.S. Dist. LEXIS 56695 (E.D. Pa. June 8, 2010)

A professional liability insurer was obligated to provide a defense to an insured real estate broker for claims accusing the insured of negligent and intentional misrepresentations and unfair trade practices in connection with the sale of various condominium properties because, looking at the facts alleged in the underlying complaint and not the causes of action asserted therein, it was clear that the claims all arose out of the insured's activities as a real estate agent or broker.

*Minn. Lawyers Mut. Ins. Co. v. Mazullo*, No. 09-830, 2010 U.S. Dist. LEXIS 39046 (E.D. Pa. Apr. 19, 2010)

Where a lawyers professional liability policy defined professional services to include "legal or notary services for others," an insured attorney was entitled to a defense under the policy for claims accusing the attorney of wrongfully inducing the claimants to invest in real estate projects undertaken by the attorney's client and then misappropriating the invested funds, even though the claimants' allegations did not attack the sufficiency of the insured's legal work.

*Willbros RPI, Inc. v. Cont'l Cas. Co.*, 601 F.3d 306 (5th Cir. 2010)

Under Texas law, a professional services exclusion in a commercial general liability policy that included surveying as a professional service did not relieve the insurer of its obligation to defend a claim alleging negligence in surveying and in drilling because the complaint included allegations of both professional and non-professional negligence.

*Admiral Ins. Co. v. Ford*, 607 F.3d 420 (5th Cir. 2010)  
Under Texas law, a professional services exclusion in a commercial general liability policy precluded coverage for a suit alleging that the insured failed to properly create and implement an oil drilling plan, because the vast majority of the services provided by the insured required specialized knowledge or skill, regardless of whether implementation of the drilling plan also included menial tasks.

*Essex Ins. Co. v. McFadden*, No. 6:09-cv-193, 2010 U.S. Dist. LEXIS 54159 (E.D. Tex. June 3, 2010)  
A professional services exclusion in a commercial general liability policy did not bar coverage for claims alleging negligence by an insured in making welding repairs to, and failing to properly wash and rinse, a saltwater disposal trough, because welding and associated cleaning activities did not constitute professional tasks.

*Nat'l Fire Ins. Co. of Hartford v. Radiology Assocs., LLP*, 694 F. Supp. 2d 658 (S.D. Tex. March 3, 2010)  
A professional services exclusion in a commercial umbrella policy that defined professional services to include the application of a medical appliance precluded coverage for a claim alleging sexual assault during an ultrasound procedure where an ultrasound probe, which was a medical appliance, was used in the procedure.

*Minn. Lawyers Mut. Ins. Co. v. Antonelli, Terry, Stouth & Kraus, LLP*, No. 1:08-CV-1020, 2010 U.S. Dist. LEXIS 122836 (E.D. Va. Nov. 18, 2010)  
Where attorneys provided both business and legal advice to a corporate client, a claim accusing those attorneys of providing bad business advice to the client was within the scope of coverage provided by a lawyers professional liability policy, even though the attorneys personally invested in the business and increasingly were involved in business strategy.

*Burns v. Scottsdale Ins. Co.*, No. C08-1136RSL, 2010 U.S. Dist. LEXIS 74907 (W.D. Wash. July 23, 2010)  
A professional services exclusion in a commercial general liability policy barred coverage for negligence claims arising out of the insured's tongue piercing activities because, although undefined in the policy, the term "professional services" commonly is understood to mean a vocation, principle calling or profession requiring specialized knowledge, which is broad enough to encompass tongue piercing activities.

*Boggs v. Camden-Clark Memorial Hosp. Corp.*, 693 S.E.2d 53 (W.Va. Apr. 1, 2010)

A professional services exclusion in commercial general liability and umbrella policies, which did not define the term "professional services," precluded coverage for malicious prosecution claims asserted against an insured attorney by a non-client.

*Sloan v. Bohlmann*, No. 09-C-883, 2010 U.S. Dist. LEXIS 55364 (E.D. Wis. May 19, 2010)

Because the alleged misconduct was outside the scope of professional services, a medical malpractice insurer had no obligation to defend a claim accusing an insured physician of sexual assault in performing an unnecessary examination on the claimant, even though the physician asserted that the examination was medically appropriate.

## INDEPENDENT COUNSEL

*Cont'l Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510 (E.D. Cal. 2010)

Under California law, because Cumis counsel represents the insured only, no attorney-client privilege attaches to communications between Cumis counsel and the insurer. Such communications, therefore, were discoverable in a subrogation lawsuit between two entities' general liability insurers.

*Endurance Am. Spec. Ins. Co. v. Lance-Kashian & Co.*, No. CV-F-101284-LJO-DB, 2010 U.S. Dist. LEXIS 100467 (E.D. Cal. Sept. 13, 2010)

An insurer's reservation of rights does not automatically create an actual conflict of interest that triggers an insured's right to independent counsel. Moreover, even where the insured is entitled to independent counsel, the insurer is not obligated to pay unreasonable defense expenses, or to pay hourly rates that exceed the actual rates of counsel ordinarily retained by the insurer.

*Exec. Risk Indem. Inc. v. Icon Title Agency, LLC*, 739 F. Supp. 2d 446 (S.D.N.Y. 2010)

Under New York law, an insurer commits a deceptive business practice when it fails to advise the insured of the right to independent counsel. The insurer in this case, however, was entitled to dismissal of the insured's counterclaim because the insured failed to allege any plausible injury arising from the insurer's purported failure to provide a conflict-free defense.



## ADVANCEMENT OF DEFENSE COSTS

*Aspen Ins. UK, Ltd. v. Fiserv, Inc.*, No. 09-cv-02770-CMA-CBS, 2010 U.S. Dist. LEXIS 130758 (D. Colo. Dec. 9, 2010)

An insurer's duty to advance defense costs is determined under a four corners standard, and an exclusion in a bankers professional liability policy providing that the insurer would not "reimburse" the insureds for damages arising from particular conduct served only to limit the insurer's duty to indemnify, not its duty to advance. In addition, the insurer's advancement obligation was not discretionary, could be triggered simply by the insured's submission of a written request to advance, and was not contingent on the insured obtaining the insurer's consent prior to incurring the defense costs in question. Finally, where the policy was silent as to the timing of advancement, the insurer was required to advance defense costs as such costs were incurred.

*Associated Community Bancorp, Inc. v. The Travelers Cos., Inc.*, No. 3:09-CV-1357(JCH), 2010 U.S. Dist. LEXIS 34799 (D. Conn. Apr. 8, 2010)

Where a directors and officers liability policy required an insurer to advance defense costs, but imposed no duty to defend, the duty to advance still would be determined under the same standard as the duty to defend. Where no potential for coverage existed, the insurer had no duty to advance defense costs.

*Am. Legacy Found., RP v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 623 F.3d 135 (3d Cir. 2010)

Under Delaware law, where an insured does not request advancement of defense costs or seek the insurer's consent to incur expenses until after the underlying litigation has concluded, the duty to advance will be determined based on the entire record in the underlying case, not merely a comparison of the underlying complaint to the terms of the policy.

*HTLH Corp. v. Axis Reinsurance Co.*, No. 07C-09-102 RRC, 2010 Del. Super. LEXIS 4 (Del. Super. Ct. Jan. 7, 2010)

In order to prevent "irreparable injury" to multiple directors and officers liability insurers who were appealing the court's denial of their motions for summary judgment regarding coverage, the court stayed the insureds' subsequent motion to compel the advancement of defense costs pending resolution of the insurers' appeal.

*Great Am. Ins. Co. v. Geostar Corp.*, Nos. 09-12488-BC, 09-12608-BC, and 09-14309-BC, 2010 U.S. Dist. LEXIS 20258 (E.D. Mich. March 5, 2010)

Rejecting a directors and officers liability insurer's argument that it had no duty to advance defense costs until a final determination of coverage was made, the court concluded that the insurer had a duty to advance defense costs as such costs were incurred as long as the underlying claims "even arguably" came within the policy's coverage.

*Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 681 F. Supp. 2d 816 (S.D. Tex. 2010)

Under Texas law, an insurer's duty to reimburse defense costs contemporaneously is governed by the "eight corners" rule, even where the policy does not impose a duty to defend. An insurer, therefore, could not rely on evidence developed in the underlying actions as a basis for refusing to reimburse defense costs.

## ALLOCATION

*Endurance Am. Specialty Ins. Co. v. Lance-Kashian & Co.*, No. CV-F-10-1284 LJO DLB, 2010 U.S. Dist. LEXIS 100467 (E.D. Cal. Sept. 13, 2010)

Where a management liability policy provided that an insurer could allocate loss between covered and uncovered matters or where a claim was asserted against both insured and uninsured parties, the insured was not entitled to dismissal of an insurer's action for partial reimbursement of costs incurred in defending an underlying action. Even though the allocation provision indicated that the insurer would pay 100% of defense costs, the insurer still could assert its right to an allocation because it had no obligation to pay any portion of the costs attributable to an uninsured defendant.

*Bar-K, Inc. v. Sec. Title Corp.*, No. A115199, 2010 Cal. App. Unpub. LEXIS 6775 (Cal. Ct. App. Aug. 25, 2010)

Under California law, an insurer must reserve its right to an allocation in order to receive reimbursement for uncovered claims under a title insurance policy.

*Strategic Capital Bancorp, Inc. v. St. Paul Mercury Ins. Co.*, No. 10-2062, 2010 U.S. Dist. LEXIS 121160 (C.D. Ill. Oct. 20, 2010)

Because an allocation provision is relevant only to the extent that some part of a claim actually is covered under the policy, the allocation provision at issue in this case was irrelevant, given that an "insured versus insured" exclusion vitiated coverage entirely for the underlying claim.

*Genzyme v. Fed. Ins. Co.*, 622 F.3d 62 (1st Cir. 2010)  
 Applying Massachusetts law, where a directors and officers liability policy provided that indemnity paid on behalf of a corporation was excluded from coverage, but indemnity paid on behalf of the directors and officers was within the scope of coverage, the First Circuit Court of Appeals remanded the case to the district court to determine an appropriate allocation between covered and uncovered loss.

*Fin. Res. Network, Inc. v. Brown & Brown, Inc.*, No. 09-113155-MBB, 2010 U.S. Dist. LEXIS 122358 (D. Mass. Nov. 18, 2010)

In ruling that some counts of a cross-claim were covered by an errors and omissions liability policy, the court noted that, under Massachusetts law, the burden of demonstrating an appropriate allocation between covered and uncovered defense costs rests with the insurer.

*Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's London*, No. 02-2075, 2010 Mass. Super. LEXIS 191 (Mass. Super. Ct. July 29, 2010)

Where an insured settled an action that involved both covered and uncovered claims, the insured had the burden of establishing a proper allocation between covered and uncovered loss under an excess insurance agents professional liability policy.

*Thomas Eng'g Co. v. Twin City Fire Ins. Co.*, No. 10-902 (RHK/JJK), 2010 U.S. Dist LEXIS 127481 (D. Minn. Dec. 2, 2010)

Although an allocation provision can limit the effect of an "insured versus insured" exclusion by precluding coverage only for claims made by insured parties, under the facts of this case, the "insured versus insured" exclusion operated to bar coverage for the claim in its entirety because each cause of action was asserted by an insured. The court also noted that the policy's allocation provision did not address a situation in which claims were asserted by both insured and uninsured claimants; rather, it addressed allocation only where claims involved both covered and uncovered matters or were asserted against both insured and uninsured parties.

*Am. Capital Homes, Inc. v. Greenwich Ins. Co.*, No. 09-622-JCC, 2010 U.S. Dist. LEXIS 89403 (W.D. Wash. Aug 30, 2010)

An employment practices liability insurer was not entitled to summary judgment on the issue of whether the insured was obligated to repay a portion of the amount

paid by the insurer to settle an underlying claim. The court reasoned that, although the policy contained an allocation provision, the insurer did not prove definitively that the final settlement amount was driven, in part, by uncovered claims.

## RECOUPMENT OF DEFENSE COSTS AND SETTLEMENT PAYMENTS

*Markel Am. Ins. Co. v. G.L. Anderson Ins. Servs., Inc.*, 715 F. Supp. 2d 1068 (E.D. Cal. 2010)

An employment practices liability insurer was permitted to recoup amounts it paid toward a settlement because it timely reserved its rights and advised the insured of its right to independent counsel.

*Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, 616 F.3d 1086 (10th Cir. 2010)

Under Colorado law, an insurer could recoup defense costs where it provided the insured with a defense, subject to a reservation of rights that included the right of recoupment, to which the insured never objected.

*Blue Cross of Idaho Health Serv. Inc. v. Atl. Mut. Ins. Co.*, 734 F. Supp. 2d 1107 (D. Idaho 2010)

A commercial general liability and umbrella insurer was not entitled to recoup amounts paid in defense and settlement where the policies at issue did not contain an express right of recoupment.

*Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co. Inc.*, 598 F.3d 257 (6th Cir. 2010)

Under Kentucky law, a commercial general liability insurer could recoup amounts paid to settle uncovered claims where the insurer reserved the right to do so and the insured accepted the insurer's funds despite its objection to the insurer's reservation of the right of recoupment.

*Lumbermens Mut. Cas. Co. v. RGIS Inventory Specialists, LLC*, No. 08-1316, 2010 U.S. Dist. LEXIS 50022 (S.D.N.Y. May 20, 2010), aff'd on other grounds, 628 F.3d 46 (2d Cir. 2010)

Under Michigan law, an excess liability insurer was entitled to recoup amounts paid in settlement of an uncovered claim, regardless of whether the insured objected to the insurer's reservation of the right of recoupment.



*Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 2 A.3d 526 (Pa. 2010)

Absent an express contractual provision to the contrary, an insurer is not entitled to recoup amounts paid in defense of its insured in an underlying claim, even if the claim ultimately is deemed to be an uncovered exposure.

*Utica Mut. Ins. Co. v. Rohm & Haas Co.*, 683 F. Supp. 2d 368 (E.D. Pa. 2010)

Where the policy did not provide for the right of recoupment, a commercial general liability insurer could not recover amounts paid to defend or settle various underlying claims because there was no implied contract for reimbursement of such payments and the insured was not unjustly enriched by the payments.

*AXIS Specialty Ins. Co. v. The Brickman Group LTD, LLC*, No. 09-3499, 2010 U.S. Dist. LEXIS 123050 (E.D. Pa. Nov. 18, 2010)

Where there was no express provision in the policy permitting reimbursement, an umbrella insurer could not recoup a settlement payment within its limits based, in part, on the rationale that permitting the carrier to recover any portion of the settlement payment would upset the incentive structure inherent in the insurer/insured relationship. The court suggested that, under different circumstances, an insurer could seek to recoup settlement payments under an unjust enrichment theory.

*Houston Cas. Co. v. Sprint Nextel Corp.*, No. 09-cv-1387, 2010 U.S. Dist. LEXIS 124302 (E.D. Va. Nov. 22, 2010)

An excess directors and officers liability insurer was not entitled to recoup amounts paid in settlement of an underlying claim where the policy required the insurer to pay both defense and settlement costs on behalf of the insured, and only provided the insurer with a right of recoupment for defense costs but not for settlement payments.

*Zurich Am. Ins. Co. v. Public Storage*, No. 09-1394, 2010 U.S. Dist. LEXIS 108059 (E.D. Va. Sept. 17, 2010)

After holding that a commercial general liability insurer had a duty to defend only one of eight counts in underlying litigation filed against the insured, the court declined "to blaze a new trail in Washington insurance law" by permitting the insurer to recoup defense costs incurred in defending the uncovered counts. The court noted that Washington courts have not decided the question, and that other jurisdictions are split on the issue.

*Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153 (10th Cir. 2010)

Under Wyoming law, a commercial general liability insurer could not preserve or create a right to recoup defense costs through a reservation of rights letter. Instead, the Court concluded, an insurer should deny a defense at the outset if the insurer does not agree to pay defense costs without reservation.

## CONSENT

*Risely v. Interinsurance Exch. of the Auto. Club*, 183 Cal. App. 4th 196 (March 26, 2010), review denied, No. S182429, 2010 Cal. LEXIS 5105 (Cal. June 9, 2010)

Where an insurer has repudiated its duty to defend, the insured may, without forfeiture of any right to indemnity, settle upon the best terms possible with the injured party without the insurer's consent.

*Am. Legacy Found., RP v. Nat'l Union Fire Ins. Co.*, 623 F.3d 135 (3d Cir. 2010)

Under Delaware law, an insured could not recover defense costs under a directors and officers liability policy where the insured did not obtain the insurer's consent before incurring the costs in question.

*Gallina v. Commerce & Indus. Ins.*, 375 F. App'x 935 (11th Cir. 2010)

Under Florida law, an insured breached a "no voluntary payments" provision contained in a workers compensation and employers liability policy where the insured settled a claim without the insurer's consent, given that the insurer had been defending the insured and had agreed to withdraw its reservation of rights in connection with the underlying claim.

*Mid-Continent Cas. Co. v. Am. Pride Bldg. Co., LLC*, 601 F.3d 1143 (11th Cir. 2010)

Under Florida law, if an insurer offers to defend a claim subject to a reservation of rights, the insured has the right to reject the defense, to hire its own counsel, and to enter into a reasonable settlement of the claim without the insurer's express consent. Accordingly, a commercial general liability insurer was not entitled to summary judgment on the issue of whether the policy's "no voluntary payments" provision precluded coverage for an underlying settlement where a question of fact existed as to whether the insured informed the insurer of the proposed settlement and/or finalized that settlement before properly rejecting the insurer's conditional defense of the claim.

*Arnett v. Mid-Continent Cas. Co.*, No. 8:08-2373, 2010 U.S. Dist. LEXIS 71666 (M.D. Fla. July 16, 2010)

As a defense to coverage for a settlement of a construction defect claim, multiple commercial general liability insurers alleged that the insured breached its duty to cooperate by entering into the settlement without the insurers' consent. The district court, however, rejected this argument, holding that the insured provided sufficient cooperation once it received notice that the insurers were reserving their right to invoke the policy cooperation clause as a basis for denying coverage.

*Kmart Corp. v. Footstar, Inc.*, No. 09-3607, 2010 U.S. Dist. LEXIS 38817 (N.D. Ill. Apr. 14, 2010)

An insurer was not entitled to dismissal, at the pleading stage, of an action filed by the insured to establish coverage for payments made by the insured without the insurer's consent where the insured properly pled that the insurer wrongfully failed to defend the claim and the insurer had not established that it had suffered prejudice as a result of the insured's incurring defense expenses.

*Am. Family Mut. Ins. Co. v. C.M.A. Mortg., Inc.*, 682 F. Supp. 2d 879 (S.D. Ind. 2010)

A business owner and commercial general liability umbrella insurer properly denied coverage for a settlement entered into without its consent where, at the time of the settlement, the insurer was providing a defense to the insured subject to a reservation of rights, even though the insurer also was pursuing a declaratory judgment action to establish its coverage obligations.

*Colony Ins. Co. v. Danly, Inc.*, No. 10-308, 2010 U.S. Dist. LEXIS 130697 (D. Me. Dec. 9, 2010)

An insured may enter into a reasonable, noncollusive good faith settlement with a claimant after notice to, but without the consent of, its insurer, even where the insurer is providing the insured with a defense in the underlying claim subject to a reservation of rights.

*Demolition Contractors, Inc. v. Westchester Surplus Lines Ins. Co.*, 381 F. App'x 526 (6th Cir. June 11, 2010)

Under Michigan law, where a general liability insurer previously had offered \$75,000 to settle an underlying claim, the insurer could not rely on a "no voluntary payments" provision as a basis for denying coverage for amounts incurred without its consent, because it had led the insured to believe that the policy's "no voluntary payments" provision would not be enforced. The insured, however, was not excused from complying with the "no voluntary payments" provision for amounts in excess of \$75,000.

*PB Ams. Inc. v. Cont'l Cas. Co.*, 690 F. Supp. 2d 242 (S.D.N.Y. 2010)

A professional liability insurer was not entitled to dismissal, at the pleading stage, of a coverage action filed by the insured where it was not clear whether the insurer actually had denied coverage for the underlying claims and, therefore, whether the insurer would be precluded from relying on the policy's "no voluntary payments" provision as a basis for denying coverage for settlements entered without its consent.

*Essex Ins. Co. v. Liberty Mut. Ins. Co.*, No. 10-1078, 2010 U.S. Dist. LEXIS 124069 (E.D. Pa. Nov. 23, 2010)

An insurer who did not participate in the defense or settlement of an underlying claim was entitled to dismissal of a coverage action filed by an insurer who did fund the underlying settlement where the funding insurer's complaint did not allege that the insured had obtained the non-funding insurer's consent prior to entering into the settlement in question.

*Vision One, LLC v. Phila. Indem. Ins. Co.*, 158 Wn. App. 91 (Wash. Ct. App. 2010)

An insurer who has denied coverage is estopped from relying on a policy's consent provision as an additional basis for denying coverage for a settlement entered without the insurer's consent, even if the settlement impairs the insurer's right of subrogation.

*Columbia Cas. Co. v. Gordon Trucking, Inc.*, 09-cv-05441, 2010 U.S. Dist. LEXIS 131616 (N.D. Cal. Dec. 13, 2010)

Under Washington law, an insurer only may rely on a "no voluntary payments" provision as a basis for denying coverage where the insurer can establish that it actually has been prejudiced by the insured's failure to obtain consent to the payments in question.



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