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D&O and Professional Liability

2012 | A Year In Review

2012 proved to be another active year for courts considering issues that will affect directors and officers and professional liability insurers, with at least ten federal courts of appeal, seven state supreme courts and numerous other courts issuing decisions of note. Notice issues, including those involving timeliness, and prior notice/prior knowledge issues, including rescission, continued to result in a large number of decisions in a wide range of fact patterns. Other heavily litigated topics included the assessment of whether claims were related and the application of dishonesty and insured-verses-insured exclusions. Courts continued to scrutinize attempts by insurers to recoup defense or settlement payments. We have summarized a selection of cases here and expect that these issues will continue to be important in the directors and officers and professional liability arena in 2013 and beyond.

In This Issue

Notice

Sharp Realty & Mgmt., LLC v. Capitol Specialty Ins. Corp., No. CV-10-AR-3180-S, 2012 U.S. Dist. LEXIS 75353 (N.D. Ala. May 31, 2012), aff'd No. 12-13344, 2013 U.S. App. LEXIS 243 (11th Cir. Jan. 4, 2013)

An insurer can deny coverage under a claims made errors and omissions policy. An eight month delay in notice was unreasonable as a matter of law and the insured failed to offer an objectively reasonable excuse for the delay. A subsequent errors and omissions insurer properly denied coverage, because the claim was first made four months prior to the policy's inception date and, therefore, not within the policy period as required.

NovaPro Risk Solutions, LP v. TIG Ins. Co., No. D059066, 2012 Cal. App. Unpub. LEXIS 2035 (Cal. Ct. App. Mar. 16, 2012)

An insured waived its right to coverage under a claims made and reported errors and omissions policy when the insured waited more than two years to provide notice of its claims to its insurer.

Re/Max Mega Grp. v. Maxum Indem. Co., 471 Fed. App'x. 689 (9th Cir. 2012)

Under California law, an insurer was not estopped from denying

coverage where the insured failed to provide timely notice pursuant to the policy's thirty day reporting requirement, even though the insurer failed to rely on late notice in its initial denial.

Davis & Assocs., PC v. Westchester Fire Ins. Co., No. 10-cv-03126-REB-CBS, 2012 U.S. Dist. LEXIS 7975 (D. Colo. Jan. 24, 2012)

No coverage was available under the first of two claims made and reported professional liability policies where the claim was first reported to the insurer after the expiration of the first policy period.

Arrowood Indem. Co. v. King, 39 A.3d 712 (Conn. 2012)

On a certified question from the Second Circuit Court of Appeals, and in connection with an occurrence-based homeowner's insurance policy, the court held that continued social interactions between the insured and the claimant after an accident did not justify a delay in providing notice to an insurer. However, the court ruled that the insurer bears the burden of proving prejudice from late notice, overruling an earlier opinion of the Connecticut Supreme Court.

Jennings Constr. Servs. Corp. v. ACE Am. Ins. Co., No. 6:10-cv-1671-Orl-28KRS, 2012 U.S. Dist. LEXIS 3478 (M.D. Fla. Jan. 11, 2012), aff'd 472 Fed. App'x. 906 (11th Cir. 2012)

An insurer's failure to comply with Section 627.426 of the Florida Statutes, providing that "a liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless . . . [w]ithin 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured . . . ," did not preclude it from denying coverage for a claim not reported during the policy's claims made and reported period.

Fla. Dep't of Fin. Servs. v. Nat'l Union Fire Ins. Co., No. 4:11cv242/RS-WCS, 2012 U.S. Dist. LEXIS 29944 (N.D. Fla. Mar. 7, 2012)

Under a claims made and reported directors and officers liability policy, the insured's timely notice of circumstances satisfied the policy's requirement that the notice include a description of the "full particulars" of potential claims where the insured's letter stated that it was aware of a claimant that intended to assert claims against the insured's former directors, officers and shareholders, for "wrongful acts including, but not limited to breach of duty, neglect, error, mistaken statement, misleading statement, omission or other wrongful acts . . . resulting in injury in excess of $5 million." The insurer argued that the description was merely "boilerplate," but the court held that the letter satisfied the policy's notice requirement.

Clena Invs., Inc. v. XL Specialty Ins. Co., No. 10-cv-62028-SCOLA, 2012 U.S. Dist. LEXIS 40503 (S.D. Fla. Mar. 26, 2012)

An insured's notice of a claim to its insurer provided four years after it suffered property damage was unreasonably late as a matter of law under an occurrence-based commercial general liability policy requiring notice "as soon as practicable," and the undisputed facts demonstrated that the insurer was prejudiced as a result of this late notice.

Wheeler's Moving & Storage, Inc. v. Markel Ins. Co., No. 11-80272-civ-MARRA/HOPKINS, 2012 U.S. Dist. LEXIS 125726 (S.D. Fla. Sept. 5, 2012)

The court concluded as a matter of law that a commercial general liability insurer was not obligated to defend the insured under an occurrence-based policy requiring notice "as soon as practicable" when the insured provided notice of a claim eighteen months after the lawsuit was filed.

Hoover v. Maxum Indem. Co., 730 S.E.2d 413 (Ga. 2012)

A general liability insurer waived its right to deny coverage based on late notice under an occurrence-based policy where the insurer's reservation of rights on late notice was ambiguous, the insurer did not raise late notice in its declaratory judgment action against the insured, and the insurer did not move for summary judgment on the basis of late notice in the coverage action inihated by the insured.

OneBeacon Am. Ins. Co. v. Catholic Diocese of Savannah, 477 Fed. App'x. 665 (11th Cir. 2012)

Under Georgia law, an insurer properly denied coverage under an occurrence-based multi-peril policy where the insured failed to provide notice for twenty-one months. The notice provision was a condition precedent to coverage, and the insured failed to offer a reasonable justification for the twenty-one month delay.

Hoffman v. Oregon Mut. Ins. Co., No. 1:11-120 WBS, 2012 U.S. Dist. LEXIS 76090 (D. Idaho May 29, 2012)

Denying summary judgment because the issue of whether the insured breached the prompt notice provision of its business automobile policy when it provided notice to its insurer only before entering into a settlement agreement was a question of fact for the jury and summary judgment, therefore, was denied.

MHM Servs., Inc. v. Assurance Co. of Am., 975 N.E.2d 1139 (Ill. App. Ct. 2012)

An excess commercial general liability and property insurer properly denied coverage under an occurrence-based policy requiring notice "as soon as practicable." The court held that a twenty-five month delay in notice was unreasonable as a matter of law and that the insured failed to offer an objectively reasonable excuse for the delay.

Philadelphia Idem. Ins. Co. v. 1801 W. Irving Park, LLC, No. 11 C 1710, 2012 U.S. Dist. LEXIS 115256 (N.D. Ill. Aug. 13, 2012)

Coverage was properly denied under an occurrence-based commercial general liability policy where notice was required to be given "as soon as practicable" and the insured delayed more than ten months before reporting a claim.

Koransky, Bouwer & Poracky, P.C. v. Bar Plan Mut. Ins. Co., No. 3:10cv535, 2012 U.S. Dist. LEXIS 16909 (N.D. Ind. Feb. 8, 2012)

There was no coverage under either of two successive claims made and reported professional liability policies where the insured law firm failed to report circumstances that could reasonably give rise to a claim during policy period one and failed to disclose the circumstances in its renewal application.

West Bend Mut. Ins. Co. v. Willmez Plumbing, Inc., No. 1:09-cv-832-TAB-TWP, 2012 U.S. Dist. LEXIS 58395 (S.D. Ind. April 26, 2012), aff'd 2013 U.S. App. LEXIS 438 (7th Cir. Jan 8, 2013), reh'g denied, 2013 U.S. App. LEXIS 2932 (7th Cir. Feb. 6, 2013)

Denial of coverage was proper where an insured failed to notify its general commercial liability insurer of a claim before entering into a settlement agreement and failed to rebut the presumption of prejudice caused by the insurer's lack of opportunity to participate in the settlement discussions.

Minn. Lawyers Mut. Ins. Co. v. Baylor & Jackson, PLLC, 852 F. Supp. 2d 647 (D. Md. 2012)

Where a professional liability policy provided coverage only for claims made and reported within the policy period or a sixty-day extended reporting period, notice was a condition precedent to coverage, and the insureds' notice provided to the insurer after the expiration of the policy period was insufficient to trigger coverage. As a result no showing of prejudice was required to disclaim coverage.

Lexington Ins. Co. v. Integrity Land Title Co., 852 F. Supp. 2d 1119 (E.D. Mo. 2012)

Where it was undisputed that the insured did not provide notice of a lawsuit under a claims made and reported professional liability policy until after the expiration of the policy period, the suit was not covered and the insurer was not required to show of prejudice.

City of Maplewood v. Northland Cas. Co., No. 4:11cv564-RWS, 2012 U.S. Dist. LEXIS 95088 (E.D. Mo. July 10, 2012)

An insurer properly denied coverage under a public officials claims made liability policy where the insured did not provide notice of the employment discrimination claim until two years after expiration of the reporting period. The insurer was not required to show prejudice under a claims made policy before denying coverage.

Sollek v. Westport Ins. Corp., No. 3:12cv115-DPJ-FKB, 2012 U.S. Dist. LEXIS 157649 (S.D. Miss. Nov. 2, 2012)

A claims made and reported lawyer's professional liability policy did not provide coverage for a malpractice lawsuit where neither notice of the claim nor notice of a potential claim was provided to the insurer until two months after the policy expired.

Physicians Ins. Co. of Wisconsin, Inc. v. Williams, 279 P.3d 174 (Nev. 2012)

There was no coverage under a claims made and reported professional liability policy where the insurer did not receive actual notice of the claim until after the policy period expired. The insurer's knowledge of media coverage of the insured dentist's legal troubles did not constitute "the receipt by [the insurer] of an oral or written report from someone other than [the insured] regarding a professional health care incident that is reasonably likely to give rise to a demand for damages." The court held that construing the policy to allow it to be triggered by "broadly phrased, innocuous, or non-specific statements, would permit an unbargained-for expansion of the policy."

Rupracht v. Certain Underwriters at Lloyd's of London, No. 3:11-cv-000654-LRH-VPC, 2012 U.S. Dist. LEXIS 137098 (D. Nev. Sept. 25, 2012)

A directors and officers claims made policy did not apply to a claim that was made several months before the inception of the policy.

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Atl. Health Sys. v. Nat'l Union Fire Ins. Co., 463 Fed. App'x. 162 (3d Cir. 2012)

Under New Jersey law, an insurer properly denied coverage under a claims made liability policy because the insured's reference to the claim in its renewal application did not strictly satisfy the policy's notice reporting requirements, which required claim notices be sent to a different address.

Glasbrenner v. Gulf Ins. Co., No. 03-3353, 2012 U.S. Dist. LEXIS 42657 (D.N.J. Mar. 28, 2012)

Under New Jersey law, an excess umbrella insurer was required to demonstrate prejudice to prevail on a late notice defense and, therefore, the insurer's motion to dismiss was denied.

Simon Prop. Group, L.P. v. Lumbermen's Mut. Cas. Co., 459 Fed. App'x. 16 (2d Cir. 2012)

Under New York law, an insured's three year delay in providing notice under an occurrence-based commercial general liability policy was unreasonable as a matter of law and precluded coverage without a showing of prejudice.

Deutsche Bank Trust Co. Ams. v. Royal Surplus Lines Ins. Co., No. 06C-09-261 JAP, 2012 Del. Super. LEXIS 244 (Del. Super. Ct. May 30, 2012)

Under New York law, an additional insured's notice to its insurer under primary and excess occurrence policies within sixty days of the occurrence was deemed reasonable and sufficient, where the insured set up a systematic and efficient method for notifying insurers of numerous incoming bodily-injury claims.

Nautilus Ins. Co. v. JDL Dev., IX, LLC, No. 10 C 3435, 2012 U.S. Dist. LEXIS 57294 (N.D. Ill. Apr. 4, 2012)

An insured's three year delay in reporting a potential property damage claim to its insurer was unreasonable where the occurrence-based general contractor liability policies required that the insured notify the insurer as soon as practicable after becoming aware that property damage had occurred. Under Illinois law, delays of as little as three months have been deemed unreasonable.

Wolfson v. Medical Care Availability & Reduction of Error Fund, 39 A.3d 551 (Pa. Commw. Ct. 2012)

A request for medical records from an attorney to an insured doctor, stating that the attorney represented the former patient, now deceased, in connection with a claim for personal injuries, was insufficient to constitute a claim under a claims made errors and omissions policy because the request did not state the claim for personal injuries was being asserted against the insured.

Jessco, Inc. v. Builders Mut. Ins. Co., 472 Fed. App'x. 225 (4th Cir. 2012)

Finding that under South Carolina law, an insurer that issued an occurrence-based commercial general liability policy must demonstrate that it was substantially prejudiced by the insured's late notice, and rejecting the insurer's unsupported assertion that it was prejudiced in light of the fact that it had received notice of a claim more than a year before the claim was arbitrated.

Berkley Reg'l Ins. Co. v. Phila. Indem. Ins. Co., 690 F.3d 342 (5th Cir. 2012)

Under Texas law, an excess insurer was prejudiced by the late notice, and the insured forfeited his ability to receive coverage, where the insured gave notice after a jury verdict, denying the excess insurer an opportunity to investigate or conduct its own analysis of the case.

Capitol Spec. Ins. Corp. v. Yuan Zhang, No. C11-41Z, 2012 U.S. Dist. LEXIS 52549 (W.D. Wash. Apr. 13, 2012)

There were genuine issues of material fact as to whether the insureds' breach of a notice provision in the occurrence-based policy "caused actual and substantial prejudice" to the insurer and relieved the insurer of its duty to defend. The insurer had received notice of the lawsuit against the insureds almost one year after the allegedly defective construction work had occurred.

Ansul, Inc. v. Emp'rs Ins. Co. of Wausau, No. 2011AP2596, 2012 Wisc. App. LEXIS 927 (Wisc. Ct. App. Nov. 27, 2012)

An insured's unexplained delay of at least six and eleven years, respectively, before providing notice of environmental contamination claims under its excess general liability policies was prejudicial as a matter of law to the insurer and, therefore, coverage was precluded.

Related Claims

NovaPro Risk Solutions, LP v. TIG Ins. Co., No. D059066, 2012 Cal. App. Unpub. LEXIS 2035 (Cal. Ct. App. Mar. 16, 2012)

A series of 900 program-wide claims made during a 2005 policy period were not related to a single claim made under a 2001 claims made and reported professional liability policy because the claims, which were four years apart, were not "logically or causally related" because they "involve[d]

separate underlying claims files, separate claims adjusters, separate injuries and separate allegations of wrongdoing that occurred at different times and were attributable to different acts, errors or omissions."

Catlin Specialty Ins. Co. v. CAMICO Mut. Ins. Co., No. C-12-0424 EMC, 2012 U.S. Dist. LEXIS 131014 (N.D. Cal. Sept. 13, 2012)

A claim under an insurance agency professional liability policy did not relate back to a letter sent to the insured prior to the policy period because the letter did not contain a demand for money damages and therefore was not a claim.

XL Specialty Ins. Co. v. Perry, No. CV 11-02078-RGK (JCGx), 2012 U.S. Dist. LEXIS 109341 (C.D. Cal. June 27, 2012)

The court held that the interrelated wrongful act provisions in directors and officers policies were unambiguous and should be broadly construed. Because a series of underlying actions in the 2008-2009 policy period shared common allegations with an earlier lawsuit filed in the 2007-2008 policy period, the lawsuits all were deemed first made in the earlier policy period. It was not necessary for alleged wrongs to be "temporally identical" when the definition encompassed a "series" of facts, circumstances, situations, events, or transactions.

CAMICO Mut. Ins. Co. v. Rogozinski, No. 3:10-cv-762-J-32MCR, 2012 U.S. Dist. LEXIS 130648 (M.D. Fla. Sept. 13, 2012)

All claims against an accounting firm were subject to a single per-claim limit because they were based on the common fact that the firm wrongly classified income on multiple tax returns.

Simpson & Creasy, P.C. v. Cont'l Cas. Co., No. CV409-202, 2012 U.S. Dist. LEXIS 161599 (S.D. Ga. Oct. 31, 2012)

An attorney and his law firm were not entitled to professional liability insurance coverage in connection with an action brought by a former client. A pre-lawsuit dispute between the client and the insureds regarding the repayment of money was a claim first made prior to the start of the policy. Later claims of legal malpractice made in a lawsuit filed by the client during the policy period were found to be related to the pre-lawsuit dispute and, therefore, were deemed to be a single claim first made prior to the policy period.

Idaho Trust Bank v. BancInsure, Inc., No. 1:12-CV-032-REB, 2012 U.S. Dist. LEXIS 124660 (D. Idaho Aug. 31, 2012)

An insurer's motion to dismiss claims under a lender's miscellaneous professional liability policy was denied because, when accepting the factual statements of the complaint as true and drawing inferences in favor of the insured non-moving party, two lawsuits that alleged failures to extend financing to the same entity could be distinct events and may not constitute interrelated wrongful acts.

Lexington Ins. Co. v. Integrity Land Title Co., 852 F. Supp. 2d 1119 (E.D. Mo. 2012)

Two claims involving title searches on the same property were not related under an errors and omissions policy merely because they involved the same condemnation judgment where the insured conducted a new title search when the property was re-sold to different clients. The court held that the insured's preferred interpretation would pose a continuing threat of claims that would defeat the purpose of a claims made and reported policy, which is to allow the insurer to more accurately fix its reserves for future liabilities and compute premiums with greater certainty.

Brecek & Young Advisors v. Syndicate 2003, No. 4:11CV3003, 2012 U.S. Dist. LEXIS 163441 (D. Neb. Nov. 14, 2012)

Under New York law, an insured investment firm facing three sets of multiple claims by various clients involving allegedly unsuitable investments was entitled to a declaration that each set arose out of interrelated wrongful acts and each set constituted one claim under the governing policy. The court applied a "sufficient factual nexus test," and a sufficient factual nexus was found to exist for different reasons within each set of claims, including based on similarities between the respective plaintiffs, investments, and the investment firm representative/s involved in each of the claims within a set. The insured investment firm was not entitled to a declaration that a fourth set of claims did not arise from interrelated wrongful acts because the insured had not shown that the claims within that set lacked a sufficient factual nexus.

Superior Bev. Group, Ltd. v. Cincinnati Ins. Co., No. 1126 WDA 2010, 2012 Pa. Super. LEXIS 527 (Pa. Super. Ct. Apr. 13, 2012)

Affirming as "beyond reproach" the trial court's finding that age discrimination claims, race discrimination claims, and retaliation claims were all "interrelated wrongful acts" under a policy providing employment practices liability coverage and, thus, constituted a single claim where all of the plaintiffs were employees of the same company who all alleged that, when their company was acquired, they were not hired by the acquirer in violation of applicable employment discrimination law.

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Borough of Moosic v. Darwin Prof'l Underwriters, Inc., No. 3:11-cv-1689, 2012 U.S. Dist. LEXIS 90372 (M.D. Pa. June 29, 2012)

Under Tennessee law, coverage was barred under a public officials professional liability policy for a lawsuit brought against the borough by residents claiming violations of civil rights and adverse possession relating to a dispute with the borough over the expansion of a tire company that was adjacent to their property because it was related to a mandamus complaint filed against the borough by the same residents prior to the policy's inception date.

Cracker Barrel Old Country Store v. Cincinnati Ins. Co., No. 11-6306, 2012 U.S. App. LEXIS 19161 (6th Cir. Sept. 10, 2012)

Under an employment practices liability policy, a charge filed with the EEOC by an employee and a subsequent civil suit filed by the EEOC based on the same wrongful acts constituted a single claim deemed made when notice of the earliest claim was made, because the policy contemplated that multiple claims arising from the same wrongful act would be considered a single claim, and stated that "[r]egardless of the number of policies or Coverage Parts involved, all 'claims' based upon or arising out of the same 'wrongful act' or any 'interrelated wrongful acts' shall be considered a single 'claim.'"

Columbia Cas. Co. v. SMI Liquidating, Inc., No. 2:10-CV-821, 2012 U.S. Dist. LEXIS 162892 (D. Utah Nov. 13, 2012)

Where medical devices manufacturer was insured by the same insurer under two successive one-year policies, and the parties had specifically negotiated coverage for claims arising from defective shoulder pumps under the Year Two policy so that the Year Two policy specifically and unambiguously provided coverage for shoulder pump claims, shoulder pump claims arising in Year Two did not relate back to the Year One policy.

Sterling Sav. Bank v. Federal Ins. Co., No. CV-12-368-LRS, 2012 U.S. Dist. LEXIS 133254 (E.D. Wash. Sept. 18, 2012)

A professional liability insurer's motion to dismiss based on late notice was denied because of ambiguity whether the original underlying complaint seeking specific performance was a claim to which the amended complaint seeking monetary damages could relate back where there was no express provision stating that notice of a related claim is a condition precedent to coverage for subsequent claims.

Prior Knowledge, Known Loss, And Rescission

Endurance Am. Specialty Ins. Co. v. WFP Sec. Corp., No. 11-cv-2611-JAH (KSC), 2012 U.S. Dist. LEXIS 153864 (S.D. Cal. Sept. 28, 2012)

An insurer could proceed with an action seeking a judicial determination of its right to rescind after having first filed an interpleader action in which the insurer did not seek rescission. But the insurer's having raised the rescission argument did not preclude judgment in the insured's favor on a duty to defend claim.

Davis & Assocs., PC v. Westchester Fire Ins. Co., No. 10-cv-03126-REB-CBS, 2012 U.S. Dist. LEXIS 7975 (D. Colo. Jan. 24, 2012)

An insurer had no duty to defend or indemnify the insured law firm pursuant to the prior knowledge condition in a lawyers professional liability policy where the insured, prior to inception of the policy, had a reasonable basis to believe that it had breached a professional duty to a client by failing to file an action for judicial review before the relevant deadline, and that such breach might be expected to result in a claim.

Frisbie v. Carolina Cas. Ins. Co., 103 So. 3d 1011 (Fla. Dist. Ct. App. 2012)

A court held that issues of fact concerning waiver or estoppel prevented summary judgment in an insurer's rescission action where the insurer received notice of facts that formed the basis to rescind, but it did not assert rescission until nearly two years later; meanwhile, the insurer defended the firm, settled another claim on the policy, and took other actions inconsistent with rescission, and supporting the insured's argument of detrimental reliance.

Fid. Nat'l Title Ins. Co. v. Houston Cas. Co., No. 6:11-cv-1438-Orl-28DAB, 2012 U.S. Dist. LEXIS 141590 (M.D. Fla. Sept. 30, 2012)

Based on prior knowledge provisions in the application and the resulting professional liability errors and omissions insurance policy issued to a title insurance agent, an insurer was entitled to summary judgment that it had no duty to defend or indemnify. The insured was aware before the policy period of its failure to determine that a signature on a quitclaim deed was forged, despite information in its possession that could have led it to recognize the forgery, which provided an objective basis to believe that a claim

could arise. What the insured reportedly believed about whether a claim would be made against it did not preclude summary judgment because a subjective test applies only to the "knowledge" aspect of the application question, while an objective test applies to the "might reasonably be expected to give rise to a claim" component.

Perkins v. Am. Int'l Specialty Lines Ins. Co., No. 1:12-cv-3001-TWT, 2012 U.S. Dist. LEXIS 175592 (N.D. Ga. Dec. 11, 2012)

An insurer was entitled to summary judgment on the issue of rescission of an investment management insurance policy because insured had failed to disclose that it was operating a Ponzi scheme.

FDIC v. Onebeacon Midwest Ins. Co., No. 11 C 3972, 2012 U.S. Dist. LEXIS 94922 (N.D. Ill. July 10, 2012)

Where the FDIC was appointed receiver of a failed bank and, in that capacity, brought a coverage action against an insurer that had issued a bond and a directors and officers insurance policy to the bank, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 barred the insurer's counterclaims for rescission of the bond and insurance policy because rescission claims have the same capacity to "restrain or affect" the FDIC's powers as claims for injunctive relief.

Koransky, Bouwer & Poracky, P.C. v. Bar Plan Mut. Ins. Co., No. 3:10-cv-535, 2012 U.S. Dist. LEXIS 16909 (N.D. Ind. Feb. 8, 2012)

An insurer was found to have properly denied coverage under a claims made professional liability policy's prior knowledge exclusion where the insured attorney's failure to timely notify a seller of his client's acceptance of a sales contract, causing the seller to rescind the contract, created an objective basis to anticipate a claim prior to the policy period.

Cont'l Cas. Co. v. Law Offices of Melbourne Mills, Jr., P.L.L.C., 676 F.3d 534 (6th Cir. 2012)

Under Kentucky law, an insurer was properly awarded summary judgment on the issue of rescission under an errors and omissions liability policy because the insured attorney materially misrepresented facts on the insurance application when he failed to disclose an ongoing state bar investigation and the circumstances surrounding his handling of a class action settlement that led to his disbarment and a lawsuit by disgruntled class members.

Endurance Am. Specialty Ins. Co. v. Cohen (In re Envtl. Pres. Ass'n), Ch. 7 Case No. 10-14421-TJC, Adv. No. 10-00751-TJC, 2012 Bankr. LEXIS 3729 (Bankr. D. Md. Aug. 14, 2012)

An insurer did not waive its right to rescind an environmental impairment insurance policy where the insurer rescinded approximately one month after becoming actually aware of the basis to rescind and, even if knowledge of the misrepresentations were imputed to the insurer several months earlier, the insurer did not fail to rescind within a reasonable time. The court also held that the insurer made reasonable, good faith efforts to balance its obligations in the meantime by defending under a reservation of rights.

Div. of Emp't Sec. v. St. Paul Mercury Ins. Co., 477 Fed. App'x 428 (8th Cir. 2012)

Under Missouri law, there was no coverage under an employment practices liability policy for a wrongful discharge suit because, before the policy's inception, the employee made allegations of wrongful discharge and retaliation in her unemployment application and appeal, which, under a "reasonable person standard," should have reasonably alerted the insured to a potential claim.

City of Maplewood v. Northland Cas. Co., No. 4:11CV564 RWS, 2012 U.S. Dist. LEXIS 116705 (E.D. Mo. Aug. 20, 2012)

An insurer was granted summary judgment after denying coverage based on the prior knowledge exclusion of a policy providing coverage for employment practices because, before the policy's inception date, the insured had received an EEOC complaint and letter listing employment-related grievances from an employee, which the court held made the employee's subsequent lawsuit reasonably foreseeable.

Colony Ins. Co. v. Kuehn, No. 2:10-cv-01943-KJD-GWF, 2012 U.S. Dist. LEXIS 137071 (D. Nev. Sept. 25, 2012)

Based on a prior knowledge exclusion, an insurer was entitled to summary judgment that a policy it issued to a law firm did not provide coverage for a malpractice suit because, before the policy's inception, the insured failed to respond on the client's behalf to discovery requests and summary judgment motions resulting in an adverse judgment against the client. Because the exclusion applied if "any insured" knew or could have reasonably foreseen that the legal services could give rise to a claim, the exclusion applied even to "innocent insureds."

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Great Am. Ins. Co. v. Christy, 164 N.H. 196 (N.H. Sept. 28, 2012)

The trial court erred in rescinding a professional liability policy by imputing to an "innocent insured" another insured's knowledge of a client's existing claim that he misappropriated assets. The innocent insured provision showed that the parties intended to distinguish actual from imputed knowledge and not to penalize insureds who did not have actual knowledge of wrongful acts, and it was ambiguous whether the innocent insured provision applied to statements in the application.

Ulster Cnty. v. CSI, Inc., 95 A.D.3d 1634 (N.Y. App. Div. 2012)

An insurer had a duty to defend and indemnify an insured third-party claims administrator under a professional liability policy because the evidence did not establish that the insured, subjectively knew of facts which would have provided a reasonable person with a basis to expect a claim, prior to the effective date of the policy,.

Stein v. N. Assur. Co. of Am., No. 11-2466-cv, 2012 U.S. App. LEXIS 18472 (2d Cir. Aug. 30, 2012)

Under New York law, an insurer failed to meet its burden of establishing that it was entitled, as a matter of law, to disclaim coverage based on an exclusion for property damage of which the insured was aware prior to the policy period. The underlying complaint and bill of particulars were insufficient to establish as a matter of law that the insured had prior knowledge of the property damage at issue, because they were ambiguous regarding the nature and quality of the notice that the insured had received.

XL Specialty Ins. Co. v. Level Global Investors, L.P., 874 F. Supp. 2d 263 (S.D.N.Y. 2012)

An insurer was required to advance defense costs in connection with a federal investigation for insider trading, because the interplay between the policy application's prior knowledge provision and reasonable inquiry provision created an ambiguity as to whether the prior knowledge question only required disclosure of facts known to the application signer upon "reasonable inquiry."

Goodman v. Medmarc Ins., 977 N.E.2d 128 (Ohio Ct. App. 2012)

An insurer could not rescind a professional liability insurance policy after a malpractice lawsuit was filed against the insured even if the insured made misrepresentations in the policy application by answering "no" in response to questions about whether the insured was aware of any possible claims, errors, or omissions that might reasonably be expected to be the basis of any claims. Because the answers were representations, not warranties, even if misrepresentations were made, they did not void the policy and could not be used to avoid liability arising under the policy after such liability has been incurred.

Foster v. Winchester Fire Ins. Co., No. 09-1459, 2012 U.S. Dist. LEXIS 88274 (W.D. Pa. June 26, 2012)

The court declined to follow case law in other jurisdictions and denied a motion to reconsider its holding that, under Pennsylvania law, the insurer had the burden of proving the applicability of a prior knowledge condition that appeared within an errors and omissions policy's insuring agreement.

Nat'l Specialty Ins. Co. v. Nat'l Union Fire Ins. Co., No. 6:10-826-TMC, 2012 U.S. Dist. LEXIS 69456 (D.S.C. May 18, 2012)

An insurer was denied summary judgment, in part, on the applicability of a prior knowledge exclusion in an errors and omissions policy issued to an insurance agent because, applying a two-part subjective/objective test, the court found that although the agent had received a letter from a client insurance company directing the insured to notify its errors and omissions carrier and asserting there was no coverage for an accident due to the insured's failure to add certain vehicles to a policy as requested by the policyholder, there was a genuine issue of material fact as to whether the insured should have reasonably foreseen the claim where the insured initially responded by asserting that he believed that the client, in fact, had the desired coverage in force for the accident notwithstanding the client's contrary concerns.

Cont'l Cas. Co. v. Battery Wealth, Inc., 474 Fed. App'x 898 (4th Cir. 2012)

Under South Carolina law, an insured financial investment firm an insurer properly denied coverage to under a professional liability policy. A prior knowledge exclusion precluded coverage for all claims arising from a Ponzi scheme orchestrated by one of the firm's officers/directors before the policy's inception because he knew of his own acts, they were fraudulent, and "had a basis to believe" knew that these fraudulent acts "might reasonably be expected to be the basis of a claim."

Darwin Select Ins. Co. v. Laminack, Pirtle & Martines, L.P., No. H-10-5200, 2012 U.S. Dist. LEXIS 15712 (S.D. Tex. Feb. 8, 2012)

An insurer had no duty to defend an insured law firm under an errors and omissions policy that contained a prior acts condition because the court held that it was inconceivable that two experienced, accomplished attorneys having received notice that a federal district judge determined

that they filed a lawsuit outside the statute of limitations, would not have a basis to foresee that missing the filing deadline might reasonably be expected to be the subject of a malpractice claim against them.

Colony Nat'l Ins. Co. v. Unique Indus. Prod. Co., No. 11-20355, 2012 U.S. App. LEXIS 17977 (5th Cir. Aug. 24, 2012)

Under Texas's eight-corners rule, the trial court erred in looking to extrinsic evidence to support its summary judgment determination in an insurer's favor on a commercial general liability policy's known-loss exclusion. The underlying suit did not allege that the insured knew that the replacement parts they used were defective.

OneBeacon Ins. Co. v. T. Wade Welch & Assocs., No. H-11-3061, 2012 U.S. Dist. LEXIS 48280 (S.D. Tex. Apr. 5, 2012)

A prior knowledge exclusion in a lawyers professional liability policy did not bar coverage only for insureds that actually had prior knowledge of the relevant events. Two severability provisions in the policy applied only to the sections in which they were contained, and did not apply to all of the policy sections, including the prior knowledge exclusion.

OneBeacon Ins. Co. v. T. Wade Welch & Assocs., No. H-11-3061, 2012 U.S. Dist. LEXIS 178587 (S.D. Tex. Dec. 18, 2012)

A prior knowledge exclusion did not preclude an insurer's duty to defend where an underlying arbitration demand alleged acts and omissions both before and after the policy's inception date. The district court declined to relate the latter alleged acts back to the earlier acts, finding it ambiguous whether a policy provision relating multiple wrongful acts applied to the policy's prior knowledge exclusion.

Tudor Ins. Co. v. Hellickson Real Estate, No. 11-35753, 2012 U.S. App. LEXIS 19904 (9th Cir. Sept. 21, 2012)

Under Washington law, an insurer was properly granted summary judgment on the issue of rescission of a professional errors and omissions liability policy issued to real estate brokers where the insureds had been notified of at least ten complaints filed against them with the Washington Department of Licensing ("DOL"), and of the resulting DOL investigations, at the time they completed their policy application.

Prior Acts, Prior Notice, And Pending And Prior Litigation

XL Specialty Ins. Co. v. Perry, No. CV 110-2-78-RGK (JCGx), 2012 U.S. Dist. LEXIS 109341 (C.D. Cal. June 27, 2012)

The prior notice exclusions in claims made directors and officers policies barred coverage for a series of actions against an insured bank "arising out of, directly or indirectly resulting from or in consequence of, or in any way involving" an underlying class action securities lawsuit that was noticed prior to the policy period, as each of the later actions involved the allegations at issue in prior class action.

FDIC v. Gen. Star Nat'l Ins. Co., No. CV 11–3729–JFW (MRWx), 2012 U.S. Dist. LEXIS 22602 (C.D. Cal Feb. 7, 2012)

An insured real estate appraiser was not entitled to coverage under a claims made errors and omissions policy when the insured's alleged misrepresentations regarding the value of a property occurred before the prior acts date in the insurance policy, even though a resulting FDIC suit against the insured commenced within the insured's policy period.

Endurance Am. Specialty Ins. Co. v. WFP Sec. Corp., No. 11cv2611 JAH (KSC), 2012 U.S. Dist. LEXIS 153864 (S.D. Cal. Sept. 28, 2012).

A pending and prior litigation exclusion in an investment advisers professional liability policy applying to, among other things, future proceedings "derived from the essential facts or circumstances" of pending litigation did not apply to a lawsuit that involved some of the same investments at issue in a prior arbitration, because the later lawsuit also involved several other investments that were wholly unrelated to the prior arbitration.

ABCO Premium Fin. LLC v. Am. Int'l Grp., Inc., No. 11-23020-CIV-SCOLA/BANDSTRA, 2012 U.S. Dist. LEXIS 111833 (S.D. Fla. Aug. 9, 2012)

A financial institution bond did not provide coverage for a fraud scheme that began prior to the date in the bond's retroactive date rider, as the rider clearly stated that coverage was only available for loss sustained entirely after the retroactive date, and the insured's argument that the loss should be pro-rated between loss sustained before and after the retroactive date was unreasonable.

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Perkins v. Am. Int'l Specialty Lines Inc, No. 06-62966, 2012 Bankr. LEXIS 2736 (Bankr. N.D. Ga. Apr. 3, 2012)

A policy's pending and prior litigation exclusion did not bar coverage for a lawsuit alleging negligent investment, breach of contract and breach of fiduciary duty when the prior lawsuit against the insured involved a different type of investment and different allegations of misconduct.

Idaho Trust Bank v. BancInsure, Inc., No. 1:12-CV-032-REB, 2012 U.S. Dist. LEXIS 124660 (D. Idaho Aug. 31, 2012)

A lawsuit against an insured for breaching a settlement agreement did not trigger a policy's pending and prior litigation exclusion as a matter of law because the lawsuit over the settlement agreement does not clearly arise out of the actions leading to the initial lawsuit. Additionally, a policy exclusion barring coverage for claims reported to another insurer did not apply as a matter of law, even though the insured reported the claim to another insurer, because applying this exclusion would unfairly prevent an insured from tendering claims when it is unclear which insurance policy may apply.

Manganella v. Evanston Ins. Co., 702 F.3d 68 (1st Cir. 2012)

Applying Massachusetts law, the First Circuit vacated the District Court's finding that the insurer had a duty to defend and indemnify its insured in regard to a sexual harassment suit under an employment practices liability policy when it was unclear from competing evidence whether the alleged harassment began before the policy's retroactive date.

Henson v. U.S. Liab. Ins. Co., No. 4:11-CV-38, 2012 U.S. Dist. LEXIS 101963 (N.D. Miss. July 23, 2012)

An insurance agent was not entitled to coverage under his errors and omissions policy when the alleged wrongdoing at issue – improperly filling out an insurance application – occurred prior to the retroactive date of the policy and, although evidence suggested that the insured requested prior acts coverage, the insurer did not provide this coverage, in accordance with its usual practice in dealing with applicants who allowed prior coverage to lapse.

Grissom v. First Nat'l Ins. Agency, 371 S.W.3d 869 (Mo. Ct. App. 2012)

A claims made provision of an employment practices policy, stating that coverage is only available for alleged "employment practices" taking place after the policy's retroactive date, barred coverage for conduct that took place before the retroactive date even though the claim based on that conduct was made after the retroactive date.

City of Maplewood v. Northland Cas. Co., No. 4:11CV564 RWS, 2012 U.S. Dist. LEXIS 95088 (E.D. Mo. July 10, 2012)

The pending and prior litigation exclusion in a public officials liability policy barred coverage for a lawsuit alleging constructive discharge and retaliation when the claimant alleged she was forced to resign in response to her filing a prior lawsuit for gender discrimination prior to the policy's retroactive date.

Exec. Risk Indem., Inc. v. Starwood Hotels & Resorts Worldwide, Inc., 98 A.D.3d 878 (N.Y. App. Div. 2012)

A pending and prior litigation exclusion applying to claims "based upon [or] arising from…any written demand" that is "pending" before June 10, 2006 barred coverage for a lawsuit against the insured when the claimant had sent the insured a demand letter in October 2005, and the court rejected the argument that a demand cannot be "pending" for the purposes of the exclusion.

Ciena Capital LLC v. XL Specialty Ins. Co., No. 651452/2010 (N.Y. Sup. Ct. Mar. 26, 2012)

Pending and prior proceeding exclusion and a general errors and omissions exclusion in a management liability policy did not bar coverage as a matter of law when questions of fact remained as to whether alleged misconduct with the loans at issue "bear[s] a substantial enough relationship" to allegations of fraudulent lending practices raised in a prior lawsuit and investigations by the SEC and U.S. Attorney General.

Tudor Ins. Co. v. First Advantage Litig. Consulting, LLC, Nos. 11 Civ. 3567 (KBF), 11 Civ. 8923 (KBF) 2012 U.S. Dist. LEXIS 120178 (S.D.N.Y. Aug. 21, 2012)

A prior acts exclusion barring coverage for any claim alleging or arising out of any wrongful act based upon or relating to an error or omission committed before the policy's retroactive date applied to defamation claims against company issuing background reports on hedge funds when the statements at issue were first made prior to the retroactive date.

A.P. Pino & Assocs. v. Utica Mut. Ins. Co., No. 11-3962, 2012 U.S. Dist. LEXIS 91918 (E.D. Pa. July 3, 2012)

An insured was not entitled to coverage under two errors and omissions liability policies because the "wrongful acts" at issue occurred prior to the policies' retroactive date. The court rejected the application of Pennsylvania's "reasonable expectations doctrine" when the policy language clearly stated that prior acts coverage was not available and when

the insured was an established insurance agent.

Climent-Garcia v. Autoridad De Transporte Martimo y Las Islas Municipo, No. 09-15777 (GAG), 2012 U.S. Dist. LEXIS 51228 (D. P.R. Apr. 11, 2012)

The prior acts exclusion in an employment liability policy barring coverage for loss arising out of wrongful acts occurring before August 20, 2005 applied to a lawsuit alleging that the claimant was the victim of discrimination beginning in 2002 and continuing into 2007.

Oceanus Ins. Co. v. White, 372 S.W.3d 700 (Tex. App. 2012)

A malpractice policy that excluded coverage "for claims reported to a previous insurer" did not provide coverage for victims of an insured doctor where the victims' claims against the insured had been "defended and settled by the prior insurer."

Dishonesty/Fraud and Personal Profit Exclusions

Health Net Inc. v. RLI Ins. Co., 206 Cal. App. 4th 232 (Cal. Ct. App. 2012), modified and reh'g denied, Nos. B224884, B240833, 2012 Cal. App. LEXIS 682 (Cal. Ct. App. June 12, 2012)

Assuming, without deciding, that a discovery sanctions order, which deemed certain misconduct admitted in the underlying action, constituted a "finding in fact" that triggered the dishonesty exclusion in an errors and omissions policy, the court nevertheless limited the application of the dishonesty exclusion to claims arising out of the admitted misconduct, rather than applying the exclusion to the entire underlying action.

Axis Reinsurance Co. v. Telekenex, Inc., No. 12-2979 SC, 2012 U.S. Dist. LEXIS 179647 (N.D. Cal. Dec. 19, 2012)

On summary judgment, the court held that an exclusion in a management liability policy for "the gaining of any profit, remuneration, or advantage to which the Insured was not legally entitled . . . if evidenced by any judgment [or] final adjudication" was triggered by a judgment against the insured. Even though a finding of profit or advantage was not a necessary element of the claims asserted, the court held that it could properly look at the judgment in the context of the plaintiff's allegations and evidence in order to determine its applicability.

Navigators Specialty Ins. Co. v. Beltman, No. 11-cv-00715-RPM, 2012 U.S. Dist. LEXIS 156666 (D. Colo. Nov. 1, 2012)

Where factual allegations supporting a negligence claim were predicated on the same allegations supporting a RICO claim, a professional liability policy's exclusion for "dishonest, fraudulent, malicious or knowingly wrongful act, error or omission" and "willful or deliberate failure to comply with statute" precluded any duty to defend.

Riverdale Peaks Homeowners Ass'n v. Auto-Owners Ins. Co., No. 11-cv-01920-WJM-MJW, 2012 U.S. Dist. LEXIS 54180 (D. Colo. Apr. 18, 2012)

An exclusion for "liability based upon any intentionally dishonest or fraudulent act or any judgment based upon any intentionally dishonest or fraudulent act" contained in a Habitational Association Directors and Officers Liability Endorsement precluded defense and indemnity coverage for a complaint alleging violations of RICO and the Colorado Organized Crime and Control Act.

Phila. Indem. Ins. Co. v. Hamic, No. 8:12-cv-829-T-26EAJ, 2012 U.S. Dist. LEXIS 125180 (M.D. Fla. Sept. 4, 2012)

In the absence of a "legal adjudication" of the wrongful acts alleged as required by the dishonesty/fraud and "knowingly wrongful" acts exclusion, a lawyers professional liability insurer was obligated to defend lawsuit alleging intentional torts of conspiracy to commit malicious prosecution, conspiracy to commit abuse of process, abuse of process, and a violation of Florida RICO statute.

Med. Protective Co. v. Duma, 478 Fed. App'x 977 (6th Cir. , 2012)

Under Kentucky law, the adjudication of an insured doctor's crime of wanton endangerment was not necessary to preclude indemnity coverage under professional liability policy's "criminal acts" exclusion, when the insured "admitted all the composite elements of the crime" and the jury found in an underlying action that the doctor's wanton endangerment was a substantial factor in the cause of injury to the plaintiffs.

Cont'l Cas. Co. v. Law Offices of Melbourne Mills, Jr., 676 F.3d 534 (6th Cir. 2012)

Under Kentucky law, a regulatory ruling disbarring an attorney and determining that the attorney had committed "dishonest" and "fraudulent" acts was sufficient basis to bar coverage under the malpractice liability policy's dishonesty

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exclusion which applied once the dishonest conduct was "determined by any trial verdict, court ruling, regulatory ruling or legal admission."

Coral Reef Productions, Inc. v. AXIS Surplus Ins. Co., No. 302706, 2012 Mich. App. LEXIS 1149 (Mich. Ct. App. June 19, 2012)

Under the terms of a miscellaneous professional liability insurance policy, the insurer did not owe its insured a defense in connection with a lawsuit in which the insured allegedly hacked into its competitor's customer list and directly solicited its competitor's customers.

Emp'rs Mut. Cas. Co. v. Raddin, No. 5:10-cv137 (DCB) (RHW), 2012 U.S. Dist. LEXIS 44649 (S.D. Miss. Mar. 30, 2012)

Finding that a general liability policy issued to a medical clinic did not provide coverage for a lawsuit that arose out of a school administrator's inappropriate viewing and touching student athletes because, among other reasons, the perpetrator's actions were intentional and not accidental.

Shiddell v. The Bar Plan Mutual, 385 S.W. 3d 478 (Mo. Ct. App. 2012)

Under Missouri law, "deliberately wrongful acts" exclusion in a lawyers errors and omissions policy barred coverage, as a matter of law, for a claim against an insured attorney for malicious prosecution.

Am. Auto. Ins. Co. v. Sec. Income Planners & Co., LLC, et al., 847 F. Supp. 2d 454 (E.D.N.Y. 2012)

Despite the fact that the underlying lawsuit primarily concerned the misappropriation of investment funds, the insurer had a duty to defend the causes of action for negligence, negligent training, negligent supervision and breach of fiduciary duty because liability for those counts, conceptually, was not predicated on the fraudulent conduct.

Minn. Lawyers Mut. Ins. Co. v. Mazullo, No. 11-1470. 2012 U.S. Dist. LEXIS 85693 (E.D. Pa. June 19, 2012)

A fraud/dishonesty exclusion in a lawyers professional liability insurance policy precluded coverage for underlying lawsuits alleging a fraudulent investment scheme where all counts in the complaints incorporated allegations of dishonest, malicious and deliberate misconduct.

Shore Chan Bragalone Depumpo LLP v. Greenwich Ins. Co., 856 F. Supp. 2d 891 (N.D. Tex. 2012)

A question of fact existed as to whether exclusion for "intentionally wrongful" acts or omissions in a lawyers professional liability policy precluded coverage for an amended complaint alleging that law firm and individual lawyers intentionally breached a contract. The court explained that even though a claim for breach of contract does not require a showing of intent, if the breach itself were intentional, then the claim would arise out of an intentionally wrongful act and be excluded.

Farkas v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 861 F. Supp. 2d 716 (E.D. Va. 2012)

Jury verdict in criminal action was an "in fact" finding that insured committed fraud triggering application of personal profit or advantage exclusion and dishonesty exclusion, entitling directors and officers liability insurer to recoup amounts advanced for defense costs.

Restitution, Disgorgement and Damages

Dobson v. Twin City Fire Ins. Co., No. SACV 11-0192 DOC(MLGx), 2012 U.S. Dist. LEXIS 93823 (C.D. Cal. July 5, 2012)

A directors and officers liability insurer was entitled to summary judgment on the ground that the amounts sought by the claimant from the individual insureds in the underlying action in its claims alleging fraudulent transfer and breach of fiduciary duty, and seeking the return of funds acquired on account of those claims, constituted restitution and was uninsurable under California public policy.

Ryerson Inc. v. Fed. Ins. Co., 676 F.3d 610 (7th Cir. 2012):

Under Illinois law, an "Executive Protection" liability policy did not cover amounts paid by the insured to settle a lawsuit claiming that the third party was fraudulently induced to purchase the insured's subsidiary because the settlement was a "post-closing price adjustment" and, therefore, constituted restitution and disgorgement. Even if a claim is based on fraud, or is given any other label, a claim for restitution is a claim that the defendant has something that belongs of right not to him but to the plaintiff.

Carolina Cas. Ins. Co. v. Merge Healthcare Solutions, Inc., No. 11 C 3844, 2012 U.S. Dist. LEXIS 4772 (N.D. Ill. Jan. 13, 2012) and 2012 U.S. Dist. 60765 (Apr. 30, 2012)

Where a directors and officers liability insurance policy generally covered attorneys' fees as damages, but stated that covered loss did not include the multiplied portion of multiplied damages, an insured was entitled to summary judgment that the policy provided coverage for that portion of the underlying attorney fee award due to application of a lodestar enhancement multiplier.

Walpole v. Le Petit Theatre Du Vieux Carre, No. 11-2442, 2012 U.S. Dist. LEXIS 670 (E.D. La. Jan. 4, 2012)

Under Louisiana law, a directors and officers liability insurer had no duty to defend an underlying action seeking equitable relief where policy excluded coverage for claims seeking relief other than monetary damages.

Certain Underwriters at Lloyd's, et al. v. BDO Seidman LLP, No. 36 Misc.3d 1222A, 2012 N.Y. Misc. LEXIS 3642 (N.Y. Sup. Ct. July 27, 2012)

Under New York law, a punitive damages award rendered in Florida was uninsurable under a professional liability insurance policy where the insured was found liable for intentional misconduct or gross negligence and indemnification would be contrary to New York public policy.

Republic Franklin Ins. Co. v. Albemarle Cnty. Sch. Bd., 670 F.3d 563 (4th Cir. 2012)

Under Virginia law, unpaid wage claims under the Fair Labor Standards Act were not covered by the insured school board's liability insurance policy because the insured had a preexisting duty to pay the wages. However, the insurer still had a duty to defend and to pay any part of the judgment attributable to covered liquidated damages and attorneys' fees, which the third party claimants also sought.

Trax, LLC v. Cont'l Cas. Co., No. 10-CV-6901, 2012 U.S. Dist. LEXIS 123141 (N.D. Ill. Aug. 29, 2012)

Under Virginia law, a general liability insurer could not avoid liability for a copyright infringement claim on the ground that the damages sought constituted uninsurable restitution.

Kelly v. Dahle, No. 11-C-600, 2012 U.S. Dist. LEXIS 104111 (E.D. Wisc. July 26, 2012)

Where a legal malpractice insurance policy's definition of damages excluded "legal fees, costs, expenses or other expenditures paid or payable by you or paid or owed to you," the policy did not provide coverage for a third party client's action seeking repayment of a loan made to the insured attorney.

Insured Capacity

Hardin v. Greenwich Ins. Co., No. SACV 11-1785-JST (ANx), 2012 U.S. Dist. LEXIS 109950 (C.D. Cal. Aug. 3, 2012)

An insured was not entitled to a defense under the Employment Practices Liability Part of a Private Company Reimbursement Policy for two underlying cross-complaints that arose from alleged misrepresentations and wrongdoings relating to the insured's participation in a competing business, and not the insured's role as an employee supervisor for the insured organization. The Directors and Officers Coverage Part, however, defined "Wrongful Act" to include "'any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty' by an officer or board member of [the insured] 'but solely by reason of his or her status as such.'" Because the wrongdoing alleged in one of the cross-complaints was expressly premised upon the insured's breach of her fiduciary duties as an officer and board member of the insured organization, the court determined that defense coverage was available under the coverage part, despite the fact that some of the causes of action included allegations that the insured acted in a non-insured capacity as well.

Lancia v. State Nat'l Ins. Co., 41 A.3d 308 (Conn. App. Ct. 2012)

An insured attorney was not entitled to defense of an underlying action involving his ownership of a non-insured mortgage brokerage company because the insured's professional liability errors and omissions policy "excluded coverage for claims arising from the plaintiff's activities as an officer, director, partner, manager or employee of any business other than that of his law firm," and the underlying action arose from the insured's activities as a mortgage broker, rather than his activities as an attorney.

K2 Inv. Grp., LLC v. Am. Guar. & Liab. Ins. Co., 91 A.D.3d 401(N.Y. App. Div. 2012)

An exclusion in a lawyers professional liability policy for claims arising out of the insured's capacity as an officer or director of a business enterprise was not applicable to a case based on the

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insured attorney's failure to record mortgages and obtain title insurance on behalf of his clients. The fact that the mortgage and title insurance were intended to secure the clients' loans to a limited liability company of which the insured attorney was a member did not trigger the exclusion because the complaint was based exclusively on his conduct as an attorney for the claimants, and not on his conduct as a member of the limited liability company.

Insured vs. Insured Exclusions

Hardin v. Greenwich Ins. Co., No. SACV 11-1785-JST (ANx), 2012 U.S. Dist. LEXIS 109950 (C.D. Cal. Aug. 3, 2012)

Under a directors and officers liability policy's Insured vs. Insured Exclusion, an insurer had a duty to defend an insured officer for cross-claims against her by an uninsured corporate shareholder but not against cross-claims made by the insured corporation, where the policy precluded coverage for "any Claim made against an Insured . . . brought by, or on behalf of, or at the direction of any Insured . . . ."

Gemini Ins. Co. v. Delos Ins. Co., 211 Cal. App. 4th 719 (Cal. Ct. App. 2012)

An Insured vs. Insured Exclusion did not apply to an Additional Insured's claim against the Named Insured because the Additional Insured was only an Insured with respect to liability assessed against it for the Named Insured's actions, and the relevant lawsuit did not involve any claims against the Additional Insured, much less claims against the Additional Insured based on the conduct of the Named Insured.

Miller v. St. Paul Mercury Ins. Co., 683 F.3d 871 (7th Cir. 2012)

Under Illinois law, when a suit against an Insured is brought by both Insured and non-Insured plaintiffs, the court should apply the allocation provision in the policy to exclude coverage only for the damages awarded to the Insured plaintiffs and not for damages awarded to the non-Insured Plaintiffs.

In re Cent. La. Grain Coop. v. Vanderlick, 467 B.R. 390 (Bankr. W.D. La. 2012)

A directors and officers liability policy's Insured vs. Insured Exclusion did not preclude coverage where a bankruptcy trustee brought claims against the company's directors and officers because the corporation retained no interest in the claims, which were brought solely for the benefit of the company's creditors.

Intelligent Digital Sys., LLC v. Beazley Ins. Co., No. 12-CV-1209 (ADX)(GRB), 2012 U.S. Dist LEXIS 170922 (E.D.N.Y. Nov. 27, 2012)

Summary judgment was not appropriate where there was a genuine issue of material fact as to whether the plaintiff had been "duly elected or appointed" such that he would qualify as an "Insured" for the purposes of the application of the Insured vs. Insured Exclusion, where each side presented credible evidence on the issue of whether the election had followed proper corporate procedures in place at the time.

Express Servs., Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, No. CIV-12-222-R, 2012 U.S. Dist. LEXIS 184808 (W.D. Okla. Nov. 7, 2012)

An Insured vs. Insured Exclusion applied to preclude coverage for derivative claims brought on behalf of the insured corporation where the exclusion specifically stated that it eliminated coverage for any Claim "brought by or on behalf of … any security holder of the Company, whether directly or derivatively…."

W Holding Co., Inc. v. Chartis Ins. Co. – Puerto Rico, No. 11-2271 (GAG), 2012 U.S. Dist. LEXIS 153151 (D. P.R. Oct. 23, 2012)

An exclusion for Claims "brought by, on behalf of or in the right of, an Organization or any Insured Person" did not apply to Claims brought by the FDIC as a receiver where Organization was defined as "the named entity, each subsidiary, and debtors in bankruptcy proceedings."

Coverage for Contractual Liability

Health Net, Inc. v. RLI Ins. Co., 206 Cal. App. 4th 232 (2012)

Professional liability policies did not provide coverage for the defense costs and settlement amounts related to unpaid benefits under health insurance plans administered by Health Net. The claims for unpaid benefits did not seek "damages . . . resulting from any claim or claims . . . for any wrongful act" under the policies' insuring agreements because Health Net was contractually obligated to pay those benefits to subscribers. The court also held that there was no coverage for a $70 million attorney fee award to plaintiffs' class counsel because such award did not constitute "damages."

Wellpoint, Inc. v. Cont'l Cas. Co., No. 49D10-0507-PL-26425, 2012 WL 4803595 (Ind. Super. Ct., Marion Cty. Jan. 31, 2012)

A professional liability policy did not provide coverage for

a settlement payment to providers of health care services. The providers' claims were for recovery of amounts owed under contracts or pursuant to assignments of rights by subscribers under their health care plans. The court granted the insurer's motion for summary judgment on numerous grounds, including that under Indiana law, a liability policy cannot be construed as a performance bond to pay an insureds' corporate contractual obligations.

Kittansett Club v. Phila. Indem. Ins. Co., No 11-11385-DJC, 2012 U.S. Dist. LEXIS 127939 (D. Mass. Sept. 10, 2012)

Under a policy providing both directors and officers liability and employment practices liability insurance, amounts constituting tips owed to employees did not constitute covered "loss." However, treble damages and attorneys' fees authorized under Massachusetts law constituted "loss" arising from the "wrongful act" of breaching the pre-existing duty to pay those tips.

Fed. Ins. Co. v. KDW Restructuring & Liquidation Servs., LLC, No. 3:07–01357, 2012 U.S. Dist. LEXIS 121668 (M.D. Pa. Aug. 17, 2012)

Under Pennsylvania law, contract exclusions in two directors and officers liability policies precluded coverage for both breach of contract and tort claims by parties who purchased convenience stores from the insured, a convenience store chain. The policies excluded coverage for claims "based upon, arising from, or in consequence of any actual or alleged liability" under a contract. The court found that the tort claims would not exist but for the insured's breach of its contracts, and that the tort claims arose from the same essential facts and circumstances underlying the breach of contract claims.

Pinnacle Anesthesia Consultants v. St. Paul Mercury Ins. Co., 359 S.W.3d 389 (Tex. App. 2012)

An employment practices liability policy did not provide coverage for an award of past and future lost earnings resulting from insured's breach of a written employment contract, where "amounts owed under a written contract or agreement" were excluded from the policy's definition of "loss."

Republic Franklin Ins. Co. v. Albemarle Cnty. School Bd., 670 F.3d 563 (4th Cir. 2012)

Under Virginia law, an educator's obligation to pay back wages and overtime pay resulted from a pre-existing duty and, therefore, did not constitute covered "loss." However, the educator's liability policy provided coverage for liquidated damages and attorneys' fees authorized by the Fair Labor Standards Act ("FLSA"), because those amounts constituted compensatory damages resulting from the "wrongful act" of the insured's failure to comply with the FLSA.

Sauter v. Houston Cas. Co., 276 P.3d 358 (Wash. Ct. App. 2012)

A directors and officers liability policy did not provide coverage for amounts owing under a personal guaranty executed by a company's CEO, both because the CEO was not acting in an insured capacity when executing the guaranty and because the money owed was not a "loss" resulting from a "wrongful act," but instead was an obligation arising from the guaranty itself.

Kelley v. Dahle, No. 11-C-600, 2012 U.S. Dist. LEXIS 104111 (E.D. Wis. July 26, 2012)

A professional liability policy did not provide coverage for a lawyer's failure to repay a loan made to her by a client.

Professional Services

National Fire Ins. Co. v. Lewis, No. CV-11-01220, 2012 U.S. Dist. LEXIS 139980 (D. Ariz. Sept. 28, 2012)

An insurer did not have a duty to defend or indemnify an insured medical facility under a businessowner's policy for allegations of vicarious liability arising out of sexual molestation of a patient by one of the facility's cardiologists. To the extent the allegations related to fondling of the patient's chest area because a cardiology examination would necessarily involve this area of the body, the court found the alleged miscords to be intertwined and inseparable from the medical services provided, such that fell within the professional services exclusion. Similarly, the court found that the cardiologist's professional liability policy only provided coverage for the claims of fondling the patient's chest area, while issues of fact remained as to whether the alleged molestation of other areas of the patient's body were intertwined and inseparable from a cardiology examination.

Health Net, Inc. v. RLI Ins. Co., 206 Cal. App. 4th 232 (2012)

Although the insuring provision of a professional services liability policy generally afforded coverage to the insured, a health insurance provider who allegedly failed to fully reimburse subscribers and beneficiaries who used out of

network services, the bulk of the underlying damages against the insured were not covered because the damages were for breach of contract claims, which are generally excluded from coverage under professional liability policies because the failure to pay money that the insured is contractually obligated to pay is typically not considered to be a wrongful act.

Heaven Massage & Wellness Ctr. v. Cont'l Cas. Co., No. B237987, 2012 Cal. App. Unpub. LEXIS 4653 (June 21, 2012)

A professional liability exclusion in a commercial general liability policy did not exclude coverage for the insured, a massage center, for an alleged sexual assault that occurred during the performance of a massage, as the alleged assault is undertaken for personal gratification, not for any valid professional purpose.

Golden Eagle Ins. Corp. v. Lemoore Real Estate and Property Mgmt., Inc., No. F061735, 2012 Cal. App. Unpub. LEXIS 3584 (May 14, 2012)

A professional liability exclusion in a business liability policy excluded coverage for an insured real estate broker and property manager for allegedly failing to install or properly maintain a smoke detector in an apartment, and for allowing a fire hazard to develop, because property management was considered to be a professional service within the meaning of the exclusion.

Navigators Specialty Ins. Co. v. Beltman, No. 11-cv-00715-RPM, 2012 U.S. Dist. LEXIS 156666 (D. Colo. Nov. 1, 2012)

A professional services exclusion eliminated an insurer's duty to defend or indemnify an insured environmental consulting firm for RICO claims arising from the insured's preparation of an environmental report relied upon by other defendants to bring sham litigation against Corporation to damage the company's reputation. The exclusion applied because the insured's actions after the report was completed still were "based upon" and "arose out of" its professional services provided in preparing the report.

Vermont Mut. Ins. Co. v. Ciccone, No. 09-CV-00445 (CSH), 2012 U.S. Dist. LEXIS 151756 (D. Conn. Oct. 22, 2012)

A professional services exclusion in a commercial liability and business owners policy did not excuse an insurer's duty to defend a lawsuit brought against a construction company by an injured employee because the exclusion required "rendering or failing to render" professional services, which the court held an insured would reasonably expect to apply only to claims brought by plaintiffs for whom the insured had been performing services and not its own employees.

Conn. Ins. Guar. Ass'n v. Drown, 37 A.3d 820 (Conn. App. Ct. 2012)

A professional liability policy did not provide coverage for a malpractice action against the insureds, a medical center and two physicians, because of an exclusion which excluded coverage for injuries arising solely out of acts or omissions by physicians.

Hirani Eng'g & Land Surveying v. Mehar Inv. Group LLC, No. 09-252-RGA, 2012 U.S. Dist. LEXIS 37021 (D. Del. Mar. 19, 2012)

The professional services portion of a pollution protection policy did not provide coverage to an insured, a professional engineering company, for claims that it defectively designed certain piping and mechanical work because the policy limited the definition of "professional services" to "Lead studies/consulting services," which was not broad enough to cover the allegedly defective work at issue.

Rissman, Barrett, Hurt, Donahue & McClain, P.A. v. Westport Ins. Corp., 477 F. App'x 639 (11th Cir. 2012)

Under Florida law, there was no coverage for an attorney who was an insured under a professional services insurance policy, which defined "professional services" as "services rendered to others in the INSURED's capacity as a lawyer, and arising out of the conduct of the INSURED's profession as a lawyer," where the insured was sued for allegedly acting as an unlicensed real estate broker and was not sued in his capacity as an attorney.

Nationwide Mut. Fire Ins. Co. v. Creation's Own Corp., No. 6:11-cv-1054-Orl-28DAB 2012 U.S. Dist. LEXIS 88766 (M.D. Fla. June 4, 2012)

A professional services exclusion in a business owners liability policy did not exclude coverage for a lawsuit against a doctor and a dietary supplement manufacturer because the underlying complaint contained a variety of alleged intentional torts in addition to a medical malpractice claim.

Phila. Indem. Ins. Co. v. Hamic, No. 8:12-cv-829-T-26EAJ, 2012 U.S. Dist. LEXIS 125180 (M.D. Fla. Sept. 4, 2012)

An insurer had a duty to defend and indemnify an insured accountant under a professional liability policy because the claims of malicious prosecution and RICO violations against the accountants, alleging that they manipulated a company's accounting records to create the appearance that two innocent employees had committed theft, were by reason of the performance of accounting services.

Hudson Specialty Ins. Co. v. Columbus Reg'l Healthcare System, Inc., No. 4:11-CV-153 (CDL), 2012 U.S. Dist. LEXIS 180818 (M.D. Ga. Dec. 21, 2012)

There was no coverage under a professional liability policy for claims of negligent credentialing by a medical center of a physician who allegedly committed malpractice in the treatment of a patient. The policy defined professional services to include "treatment or medical care" and not review board or committee work by the insured medical center.

Hawks v. Am. Escrow, LLC, No. 09 C 2225, 2012 U.S. Dist. LEXIS 43890 (N.D. Ill. Mar. 16, 2012)

An escrow agent who was sued for an alleged breach of contract and negligence in failing to distribute escrowed funds to the intended recipients was considered to be providing professional services within the meaning of a professional services policy. However, coverage was precluded due to an exclusion for any claim alleging the commingling or improper use of funds.

Dragomir v. Medical Mut. Ins. Co., No. CV-10-529, CV-10-538, 2012 Me. Super. LEXIS 110 (Me. Super. Ct. Aug. 27, 2012)

An insurer had no duty to defend or indemnify an insured therapist at a mental health facility for allegations of an improper sexual relationship with a patient because the relationship "arose from" the professional services that the insured was providing to the patient and therefore fell within a policy exclusion for such claims.

McNulty v. Assurance Co. of Am., 11-P-1134, 2012 Mass. App. Unpub. LEXIS 324 (Mass. App. Ct. Mar. 16 2012)

A professional liability exclusion did not exclude coverage for an insured, a physician, for two alleged sexual assaults that occurred while the physician was providing treatment, as the alleged assaults did not arise out of the rending of a professional service within the meaning of the exclusion.

The Saint Consulting Grp., Inc. v. Endurance Am. Specialty Ins. Co., 699 F.3d 544 (1st Cir. 2012)

Under Massachusetts law, there was no coverage under a professional liability policy for a claim of negligent spoliation of evidence against a consulting firm because only acts involving the exercise or failure to exercise professional judgment were covered.

Matthew T. Szura & Co. v. General Ins. Co., No. 12-11593, 2012 U.S. Dist. LEXIS 156792 (E.D. Mich. Oct. 26, 2012)

There was no duty to defend or indemnify under an errors and omissions liability policy for claims of tortious interference with business relationships against an insurance agency brought by a competitor after the insured hired one of its employees. The competitor was not a customer of the insured and the policy, on its face, only covered claims arising from the performance of professional services "for others."

Emp'rs Mut. Cas. Co. v. Raddin, 5:10-cv-137(DCB)(RHW), 2012 U.S. Dist. LEXIS 44649 (S.D. Miss. Mar. 30, 2012)

A professional services barred coverage for claims alleging that a school's dean and football coach was to have been improperly performing physical examinations and drug tests, exclusion because such examinations were held to be professional services, properly performed only by licensed physicians, nurses, or trainers.

Henson v. United States Liab. Ins. Co., No. 4:11-CV-38, 2012 U.S. Dist. LEXIS 101963 (N.D. Miss. July 23, 2012)

An insurer did not have a duty to defend or indemnify an insured insurance agent under an errors and omissions policy for a lawsuit brought by a policyholder alleging negligence in the preparation of an insurance application. The application was submitted prior to the policy period and the sworn statement given by the insurance agent during the policy period did not constitute a professional service merely because his statements concerned services he had performed in the past.

Lumbermens Mut. Cas. Co. v. Flow Int'l Corp., 844 F. Supp. 2d 286 (N.D.N.Y. 2012)

A court found that the insureds, who were sued for allegedly negligently designing and manufacturing certain machinery, were engaged in professional services for purposes of a professional services exclusion to a commercial general liability policy regardless of whether the insureds actually employed engineers because it was likely that the insureds provided some type of professional engineering services. The court, however, could not conclude that the exclusion was applicable, as it was unclear from the record whether the underlying accident was "due to" the rendering or failure to render professional services.

Burlington Ins. Co. v. PMI Am., Inc., 862 F. Supp. 2d 719 (S.D. Oh. 2012)

A professional services exclusion in a commercial general liability policy did not bar coverage where the policy did not

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define professional services, and where the insured, who was in the business of installing industrial machinery and equipment, failed to properly perform a mechanical repair. Such repairs were closer to the performance of routine, manual, physical processes than to the advanced knowledge acquired by a prolonged course of study or intellectual instruction.

Maxum Indem. Co. v. Selective Ins. Co., 971 N.E.2d 372 (Ohio Ct. App. 2012)

An insurer that provided a business liability insurance policy to the insured, a safety consultant company who was sued for its alleged role in an accident which led to a personal injury, was found to have a duty to defend the insured despite a professional liability exclusion to its policy as it was unclear whether the exclusion would be applicable.

D.I.C.E., Inc. v. State Farm Ins. Co., 2012 Ohio 1563 (Ohio Ct. App. 2012)

A court found that the insured, who was sued for allegedly negligently designing and manufacturing certain machinery, was engaged in professional services for purposes of a professional services exclusion to a business liability policy.

State Farm & Cas. Co. v. Lorrick Pac., LLC, No. 03:11-CV-834-HZ, 2012 U.S. Dist. LEXIS 57922 (D. Or. Apr. 24, 2012)

A professional services exclusion in a contractors insurance policy did not exclude coverage for the insured's alleged failure to manage, coordinate and oversee construction work performed by its subcontractors. The court found the term "professional services" to be ambiguous, and therefore construed it against the insure as not including oversight of third parties.

Nat'l Cas. Co. v. W. World Ins. Co., 669 F.3d 608 (5th Cir. 2012)

Under Texas law, a professional services exclusion to a business auto policy did not negate a duty to defend where emergency medical technicians failed to properly secure a patient to a gurney. The underlying complaint alleged that the injury was caused, in part, by conduct that did not constitute the provision of professional services.

Shore Chan Bragalone Depumpo LLP v. Greenwich Ins. Co., 856 F. Supp. 2d 891 (N.D. Tex. 2012)

The insurer had a duty to defend a law firm under a professional services policy where the law firm was sued for failure to pay referral fees. The policy broadly covered all loss "arising out of" a claim for acts, errors or omission in providing professional services, and the disputed fees would not have been generated but for the rendering of professional services.

Minn. Lawyers Mut. Ins. Co. v. Antonelli, Terry, Stout & Kraus, LLP, 472 F. App'x 219 (4th Cir. 2012)

Under Virginia law, although there was no dispute that a law firm's services fell within the insuring clause of a professional services insurance policy, coverage was excluded because the policy contained an exclusion for professional services rendered by an insured on behalf of a business enterprise that the insured owned, in whole or in part, or at least controlled or managed, where the claimed damages arose out of an alleged conflict of interest.

W. D. Hoard & Sons Co. v. Scharine Group, Inc., Nos. 2011AP819, 2011AP1965, 2012 Wisc. App. LEXIS 419 (Wisc. Ct. App. 2012)

The insured, who was sued for allegedly negligently supervising a construction project, was found to be engaged in professional services for purposes of a professional services exclusion to a business-owners policy.

Independent Counsel

Downhole Navigator, L.L.C. v. Nautilus Ins. Co., 686 F.3d 325 (5th Cir. 2012)

Under Texas law, a general liability insurer does not have to provide independent counsel where the facts that "could be developed" in the underlying litigation are the same facts on which coverage depends. A conflict of interest that would require retention of independent counsel only arises where the facts to be adjudicated in the underlying litigation and the facts on which coverage is based are the same.

Partain v. Mid-Continent Specialty Ins. Services, Inc., Civil Action No. H-10-2580, 2012 U.S. Dist. LEXIS 19020 (S.D. Texas Feb. 15, 2012)

An insured's retention of independent counsel based on its good faith, but incorrect, belief that a conflict of interest existed, did not permanently deprive the insured of a defense under a general liability policy.

Quality Concrete Corp. v. Travelers Prop. Cas. Co. of Amer., 43 A.3d 16 (R.I. 2012)

A general liability carrier's failure to expressly object to the insured's retention of independent counsel did not

constitute ratification that would require the insurer to pay counsel's fees and costs.

Advancement Of Defense Costs

XL Specialty Ins. Co. v. Level Global Investors, L.P., 874 F. Supp. 2d 263 (S.D.N.Y. 2012)

Under New York law, an insurer that denied coverage under a professional liability insurance policy had to continue to advance defense costs to its insureds facing civil and criminal actions. The court granted a preliminary injunction in favor of the insured, holding that a decision to stop advancement would cause the insureds to suffer "extreme or very serious damage" and that the balance of hardships tipped "lopsidedly" in favor of the insureds.

W Holding Co. v. Chartis Insur. Co., No. 11-2271 (GAG), 2012 U.S. Dist. LEXIS 157925 (D.P.R. Oct. 31, 2012)

Puerto Rico applies a "remote possibility" test, under which an insurer must advance costs when a remote possibility exists that the insurance policy provides coverage, to determine the advancement of defense costs. Because the insurer conceded it was aware of conflicting case law regarding the applicability of the exclusion on which it relied to deny coverage, the insurer knew that there was a "'remote possibility' that a court may find the [e]xclusion inapplicable." The court therefore held that the insurer acted "obstinately or frivolously" in litigating whether it was required to advance defense costs, and awarded the insured its attorney's fees.

Allocation

Dobson v. Twin City Fire Ins. Co., No. SACV 11-0192 DOC(MLGx), 2012 U.S. Dist. LEXIS 93823 (C.D. Cal. July 5, 2012)

The insurers' performance was excused where the insureds informed the insurers of an underlying litigation, the insurers responded by proposing an allocation of the defense costs, and the insureds subsequently breached the no-voluntary-payment provision of the policy by settling the underlying litigation without the insurer defendants' consent. The court rejected the insureds' argument that the insurers breached first by violating the default rule requiring insurers to cover defense costs since the policy clearly required allocation, and some of the claims were not covered.

Recoupment Of Defense Costs And Settlement Payments

Sharp Realty & Mgmt., L.L.C. v. Capital Specialty Ins. Corp., No. CV-10-AR-3180-S, 2012 U.S. Dist. LEXIS 75353 (N.D. Ala. May 31, 2012), aff'd, No. 12-13344, 2013 U.S. App. LEXIS 243 (11th Cir. Jan. 4, 2013)

An insurer could not unilaterally reserve the right to seek recoupment of defense costs.

Attorneys Liab. Prot. Soc'y, Inc. v. Ingaldson & Fitzgerald, P.C., No. 3:11-cv-00187-SLG, 2012 U.S. Dist. LEXIS 181486 (D. Alaska Dec. 21, 2012)

An insurer paying for independent counsel was precluded from seeking reimbursement of defense expenses.

Nat'l Fire Ins. Co. of Hartford v. Lewis, No. CV-11-01220-PHX-GMS, 2012 U.S. Dist. LEXIS 139980 (D. Ariz. Sept. 28, 2012)

An insurer did not have a right to reimbursement when the duty to defend continued to be triggered for some causes of action alleged in the complaint.

Connolly v. Admiral Ins. Co., No. 11-15784, 2012 US App. LEXIS 25392 (9th Cir. Dec. 12, 2012)

Under California law, an insurer that rescinded a policy was entitled to reimbursement of defense costs spent defending the claim under a reservation of rights, after refunding the policy premium.

Sierra Pac. Indus. v. Am. States Ins. Co., No. 2:11-cv-00346-MCE-JFM, 2012 U.S. Dist. LEXIS 107761 (E.D. Cal. Aug. 1, 2012)

Even though an insurer did not reserve its rights, such a reservation was not necessary when a claim for reimbursement was based on violation of the cooperation clause rather than a coverage issue.

Travelers Prop. Cas. Co. of Am. v. Raney Geotechnical, Inc., No. CIV. S-11-2011 LKK/GGH, 2012 U.S. Dist. LEXIS 86389 (E.D. Cal. June 20, 2012)

An insurer was entitled to judgment in its favor where it plainly reserved its rights to seek recoupment of defense costs.

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Allstate Ins. Co. v. Barnett, No. C-10-0077 EMC, 2012 U.S. Dist. LEXIS 28775 (N.D. Cal. Mar. 5, 2012)

The insured was obligated to reimburse the insurer for defense costs related to an uncovered claim where the insurer reserved its right to seek reimbursement.

Allstate Ins. Co. v. Baglioni, No. CV 11-06704 DPP (VBKx), 2012 U.S. Dist. LEXIS 28041 (C.D. Cal. Mar 2, 2012)

An insurer was not entitled to recoup a settlement payment where it failed to offer to the insured the right to take over its own defense.

Axis Surplus Ins. Co. v. Reinoso, 145 Cal. Rptr. 3d 128 (Cal. Ct. App. 2012)

An insurer was entitled to reimbursement of a settlement payment if it satisfied the *Blue Ridge* requirements, but any reimbursement must be allocated among the insureds.

State Farm Fire & Cas. Co. v. Wier, No. A127243, 2012 Cal. App. Unpub. LEXIS 7842 (Cal. Ct. App. Oct. 26, 2012)

An insurer was entitled to recoupment of defense costs even though it asserted such right in a supplemental coverage letter.

Certain Interested Underwriters at Lloyd's v. Halikoytakis, No. 8:09-CV-1081-T-17TGW, 2012 U.S. Dist. LEXIS 12705 (M.D. Fla. Feb. 2, 2012)

An insurer was entitled to recoupment of defense costs when it reserved the right to such recoupment and the insured acquiesced.

Ill. Union Ins. Co. v. NRI Constr, Inc., 846 F. Supp. 2d 1366 (N.D. Ga. 2012)

The court held, as a matter of first impression, that an insurer was entitled to recoup defense costs based on its reservation of rights letter.

Huntsman Advanced Materials L.L.C .v. Onebeacon Am. Ins. Co., No. 1:08-cv-00229-BLW, 2012 U.S. Dist. LEXIS 19053 (D. Idaho Feb. 13, 2012)

The court declined to provide an insurer with the unilateral right of recoupment of defense costs through a reservation of rights letter.

Max Specialty Ins. Co. v. WSG Investors, L.L.C., No. 09-CV-5237 (CBA) (JMA), 2012 U.S. Dist. LEXIS 108601 (E.D.N.Y. Apr. 20, 2012)

Because an insurer reserved its right to seek recoupment of defense costs, and the insured never objected, the insurer was entitled to recoupment .

Warren E & P, Inc. v. Gotham Ins. Co., 368 S.W.3d 633 (Tex. App. 2012), petition for review filed, No. 12-0452 (Tex. June 4, 2012)

An insurer could not maintain an equitable right to restitution of an indemnity payment without a policy provision that provided such a right.

U.S. Fid. v. U.S. Sports Specialty, 270 P.3d 464 (Utah 2012)

An insurer could not recoup its settlement payment through a unilateral reservation of rights and instead could do so only pursuant to a policy provision.

Farkas v. Nat'l Union Fire Ins. Co., 861 F. Supp. 2d 716 (E.D. Va. 2012)

An insurer had the right to recoupment where the insurance policy specifically included such right under either Florida or Illinois law.

Consent

Dobson v. Twin City Fire Ins. Co., No. SACV 11-0192 DOC (MLGx), 2012 U.S. Dist. LEXIS 93823 (C.D. Cal. July 5, 2012)

Under California law, an insured's settlement without consent breached a directors and officers policy's no-voluntary payments provision. The insured was not excused from seeking consent based on insurer breach because the insurer did not breach the policy by failing to pay 100 percent of defense costs where here the policy contained an allocation provision permitting the insurer to allocate defense payments between covered and non-covered loss, thus contracting around the default rule that an insurer must pay 100 percent of defense costs.

NextG Networks, Inc. v. OneBeacon Am. Ins. Co., No. 11-CV-05318-RMW, 2012 U.S. Dist. LEXIS 102345, (N.D. Cal. July 23, 2012)

Where an insurer wrongfully refuses to defend, the insurer forfeits the right to control settlement and defense. Therefore, a no voluntary payments provision may be unenforceable when the insurer breaches its duty to defend. It is only when the insured has requested and been denied a defense by the insurer that the insured may ignore the policy's provisions forbidding the incurring of defense costs without the insurer's prior consent. But where it is

undisputed that the insurer accepted the defense, enabling the insured to recover expenses incurred without the insurer's consent would strip the insurer of its contractual right to decide which costs to incur in discharging its duty to defend.

Ill. State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield & Assocs., P.C.,980 N.E.2d 1120 (Ill. App. Ct. 2012)

A no-voluntary payments provision in an attorney professional liability policy that restricted the attorney from admitting any liability without the insurer's consent was against public policy because it could operate to limit an attorney's disclosure to his clients. The court was troubled by the idea of an insurance company advising an attorney of his ethical obligation to his clients, and thus further held that, absent instructions from the Illinois Rules of Professional Conduct or the Illinois Attorney Registration and Disciplinary Commission, it is the attorney's responsibility to comply with the ethical rules as he understands them.

Leibowitz v. Trebels, No. 12-cv-01536, 2012 U.S. Dist. LEXIS 163028 (N.D. Ill. Nov. 14, 2012)

Under Illinois law, where a directors and officers liability policy authorized the insurer to enter into settlement agreements with the consent of its insured, and the insured gave its consent to a specific amount, which the insurer then offered to the underlying plaintiff, the insured could not later argue that it never approved of the settlement. The insured failed to object when the insurer notified it that the plaintiff had agreed to the settlement terms, and the insured also contributed to revisions to the term sheet. The court thus held that the insured was bound by the initial offer it communicated to the insurer which the insurer then sent to the plaintiff pursuant to the policy's consent-to-settlement provision.

W. Bend Mut. Ins. Co. v. Arbor Homes LLC, 703 F.3d 1092 (7th Cir. 2013)

Under Indiana law, an insurer was relieved of any duty to defend or indemnify the insured under a no-voluntary payments provision in a general liability policy because the insured did not obtain the insurer's consent before settling. The court also held that the settlement without the insurer's consent was at the insured's own expense, prejudice is irrelevant when an insured enters into a settlement without the insurer's consent in violation of a no-voluntary payments provision (unlike the prejudice required for notice provisions), and the insurer did not lose the opportunity to assert its rights under the no-voluntary payments provision simply because it denied for a time that the insured was an additional insured.

Estes v. Progressive Classic Ins. Co., 809 N.W.2d 111 (Iowa 2012)

Where an insured settled with both tortfeasors but only obtained the insurer's consent for one of the settlements, and the insurer failed to ask the trial court to apportion fault between the tortfeasors, the insurer on appeal could not show the prejudice necessary to disclaim coverage under a consent-to-settlement provision. Because the insurer failed to ask the trial court to apportion fault between the parties, it failed to preserve error on the applicability of the consent-to-settlement clause.

New Eng. Ins. Co. v. Barnett, 465 Fed. App'x 302 (5th Cir. 2012)

Under Louisiana law, an insured breached a consent-to-settle clause and a "no action" clause in its professional liability policy by entering into a consent judgment to which the insurer was not a party. The "no action" clause precluded the enforcement of the consent judgment because there was no trial of the injured party's claims and the judgment was entered without the insurer as a party. Similarly, the consent-to-settle clause prevented enforcement of the consent judgment because it was entered into without the insurer's consent – and the insurer's consent was not unreasonably withheld because the insurer had participated in settlement discussions and offered a reasonable settlement. There was no support for the contention that the "no action" and consent-to-settle clauses were against Louisiana public policy, and the consent judgment could not serve as *res judicata* as to the insurer because the insurer was not a party to that judgment.

AMI Entm't Network, Inc. v. Zurich Am. Ins. Co., No. 12-cv-12072, 2012 U.S. Dist. LEXIS 151543 (E.D. Mich. Oct. 22, 2012)

Where a commercial general liability policy contained a no-voluntary payment clause, under Michigan law, an insurer did not have to reimburse $1.3 million in defense costs and fees that the insured incurred for over a year before providing notice of the underlying lawsuit to its insurer.

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Big-D Constr. Corp. v. Take It For Granite Too, No. 2:11-cv-000621-PMP-PAL, 2013 U.S. Dist. LEXIS 8377 (D. Nev. Jan. 22, 2013)

Under Nevada law, when an insurer wrongfully denies coverage and the insured subsequently settles without the insurer's consent, the insurer cannot invoke a no-voluntary payments clause in the policy. The insured under a commercial general liability policy argued on summary judgment that giving its insurer notice of a settlement would have been futile because the insurer denied coverage before the insured entered into the settlement. Because issues of fact remained as to whether the insurer wrongfully denied the insured's claim, however, the court held that issues of fact also remained as to whether the insured's noncompliance with the no-voluntary settlement clause precluded coverage.

Kmart Corp. v. Footstar, Inc., No. 09-CV-3607, 2012 U.S. Dist. LEXIS 44360, 86-88 (N.D. Ill. Mar. 30, 2012)

Under New Jersey law, an insurer forfeited its right to control the insured's settlements because it unjustifiably denied a defense, was aware of the underlying mediation attempts but refused to contribute to a settlement, and, upon being informed of the mediation's failure, did not object to the proposed settlement, which the court found to be in a reasonable amount

Ill. Nat'l Ins. Co. v. Tutor Perini Corp., No. 11 Civ. 431 (KBF), 2012 U.S. Dist. LEXIS 165939 (S.D.N.Y. Nov. 15, 2012)

The independent actions of the insured in attempting to resolve the underlying claim without the participation or consent of any of the insurers – including even its actions preceding the ultimate settlement (such as providing the plaintiff with engineering personnel and contributing financially to the repair of its construction defects) – violated the clear terms of several commercial general liability and builder's risk policies and is an independent basis for granting summary judgment.

Cameron Int'l Corp. v. Liberty Ins. Underwriters, Inc. (In re Oil Spill), MDL No. 2179 Section J, 2012 U.S. Dist. LEXIS 115463 (E.D. La. Aug. 16, 2012)

Under Texas law, there may be instances when an insured's settlement without the insurer's consent prevents the insurer from receiving the anticipated benefit from the insurance contract; specifically, the settlement may extinguish a valuable subrogation right. In other instances, however, the insurer may not be deprived of the contract's expected benefit, because any extinguished subrogation right has no value. In the latter situation – where the insurer is not prejudiced by the settlement – the insured's breach is not material.

MidMountain Contractors, Inc. v. Am. Safety Indem. Co., No. C10-1239 JLR, 2012 U.S. Dist. LEXIS 126046 (W.D. Wash. Sept. 5, 2012)

The court held that, where an insured breaches a cooperation or no-voluntary payment clause of an insurance policy, the insurer is not relieved of its duties under the insurance policy unless it can show that the failure to cooperate or the voluntary payment caused it actual and substantial prejudice.

Practice Group Leaders

Leslie S. Ahari
D&O Insurance
Tysons Corner - 703.734.4322
leslie.ahari@troutmansanders.com

Terrence R. McInnis
D&O Insurance
Orange County - 949.622.2705
terrence.mcinnis@troutmansanders.com

Charles A. Jones
Professional Liability Coverage and Defense
Washington, D.C. - 202.662.2074
tony.jones@troutmansanders.com

Editor

Whitney Lindahl
Washington, D.C. - 202.662.2068
whitney.lindahl@troutmansanders.com

D&O Insurance and Professional Liability Practice Group Members

Chicago
Eileen King Bower
David F. Cutter
Milind Parekh
Rebecca L. Ross
Christopher White*

New York
Pamela L. Signorello

Orange County
Negar Azarfar*
William Burger*
Paddy Browne*
Monique M. Fuentes
Kevin F. Kieffer
Peter R. Lucier*
Jennifer Mathis
Terrence R. McInnis
Melissa J. Perez*
Binh Duong Pham*
Robert M. Pozin
Thomas H. Prouty*
Daniel Rashtian
Matthew C. So*
Ross Smith*
Daniel C. Streeter*
Ryan C. Tuley

Raleigh
Gary S. Parsons
Whitney S. Waldenberg*

Richmond
Philip "Duke" de Haas
Stacey E. Rufe*
Gary J. Spahn
Edward H. Starr

San Diego
Louise M. McCabe
Matthew D. Murphey
Lou Segreti

Tysons Corner
Leslie S. Ahari
Sean M. Hanifin

Washington, D.C.
Jo Ann Abramson*
Brandon D. Almond*
Richard C. Ambrow*
Wallace A. Christensen
Daniel W. Cohen*
Jonathan A. Constine
Gary V. Dixon
John W. Duchelle
Barbara E. Etkind
John R. Gerstein
David M. Gische
Thomas S. Hay*
Merril Hirsh
Patrick F. Hofer
Charles A. Jones
Prashant K. Khetan
Clarence Y. Lee
Whitney Lindahl*
Jesse K. Martin*
Stacey L. McGraw
Matthew T. McLellan*
Steven W. McNutt*
Gabriela A. Richeimer
Stuart Philip Ross
Jordan M. Rubinstein*
Anna K. Schall*
Cathy A. Simon
Karen Ventrell
Jenni Wallace
Meredith E. Werner

*Contributors

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