TROUTMAN SANDERS

D&O and Professional Liability

2014 | A Year In Review

2014 was a busy year for courts considering directors and officers and professional liability insurance coverage issues. Twenty federal courts of appeal, six state supreme courts, and dozens of other courts applying the law of 35 states, the District of Columbia, and Puerto Rico, issued notable decisions this year. This year again saw a large number of decisions with varying fact patterns in cases involving notice, prior notice/prior knowledge, related claims, whether restitution and disgorgement are insurable damages, and the meaning of professional services. 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 2015 and beyond.

In This Issue

Notice

Alterra Excess & Surplus Ins. Co. v. Gotama Bldg. Eng'rs, Inc., No. 14-CV-2969, 2014 U.S. Dist. LEXIS 110416 (C.D. Cal. July 24, 2014)

Under a claims-made-and-reported policy, the insured's failure to report the claim during the policy period or within 60 days after its expiration precluded coverage and the insurer was not required to show prejudice.

NewLife Scis. LLC v. Landmark Am. Ins. Co., No. 13-CV-05145, 2014 U.S. Dist. LEXIS 21469 (N.D. Cal. Feb. 18, 2014)

An insurer was required to show that it was prejudiced by the insured's untimely reporting of a claim under a claims-made professional liability policy. A reporting requirement contained in the policy's conditions (requiring notice as soon as practicable and in no event later than 30 days after the policy's expiration) did not transform the policy into a claims-made-and-reported policy, under which prejudice would not have been required.

Bann-Shiang Yu v. Century Sur. Co., No. G048427, 2014 Cal. App. Unpub. LEXIS 1411 (Feb. 27, 2014)

The court held that, under California law, the notice-prejudice rule does not apply to claims-made-and-reported policies.

Craft v. Phila. Indem. Ins. Co., 560 F. App'x 710 (10th Cir. 2014)

Finding that Colorado law had not yet addressed the issue, the Tenth Circuit asked the Colorado Supreme Court to decide whether the notice-prejudice rule applies to claims-made policies, and if so, to further decide whether the notice-prejudice rule applies to "all notice requirements" in a policy, including both initial and extended reporting periods. (On Feb. 17, 2015, the Colorado Supreme Court answered the certified question, holding that the notice-prejudice rule does not apply to the date-certain notice requirement of claims-made policies. *See Craft v. Phila. Indem. Ins. Co., 2015 CO 11*).

D&M Screw Mach. Prods., LLC v. Tabellione, No. CV126017117S, 2014 Conn. Super. LEXIS 417 (Feb. 24, 2014)

Coverage under a claims-made-and-reported malpractice insurance policy was precluded where the insured received notice of the claim within the policy period, but reported the claim to the insurer approximately seven months after the policy expired (or approximately five months beyond the 60-day reporting limitation). The insurer was not required to show prejudice under the claims-made-and-reported policy.

Argonaut Ins. Co. v. Town of Berlin, No. CV126017084, 2014 Conn. Super. LEXIS 2929 (Dec. 1, 2014)

An insurer that issued a workers' compensation and employers liability policy was materially prejudiced by the insured's late notice where the delay resulted in the presumptive acceptance of the claim for failure to contest pursuant to Conn. Gen. Stat. § 31-294c(b). The insurer was not required to show that the claim was defensible in order to establish material prejudice.

Bowman, Heintz, Boscia & Vician, P.C. v. Valiant Ins. Co., No. 2:13-CV-0079, 2014 U.S. Dist. LEXIS 105951 (N.D. Ind. Aug. 1, 2014)

The insurer properly denied coverage under a claims-made-and-reported lawyers professional liability policy that contained a provision requiring the insured to provide notice of a third party's intention to hold the insured responsible for a breach of duty, where the insured waited approximately seven months to notify the insurer and undertook its own defense during that time. Prejudice to the insurer was presumed from "any substantial delay in notification."

Lake Buena Vista Vacation Resort, L.C. v. Gotham Ins. Co., No. 13-15102, 2014 U.S. App. LEXIS 23957 (11th Cir. Dec. 19, 2014)

Under Florida law, coverage was not available where the claims-made-and-reported policy was effectively canceled before the insured reported any claim. Although the insured sent a letter giving notice of the claim on the same day the policy was cancelled, the insurer did not receive the letter until a week later, and under Florida law, notice is not effectuated until received by the insurer.

Gemini II Ltd. v. Mesa Underwriters Specialty Ins. Co., No. 14-11623, 2014 U.S. App. LEXIS 22105 (11th Cir. Nov. 19, 2014)

Under Florida law, a commercial general liability insurer properly denied coverage under an occurrence-based policy where notice was not provided (by the claimant) until seven months after a default judgment was entered against the insured. Prejudice to the insurer was presumed, and the claimant did not rebut this presumption. The court held that "an insurer which ultimately denies a claim based on lack of coverage may nevertheless be prejudiced due to late notice."

Lalonde v. Vallot, No. 2014 CA 0167, 2014 La. App. LEXIS 2932 (Dec. 10, 2014)

An insured's failure to report a claim to its insurer within the policy period barred coverage under the insured's claims-made-and-reported policy, despite the fact that the insured had renewed the policy. Under Louisiana law, renewing a claims-made-and-reported policy does not extend the reporting period.

Grubaugh v. Cent. Progressive Bank, 3 F. Supp. 3d 547 (E.D. La. 2014)

An insurer was required to show prejudice under a financial institutions bond, which the court found to be akin to a claims-made policy, where notice was provided during the policy period, but not within 60 days of discovery as required by the policy terms. The court noted that "[t]he scope of [the insurer]'s bargained-for coverage has not been expanded and [the insurer]'s ability to 'close its books on [the Bond] at its expiration' was not impeded because the loss was discovered and reported during the Bond period at a time when any other claim could have arisen."

Gorman v. City of Opelousas, 148 So. 3d 888 (La. 2014)

An insurer could assert the notice requirements of a claims-made-and-reported policy as a bar to coverage in a direct action brought by a claimant who was unaware of those requirements, because Louisiana's direct action statute does not prohibit a provision that makes coverage dependant on a claim being first made and reported during the policy period. Separately, the insured city's purchase of a renewal policy did not extend the policy period of the first policy or otherwise affect the reporting requirements of that policy.

Navigators Specialty Ins. Co. v. Med. Benefits Adm'rs of Md., Inc., No. 12-CV-2076, 2014 U.S. Dist. LEXIS 22631 (D. Md. Feb. 21, 2014)

The court held that claims-made-and-reported policies, as well as occurrence-based policies, come within the ambit of Md. Code Ann. Ins. § 19-110, and insurers are thus required to show prejudice before denying claims for untimely notice under such policies.

Ins. Co. of Pa. v. Great N. Ins. Co., No. 13-CV-12821, 2014 U.S. Dist. LEXIS 118089 (D. Mass. Aug. 25, 2014)

A co-insurer had no obligation to another insurer for equitable contribution until the insured tendered a claim for defense or indemnity to the co-insurer. The insured's failure to tender the claim foreclosed coverage and the other insurer, who was not authorized by the insured to tender the claim, could not trigger the co-insurer's duties by tendering the claim itself.

Catlin Specialty Ins. Co. v. Am. Superconductor Corp., No. SUCV2012-02314-BLS1, 2014 Mass. Super. LEXIS 22 (Jan. 29, 2014)

Coverage under a claims-made-and-reported policy was barred by an insured's failure to report the claim within the policy period, and the insurer was not required to show prejudice. Although the policy contained a New York choice of law provision, the policy was not "issued or delivered" in New York, and thus was not subject to the notice-prejudice requirement of N.Y. Ins. Law § 3420(d)(2).

Feller v. The Med. Protective Co., No. 13-CV-14193, 2014 U.S. Dist. LEXIS 88500 (E.D. Mich. June 30, 2014)

The court held that Mich. Comp. Laws § 500.3008, which provides that an insured's failure to give notice of a claim pursuant to the requirements of a casualty policy is excused "if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible," applies to claims-made-and-reported policies. The insured's failure to report a claim made during the policy period until after the expiration of the reporting period would be excused if the insured could show that it was not reasonably possible to provide notice within the period required by the professional liability policy.

LeCuyer v. W. Bend Mut. Ins. Co., No. A13-1685, 2014 Minn. App. Unpub. LEXIS 714 (July 14, 2014)

The reporting requirement of a claims-made-and-reported policy unambiguously precluded coverage for a claim that was first reported two years after the expiration of the policy. Alleged ambiguities in the employment practices liability policy's provisions governing when a claim is deemed first made did not alter the reporting requirements or excuse the two-year delay in reporting the claim.

Atl. Cas. Ins. Co. v. Greytak, 755 F.3d 1126 (9th Cir. 2014), cert. accepted, 2014 Mont. LEXIS 443 (July 8, 2014)

The Ninth Circuit asked the Montana Supreme Court to decide whether an insurer that does not receive timely notice of a claim according to the terms of an insurance policy (here, an occurrence-based general liability policy) must show that it was prejudiced in order to disclaim coverage based on the late notice. (The Montana Supreme Court has accepted the case, but has not yet issued a decision).

Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., No. A-4516-12T1, 2014 N.J. Super. Unpub. LEXIS 1303 (App. Div. June 6, 2014), cert. granted, 101 A.3d 1082 (N.J. 2014)

An unexplained six-month delay in reporting a claim was not "as soon as practicable" and precluded coverage under the notice provisions of a directors and officers policy. Although notice was given within the policy period, the insurer was not required to show that it was prejudiced by the delay because the policy provided claims-made coverage.

George K. Baum & Co. v. Twin City Fire Ins. Co., 760 F.3d 795 (8th Cir. 2014)

Under New York law, an insured's untimely notice of claims did not bar coverage under a claims-made-and-reported policy where the insured gave timely notice of a prior claim that was related to, and constituted a single claim with, the subsequent claims. The policy's related claims provision made the claims related "for all purposes."

Travelers Indem. Co. v. Northrop Grumman Corp., 999 F. Supp. 2d 552 (S.D.N.Y. 2014)

An insured was barred from seeking coverage for environmental contamination under a policy containing a notice-of-occurrence provision because, among other reasons, the insured waited several years to provide adequate notice to the insurer. The court rejected the insurer's arguments that it had a good faith belief that it was not liable for the claim, and that the insured provided notice of the claim through oral discussions with the insurer (because the policy required written notice and the insurer did not waive this requirement).

Hernandez Castillo v. Prince Plaza, LLC, 981 N.Y.S.2d 906 (Sup. Ct. 2014)

The irrebuttable presumption of prejudice to the insurer under N.Y. Ins. Law § 3420(c)(2)(b) (based on the insured's liability having been determined prior to notice) does not apply where a default judgment entered against the insured prior to notice is vacated after notice. The court noted that the default was vacated without any effort on the part of the insurer.

Strauss Painting, Inc. v. Mt. Hawley Ins. Co., No. 203, 2014 N.Y. LEXIS 3347 (Nov. 24, 2014)

Notice to the broker was not sufficient under a commercial general liability policy. Distinguishing other cases that allowed notice of a claim to be made to a broker, the court found that there was no close relationship between the broker and the insurer to justify notice to the broker as constituting notice to the insurer, and further that the insured was a sophisticated business.

C.L. Thomas, Inc. v. Lexington Ins. Co., No. 13-13-00566-CV, 2014 Tex. App. LEXIS 10148 (Sept. 11, 2014)

An insurer had no obligation to provide coverage for an employee's $5 million arbitration award for wrongful termination against his employer, where the employer tendered the claim under its umbrella occurrence policy six days after the arbitration judgment was issued. The court found that the insurer was prejudiced, stating that "[n]otice that comes after judgment defeats all of the recognized purposes of the notice requirements[.]"

Expedia, Inc. v. Steadfast Ins. Co., 329 P.3d 59 (Wash. 2014)

The court held that an insurer's claim that it was prejudiced by late notice under an occurrence-based policy "cannot preclude a determination that the underlying claim is conceivably covered," and thus triggers the duty to defend, "unless actual prejudice can be established by the insurer as a matter of law." The trial court should adjudicate the duty to defend issue under the eight-corners rule, and not delay ruling on the issue pending further discovery.

Anderson v. Aul, 844 N.W.2d 636 (Wis. Ct. App. 2014), review granted, 852 N.W.2d 744 (Wis. 2014)

The court held that Wisconsin's notice-prejudice statutes (Wis. Stat. §§ 631.81 and 632.26) did not distinguish claims-made policies, and that an insurer was required to show that it was prejudiced by the untimely notice even where notice was first given 11 months after the expiration of the policy period.

Related Claims

Procentury Ins. Co. v. Ezor, 554 F. App'x 576 (9th Cir. 2014)

Interpreting California law, the Ninth Circuit affirmed the district court's grant of summary judgment to the insurer, holding that coverage for two claims was unavailable because the insured failed to report the first claim, the second claim arose out of "related wrongful acts" that shared a common nexus, and the relationship between the two claims was not so attenuated or unusual that "an objectively reasonable insured could not have expected they would be treated as a single claim under the policy."

Presidio Wealth Mgmt., LLC v. Columbia Cas. Co., No. 13-CV-04604, 2014 U.S. Dist. LEXIS 47001 (N.D. Cal. Apr. 3, 2014)

Coverage was not available under an investment management liability solutions policy because claims made in emails prior to the applicable policy period and subsequently raised in a civil action and arbitration claim during the policy period arose out of and involved

the same facts, circumstances, situations, transactions, or events: namely, the insured wealth management company's investment of funds in certain securities which were allegedly unsuitable and dangerous. Because the claims were first made prior to the applicable policy period, the insurer had no liability to the insured for those claims.

Lexington Ins. Co. v. Lexington Healthcare Grp., Inc., 84 A.3d 1167 (Conn. 2014)

Relying in part on cases from other jurisdictions, the court concluded that the term "related medical incidents" in a professional liability policy did not clearly and unambiguously encompass incidents in which multiple losses were suffered by multiple people, when each loss had been caused by a unique set of negligent acts, errors or omissions by the insured, even though there may have been a common precipitating factor.

RSUI Indem. Co. v. Sempris, LLC, No. N13C-10-096, 2014 Del. Super. LEXIS 449 (Sept. 3, 2014)

The court found that a putative class action alleging two claims under the Telephone Consumer Protection Act ("TCPA") was not related to four prior lawsuits under a directors and officers liability policy. The prior lawsuits all arose out of a plaintiff contacting a third-party vendor, and in that same transaction, the third party enrolled the plaintiff in and initiated billing for membership in the insured's program. The putative class action, however, involved an online order, contact by a third-party telemarketer, and TCPA claims, and also did not involve enrollment in the insured's membership program.

Schneider v. Liberty Ins. Underwriters, Inc., No. 14-62290, 2014 U.S. Dist. LEXIS 170815 (S.D. Fla. Dec. 9, 2014)

The court held that the policy covered a claim of negligence in a fifth amended complaint because the fifth amended complaint did not relate back to the original complaint, which was filed prior to policy inception and asserted a claim for breach of contract. In making this determination, the court held that it could look beyond the four corners of the plaintiff's fifth amended complaint and analyze the original and fifth amended complaints together, because the plaintiff insured had referenced the documents, the subject of the documents was undisputed, and the defendant insurer had attached the documents to its motion to dismiss.

Gidney v. Axis Surplus Ins. Co., 140 So. 3d 609 (Fla. Dist. Ct. App. 2014), rehearing denied at 2014 Fla. App. LEXIS 10394 (3d Dist. June 25, 2014)

A class action filed after a miscellaneous professional liability policy expired was covered because it related back to an earlier claim filed during the policy period. The court first noted that the Reported Wrongful Acts provision did not govern the coverage dispute. Rather, under the multiple claims provision of the policy, the class action was based on the same common facts, circumstances, transactions, events or decisions as the earlier claim: the insured's allegedly negligent brokering and servicing of mortgages. In addition, the members of the class were investors in the same situation as the investors who made the earlier claim, and the number of claimants or amount of alleged damages involved in each claim was not dispositive of the analysis under a multiple claims provision like the one at issue.

Idaho Trust Bank v. BancInsure, Inc., No. 1:12-CV-00032, 2014 U.S. Dist. LEXIS 37660 (D. Idaho Mar. 20, 2014)

Relying on cases from various federal jurisdictions, the court concluded that a 2010 claim and a 2008 claim involved interrelated wrongful acts under an extended professional liability policy so that they were deemed to be a single claim and first made when the earlier claim was made, making the 2010 claim fall within the earlier, applicable policy period. Noting other courts' expansive reading of the same definition of "interrelated wrongful act," the court found that the claims shared a common nexus, facts, circumstances and events because they involved the same parties, lending relationship between the parties, and underlying subject matter. In addition, the 2010 claim would not have existed but for the attempts to settle the 2008 claim.

W.C. & A.N. Miller Dev. Co. v. Cont'l Cas. Co., No. GJH-14-00425, 2014 U.S. Dist. LEXIS 157814 (D. Md. Nov. 7, 2014)

Two claims constituted one claim made prior to the policy's inception because the two claims arose out of a common scheme that was directed at a specific entity, involved a single contract, involved the same real-estate transaction, and sought a single outcome.

Kilcher v. Cont'l Cas. Co., 747 F.3d 983 (8th Cir. 2014)

Analyzing a professional liability policy under Minnesota law, the Eighth Circuit held that four claims brought against the insured for allegedly selling unsuitable investments and churning in order to generate high commissions reflected interrelated wrongful acts because the insured breached her fiduciary duty to each claimant in the same manner, taking advantage of each claimant's youth, lack of sophistication, and substantial annual income and net worth, and engaged in the same modus operandi of advising each claimant to purchase unsuitable investments.

Duckson v. Cont'l Cas. Co., No. 14-1465, 2014 U.S. Dist. LEXIS 179569 (D. Minn. Dec. 8, 2014), adopted in 2015 U.S. Dist. LEXIS 859 (D. Minn. Jan. 6, 2015)

The court granted the insurer's motion to dismiss a claim for breach of contract under a legal malpractice liability policy, holding that the policy's related claims provision could not be used to extend coverage for activities that would otherwise not be covered by the policy, and thus the claims resulting from the insured's related business activities, which did not constitute legal services, were not covered.

The Hullverson Law Firm, PC v. Liberty Ins. Underwriters, Inc., No. 4:12-CV-1994, 2014 U.S. Dist. LEXIS 150351 (E.D. Mo. Oct. 22, 2014)

In a dispute regarding whether the aggregate or single limit of liability would apply to a civil action and multiple disciplinary hearings against several insured individuals for presenting false and misleading advertising information, the court ruled that only the single defense limit was owed, explaining that the disciplinary proceedings initiated against each of the insured individuals arose out of the same wrongful acts of false advertising that were alleged in the civil action brought against the insureds.

Baum & Co. v. Twin City Fire Ins. Co., 760 F.3d 795 (8th Cir. 2014)

Applying New York law, the Eighth Circuit held that a professional services liability policy provided coverage for several lawsuits that were filed years after the policy expired, even though the insured waited almost two years to notify the insurer, because the lawsuits related to a prior claim that was timely noticed under the policy.

Weaver v. Axis Surplus Ins. Co., No. 13-CV-7374, 2014 U.S. Dist. LEXIS 154746 (E.D.N.Y. Oct. 30, 2014)

The court held that two claims containing allegations that the insured: (1) schemed to defraud customers; (2) made unlawful representations about expected profits and earnings; and (3) failed to provide the requisite disclosure statement to customers, involved interrelated wrongful acts and thus were a single claim made before the claims-made-and-reported policy's inception date. The court explained that it was immaterial that one claim asserted additional facts or allegations, because all that was required for coverage was any common fact, circumstance, situation, event, transaction, cause or series of casually or logically connected facts, circumstances, situations, events, transactions or causes.

Nomura Holding Am., Inc. v. Fed. Ins. Co., No. 13-CV-5913, 2014 U.S. Dist. LEXIS 127574 (S.D.N.Y. Sept. 11, 2014)

In a dispute involving a claims-made directors and officers policy over whether certain claims were related, the court applied the "factual nexus" test, which requires a side-by-side review of the factual allegations in each of the suits to determine whether the claims arise from common facts and if logically connected facts and circumstances demonstrate a factual nexus among the claims. The court found that the claims shared a strong factual nexus because the claimants each alleged that they invested in reliance on certain misstatements in offering documents and registration statements filed in connection with specific offerings in 2005 and 2007.

Glascoff v. OneBeacon Midwest Ins. Co., No. 13 Civ. 1013, 2014 U.S. Dist. LEXIS 64858 (S.D.N.Y. May 8, 2014)

The court held that pursuant to the terms of a professional liability policy, a claim brought by the Federal Deposit Insurance Commission ("FDIC") during the policy period and a subsequent lawsuit filed by investors after the policy expired did not involve "interrelated wrongful acts" because they did not share a "sufficient factual nexus." The FDIC's claim only referenced a director/officer's general misconduct, while the investor lawsuit made specific allegations of his fraud. The court rejected the plaintiffs' argument that both claims related to the oversight of the director/officer, finding that the factual overlap between the two claims was "tenuous at best."

Templeton v. Fehn, No. 12-CV-00859, 2014 U.S. Dist. LEXIS 85639 (D. Colo. June 24, 2014)

Under New York law, an interrelated wrongful acts exclusion in an errors and omissions policy barred coverage for the insured broker's liability stemming from a 2007 securities sale. The sale was interrelated with the wrongful acts the insured committed in 2004, which predated the retroactive date of the policy, because the acts involved the same clients and investments in the same company, and the policy defined "interrelated" broadly.

Sirius XM Radio Inc. v. XL Specialty Ins. Co., 987 N.Y.S.2d 324 (App. Div. 2014)

The court found that a policy was ambiguous regarding whether its requirement of notice with respect to any claim pertains to related claims pursuant to the "interrelated wrongful acts" provision and therefore affirmed the trial court's denial of the insurer's motion to dismiss. Triable issues also existed regarding the plaintiff's "notice" to the insurer and as to the relatedness of the timely claim and three disputed claims. The court noted that the insurer's argument that the insured did not ask for consent to incur defense expenses would fail if the claims were found to be interrelated and treated as a single claim under the policy.

Am. Cas. Co. of Reading, Pa. v. Gelb, No. 653280/2011, 2014 N.Y. Misc. LEXIS 2791 (N.Y. Sup. Ct. June 19, 2014)

A shareholder class action brought against the insured chemical company and a subsequent bankruptcy action brought by the insured's creditors were not based on interrelated wrongful acts and did not constitute one claim pursuant to directors and officers liability policies. The policies did not contain provisions that would treat multiple claims as the same claim, even if the claims were determined to be based on "interrelated wrongful acts." Rather, the policies provided that in the event of two or more claims based on interrelated wrongful acts, the loss from those claims was treated as one loss, triggering only one set of policy limits. Moreover, the only true connection between the two actions was the merger that was the subject of the class action and the cause of the bankruptcy action.

Borough of Moosic v. Darwin Nat'l Assur. Co., 556 F. App'x 92 (3d Cir. 2014)

Analyzing a professional liability policy under Pennsylvania law, the Third Circuit held that a policy's related claims provision was, in effect, a policy exclusion, rather than a condition precedent to coverage, because its application limited coverage under the policy, and therefore the insurer bore the burden of proving that the related claims provision applied.

Ettinger & Assocs., LLC v. The Hartford/Twin City Fire Ins. Co., 22 F. Supp. 3d 447 (E.D. Pa. 2014)

The court held that under a related claims provision of a professional liability policy, the bad advice allegation of a malpractice action brought against the insured attorney was related to an earlier action for wrongful abuse of civil proceedings because the claims shared a common nexus of facts and arose out of the same wrongful acts: the insured's alleged professional misconduct in filing and pursuing a lawsuit against a realtor. However, the dual representation allegations of the malpractice action, which was based on the insured's allegedly improper dual representation of himself and his clients in the earlier wrongful abuse of civil proceedings action, constituted a distinct negligent act that did not constitute a related claim.

W Holding Co. v. AIG Ins. Co., No. 11-2271, 2014 U.S. Dist. LEXIS 94005 (D.P.R. July 9, 2014)

The FDIC brought several lawsuits during two separate policy periods, all of which stated allegations against all of the individuals who approved or administered each loan, the grossly negligent conduct in which they engaged, and the time frame in which they engaged in it. However, the lawsuits during the earlier policy period did so only in the context of certain loans. In assessing whether the lawsuits constituted related claims triggering coverage under the earlier policies, the court examined the specific allegations of the FDIC's claims and concluded that allegations of gross negligence concerning certain loans were covered by the earlier policies, while the rest of the claims concerning other borrowers were covered by the later policies.

John M. O'Quinn P.C. v. Nat'l Union Fire Ins. Co., No. 4:00-CV-2616, 2014 U.S. Dist. LEXIS 97034 (S.D. Tex. July 17, 2014)

The court held that two suits filed in 1999 and 2002 were one claim made in 1999 because both cases contained

the same legal and factual allegation, that the insured improperly billed clients through deducting expenses from its clients' settlement disbursement, and arose from a common nexus of facts such that they could be considered interrelated wrongful acts.

Lessard v. Cont'l Cas. Co., No. 1:14-CV-63, 2014 U.S. Dist. LEXIS 115953 (E.D. Va. Aug. 19, 2014)

Where the insureds confessed judgment in favor of Wells Fargo relating to loan defaults prior to a claims-made policy's inception in 2011, and Wells Fargo subsequently initiated a lawsuit during the policy period in an effort to collect on the defaulted loans and judgments, the court held that the second action, which was a function of Wells Fargo's failing to resolve the collections dispute regarding the confessed judgments, related to the prior claim and was deemed made prior to the policy's inception.

Great Am. Ins. Co. v. Sea Shepherd Conserv. Soc'y, No. C13-1017, 2014 U.S. Dist. LEXIS 71462 (W.D. Wash. May 23, 2014)

In analyzing the related claims provision of a nonprofit solution policy, the court concluded that a second amended motion for contempt formed part of a single claim that was first made when the complaint initiating earlier contempt proceedings and resulting in a preliminary injunction was filed. The second amended motion for contempt and the earlier contempt proceedings arose out of a common set of facts, circumstances and events: the insureds' alleged attacks on sailing vessels. Moreover, the second amended motion for contempt would not have occurred but for the earlier contempt proceedings. Because the claim was not first made during the policy period, coverage was unavailable.

Prior Knowledge, Known Loss, And Rescission

Century Sur. Co. v. Cal-Regent Ins. Servs. Corp., No. 3:13-CV-01488, 2014 U.S. Dist. LEXIS 101362 (S.D. Cal. July 16, 2014)

The court refused to stay a rescission action regarding an errors and omissions policy pending the outcome of the underlying proceeding, reasoning that the issues in the recession action were distinct from the issues in the underlying action and the parallel action was not prejudicial.

Kurtz v. Liberty Mut. Ins. Co., No. 2:11-CV-7010 (C.D. Cal. Apr. 14, 2014)

The court held that the insurers were entitled to rescind their policies due to material misrepresentations of fact in the insured's insurance application – the insured's misrepresentation regarding comingling client funds with its operating expenses in its insurance application was false on a material point. The court applied a subjective standard to reach this conclusion and examined the effect of the misrepresentation on the likely practice of the insurance company.

Chi. Ins. Co. v. Paulson & Nace, PLLC, No. 12-2068, 2014 U.S. Dist. LEXIS 49616 (D.D.C. Apr. 10, 2014)

Applying District of Columbia law, the court held that an insurer was not required to defend or indemnify its insured law firm under the terms of a professional liability policy because the insured should have known of a potential malpractice claim before it applied for the policy due to the dismissal of a claim by a trial court for "improper style" and a failure to comport with the Virginia Code. The policy at issue covered incidents occurring prior to the inception date of the policy so long as the insured did not have a reasonable basis to believe that it breached a professional duty at the time of inception.

Travelers Cas. & Sur. Co. of Am. v. Mader Law Grp., LLC, No. 8:13-CV-2577, 2014 U.S. Dist LEXIS 148955 (M.D. Fla. Oct. 20, 2014)

The court held that a misrepresentation clause in a professional liability policy, which imposed a heightened standard for rescission, trumped a state statute providing a lower standard for rescission of an insurance policy. The court held that the parties contracted out of the state standard and denied cross motions for summary judgment.

Cardenas v. Twin City Fire Ins. Co., No. 13-C-8236, 2014 U.S. Dist. LEXIS 132420 (N.D. Ill. Sept. 19, 2014)

The court held that a prior knowledge exclusion in a legal malpractice policy precluded coverage because a district court opinion and an appellate court opinion were issued before the inception date of the policy and a reasonable attorney would expect that the scathing opinions would form the basis of a malpractice claim.

Ill. State Bar Ass'n Mut. Ins. Co. v. Brooks, 2014 IL App (1st) 132608

The court held that a misrepresentation in an initial application for a legal malpractice insurance policy did not justify rescission of a renewal of the policy, where the insured made no misrepresentation in the application for renewal and neither the new policy nor the application for renewal incorporated the initial application for insurance.

Ill. State Bar Assn. Mut. Ins. Co. v. Law Office of Tuzzolino & Terpinas, 2013 IL App (1st) 122660, appeal granted at 379 Ill. Dec. 14 (March 26, 2014)

The court held that an insurer could partially rescind coverage because an insured made material misrepresentations in a malpractice insurance policy application. Citing the policy's "severability" provision and the "innocent insured" doctrine, the court also held that the insurer could not rescind coverage for other insureds who did not make misrepresentations.

Minn. Lawyers Mut. Ins. Co. v. Conour, No. 1:12-CV-1671, 2014 U.S. Dist. LEXIS 143588 (S.D. Ind. Oct. 8, 2014)

The court granted an insurer's motion for summary judgment and rescinded malpractice insurance policies because the insured attorney made material misrepresentations and omissions in obtaining coverage. The court held that an attorney's admissions in a criminal plea hearing, including a statement that he began a scheme to defraud clients years before submission of his applications for coverage, demonstrated that the attorney made misrepresentations in his policy applications.

Colony Ins. Co. v. Kwasnik, Kanowitz & Assoc., PC, No. 1:12-CV-00722, 2014 U.S. Dist. LEXIS 87659 (D.N.J. June 27, 2014)

The court held that an insurer may rescind a professional liability policy and recover damages when it relies on false statements made by the insured in the insurance application. The court reasoned that rescission is appropriate when the insured: (1) makes a false statement; (2) material to the particular risk assumed by the insurer; and (3) the insurer actually and reasonably relies on the statement in issuing the policy. The court further noted that knowledge of the statement's falsity is not a prerequisite for rescission unless the insured made the statement in response to a subjective question.

Bergen Cmty. Coll. v. Diamond State Ins. Co., No. A-5499-12T3, 2014 N.J. Super. Unpub. LEXIS 2426 (App. Div. Oct. 9, 2014)

The court overturned a grant of summary judgment in favor of the insured college and remanded the case, tasking the trial court with assessing the applicability of the insurer's prior knowledge provision and determining whether the insured had sufficient information, prior to the inception of the educators liability insurance policy, for it to reasonably expect that a claim would be made against it due to its receipt of a grievance letter and an Equal Employment Opportunity Commission claim from a faculty member.

Chandler v. Valentine, 330 P. 3d 1209 (Okla. 2014)

The court held that an insurer violated Section 3625 of the Oklahoma Code when it rescinded its professional liability policy after receiving a letter and a news article from the Oklahoma State Board of Medical Licensure and Supervision regarding the conduct of an insured physician. During a bankruptcy proceeding, the insured entered into a consent judgment with the underlying claimant. The underlying claimant successfully challenged the rescission of the policy under Section 3625 because there was evidence that the insurer and the insured entered into an agreement to cancel the policy, and because there was evidence that the insurer had knowledge of events that would lead to a malpractice claim at the time coverage was canceled.

Ettinger & Assoc., LLC v. The Hartford / Twin City Fire Ins. Co., 22 F.Supp.3d 447 (E.D. Pa. 2014)

The court enforced the terms of a prior knowledge exclusion in a legal malpractice insurance policy to preclude coverage because an action was filed against an attorney prior to the policy inception date alleging that the attorney had wrongfully abused civil proceedings. The court held that, as a matter of law, a reasonable attorney would understand that such a claim constitutes a potential breach of a professional duty and might result in a future malpractice claim.

OneBeacon Ins. Co. v. T. Wade Welch & Assoc., No. H-11-3061, 2014 U.S. Dist. LEXIS 85486 (S.D. Tex. June 24, 2014)

The court denied an insurer's motion for summary judgment based on a prior knowledge exclusion in a professional liability policy issued to a law firm. The court examined whether an objectively reasonable attorney would have expected a claim given the subjective knowledge of the particular attorney involved, and concluded that whether the claim in question was foreseeable was a question of law appropriate for a jury.

Prot. Strategies, Inc. v. Starr Indem. & Liab. Co., No. 1:13-CV-00763, 2014 U.S. Dist. LEXIS 56652 (E.D. Va. Apr. 23, 2014)

The court enforced the terms of a prior knowledge exclusion in a directors and officers policy to preclude coverage because statements of fact accompanying a guilty plea entered into by insured officers indicated that the officers had actual knowledge of an ongoing fraudulent scheme prior to the inception date of the policy. The actual knowledge of the ongoing fraudulent scheme should have provided the officers with a reasonable belief that a claim would be filed under the policy.

Prior Acts, Prior Notice, And Pending And Prior Litigation

1st Am. Warehouse Mortg. v. Topa Ins. Co., No. B251972, 2014 Cal. App. Unpub. LEXIS 8293 (Nov. 19, 2014)

The court held that coverage was precluded by the prior acts date provision in a real estate agents and brokers errors and omissions policy where an underlying claim alleged that the insured provided real estate services prior to the policy's prior acts date, and there were no allegations that any services were provided after that date. Regarding a second underlying complaint that alleged wrongful conduct by the insured during the policy period, the court found that the underlying plaintiff's admission that he knew that the real estate agent was not licensed before the key events occurred prevented the underlying plaintiff from establishing that the insured's failure to inform him that the real estate agent was not licensed caused the plaintiff damage.

RSUI Indem. Co. v. Sempris, LLC, No. N13C-10-096, 2014 Del. Super. LEXIS 449 (Sept. 3, 2014), appeal denied at 2015 Del. LEXIS 5 (Jan. 6, 2015)

Recognizing that Delaware law employs a broad interpretation of the phrases "arising out of" and "or in any way involving," the court nonetheless determined that the factual differences between litigation filed prior to the policy period and a case filed during the policy period prevented the prior notice exclusion from barring coverage under a directors and officers liability policy.

Savers Prop. & Cas. Ins. Co. v. Indus. Safety & Envtl. Servs., No. 3:12-CV-528, 2014 U.S. Dist. LEXIS 39032 (N.D. Ind. Mar. 25, 2014)

The court held that summary judgment in favor of an insurer was appropriate, in part, because the alleged wrongful acts occurred before the professional liability policy's retroactive date. Although the underlying complaint alleged a scheme to defraud that started before the policy's retroactive date and continued through the policy period, the only acts the insured was alleged to have committed occurred prior to the retroactive date.

Hurley v. Comproni, No. 13-P-974, 2014 Mass. App. Unpub. LEXIS 216 (Feb. 24, 2014)

A malpractice policy's prior acts exclusion precluded coverage where a lawyer's alleged acts or omissions predated the policy's effective date, despite the insured's argument that the malpractice claim was based in part on conduct that allegedly continued into the policy period, and where the insured did not demonstrate that the additional conduct alleged could have mattered.

Realcomp II, Ltd. v. Ace Am. Ins. Co., No. 12-CV-11280, 2014 U.S. Dist. LEXIS 134124 (E.D. Mich. Sept. 9, 2014)

The court held that a prior and pending litigation exclusion in a professional liability policy was unambiguous, despite the undefined phrase "fact, circumstance, or situation," and that the exclusion operated to bar coverage where the plaintiffs in the underlying lawsuits were "merely making alternative claims for their own damages based on the same set of facts [anti-competitive acts that occurred over a span of several years and affected multiple parties]."

Drew v. Church Mut. Ins. Co., No. 13-CV-01906, 2014 U.S. Dist. LEXIS 73562 (D.N.J. May 29, 2014)

The court held that a professional liability policy's prior acts date precluded coverage for a counseling incident that occurred prior to the commencement of the policy where "there was no question" that the insured had knowledge of the incident at the time the policy began.

Ettinger & Assocs., LLC v. Hartford/Twin City Fire Ins. Co., 22 F. Supp. 3d 447 (E.D. Pa. 2014)

Coverage was barred by a professional liability policy's prior knowledge exclusion where an action was brought against an insured lawyer prior to the policy's inception date. The court held that, as a matter of law, a reasonable attorney in the insured's position would have had a basis to believe that he or she had breached a professional duty prior to the policy period.

AmerisourceBergen Corp. v. Ace Am. Ins. Co., 100 A.3d 283 (Pa. Super. Ct. 2014)

A prior and pending litigation exclusion in a 2009-10 professional liability policy barred coverage for a lawsuit filed prior to the effective date of a 2007 policy, of which the court determined that the 2009-10 policy was a continuous renewal. The court rejected the insured's arguments that the prior notice exclusion did not apply because (1) the lawsuit was not served until the middle of the 2009-10 policy; and (2) the series of policies issued by the insurer predated the filing of the underlying action.

Mountainside Holdings, LLC v. Am. Dynasty Surplus Lines Ins. Co., No. 2003-127, 2014 Pa. Dist. & Cnty. Dec. LEXIS 73 (C.P. Centre June 30, 2014)

On summary judgment, the court held that a prior and pending litigation exclusion in a directors and officers liability policy did not bar the insured's claim where the language "brought prior to" was not defined with enough specificity to determine whether it was meant to include actions filed under seal, or whether the party must be served before the exclusion is to take effect.

OneBeacon Ins. Co. v. T. Wade Welch & Assocs., No. H-11-3061, 2014 U.S. Dist. LEXIS 85486 (S.D. Tex. June 24, 2014)

The court held that, based on the language of the lawyers' professional liability policy, the appropriate standard regarding a prior acts exclusion was whether an objectively reasonable attorney with the insured's subjective knowledge would expect his or her acts, errors, or omissions to give rise to a claim. The court held that whether a claim was foreseeable in the instant action was a question of fact for the jury.

Fed. Ins. Co. v. Holmes Weddle & Barcrott PC, No. C13-0926, 2014 U.S. Dist. LEXIS 12456 (W.D. Wash. Jan. 31, 2014)

The court held that whether a prior knowledge and application exclusion in a malpractice policy barred coverage for a claim that the insurer argued the insured had knowledge of prior to the policy's inception could not be resolved without findings of facts that would be of consequence in the underlying malpractice action, and thus the insured's motion for a stay was granted.

Dishonesty And Personal Profit Exclusions

Certain Interested Underwriters at Lloyd's, London v. AXA Equitable Life Ins., No. 10-62061, 2014 U.S. Dist. LEXIS 93779 (S.D. Fla. July 10, 2014)

Under Florida law, a criminal conduct exclusion in a professional errors and omissions policy barred coverage for a claim against an insurance broker who pled guilty to insurance fraud.

Gen. Star Nat'l Ins. Co. v. Adams Valuation Corp., No. 13-C-2973, 2014 U.S. Dist. LEXIS 14954 (N.D. Ill. Feb. 6, 2014)

Under Illinois law, an insurer did not have a duty to defend underlying claims pursuant to the False Claims Act under a real estate errors and omissions liability policy because such claims fell within the exclusion for "dishonest acts, omissions or intentional misrepresentations allegedly in violation of federal law."

Gen. Star Nat'l Ins. Co. v. Adams Valuation Corp., No. 14-C-1821, 2014 U.S. Dist. LEXIS 133223 (N.D. Ill. Sept. 23, 2014)

A district court applying Illinois law granted an insurer's motion for judgment on the pleadings, finding that the insurer had no duty to defend under a real estate errors and omissions liability policy on the grounds that the RICO and fraud claims asserted in the underlying action fell within the exclusion for dishonest, fraudulent, criminal, or malicious acts or omissions, or intentional misrepresentations.

C.A. Jones Mgmt. Group, LLC v. Scottsdale Indem. Co., No. 5:13-CV-00173, 2014 U.S. Dist. LEXIS 25931 (W.D. Ky. Feb. 28, 2014)

The court held that a stipulated permanent injunction in which the insured did not admit to dishonesty or fraudulent acts was not a judgment triggering a directors and officers liability policy's dishonesty exclusion.

Cornerstone Title & Escrow, Inc. v. Evanston Ins. Co., No. 12-746, 2014 U.S. Dist. LEXIS 72451 (D. Md. May 28, 2014)

The court narrowly construed a dishonesty exclusion in a professional liability insurance policy, finding that there was a potential for coverage because some of the allegations related to liability based on co-defendants' conduct and therefore were not committed by or at the direction of the insured. The court also noted that a finding of liability under the Maryland Consumer Protection Act, Md. Code Ann., Com. Law § 13-410(d)(2), did not require the insured's actions to be "dishonest, deliberately fraudulent, malicious, willful or knowingly wrongful."

Am. Guar. & Liab. Ins. Co. v. Lamond, No. 13-13168, 2014 U.S. Dist. LEXIS 103117 (D. Mass. July 29, 2014)

The court held that a professional liability policy's dishonesty exclusion barred coverage for actual damages awarded under Massachusetts General Laws Chapter 93A because the jury's finding of knowing and willful conduct constituted malicious acts.

Avon State Bank v. BancInsure, Inc., No. 12-2557, 2014 U.S. Dist. LEXIS 3099 (D. Minn. Jan. 10, 2014)

The court held that a fraud exclusion barred coverage under a directors and officers liability policy for a judgment arising out of the insured's employee's participation in a fraudulent scheme because the employee was acting within the scope of his employment.

Associated Cmty. Bancorp, Inc. v. St. Paul Mercury Ins. Co., 989 N.Y.S.2d 15 (App. Div. 2014)

The underlying claims brought by investors relating to a Ponzi scheme were not covered by a bankers professional liability policy because the allegation that the insured used the fees to sustain its business was a profit and a financial advantage to which the insured was not entitled.

J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., No. 600979/09, 13358, 2015 N.Y. App. Div. LEXIS 432 (1st Dept. Jan. 15, 2015)

In a case involving professional liability insurance, the appellate court affirmed in part the trial court's grant of partial summary judgment to the insured regarding the insurers' affirmative defense that a dishonest acts exclusion applied to exclude coverage, because the insured's settlement with an administrative agency, in which the insured consented to the entry of an administrative order, but otherwise neither admitted nor denied any of the administrative findings, did not constitute a final adjudication for purposes of the exclusion.

Lifespan Corp. v. Nat'l Union Fire Ins. Co., No. 1:12-CV-00300, 2014 U.S. Dist. LEXIS 162376 (D.R.I. Nov. 17, 2014)

The court held that a fraud exclusion contained in two directors and officers liability policies, requiring a judgment, final adjudication or binding arbitration adverse to the insureds, did not apply even though the trial court had made factual findings indicating that the insured had committed fraud, because the judgment adverse to the insured was for claims of breach of fiduciary duty and contractual indemnification, neither of which required any element of fraud.

John M. O'Quinn P.C. v. Nat'l Union Fire Ins. Co., No. 4:00-CV-2616, 2014 U.S. Dist. LEXIS 97034 (S.D. Tex. July 17, 2014)

The court held that an excess professional liability policy's personal profit exclusion applied because the insured received a profit or advantage to which it was not legally entitled based on an arbitration panel's finding that the insured was improperly deducting general expenses from its clients' settlements.

Prot. Strategies, Inc. v. Starr Indem. & Liab. Co., No. 1:13-CV-00763, 2014 U.S. Dist. LEXIS 56652 (E.D. Va. Apr. 23, 2014)

The court held that an insurer could recoup defense costs paid as a result of a government investigation once the individual insureds pled guilty to charges of receiving money and knowingly and willfully taking such actions in furtherance of fraud, thereby triggering, among others, the personal profit and fraud exclusions in a directors and officers liability policy.

Restitution, Disgorgement and Damages

Orchard Brands Topco LLC, v. Twin City Fire Ins. Co., No. CGC-12-526950, slip op. (Cal. Super. Ct., S.F. Cnty., Jan. 24, 2014)

In a case involving management liability policies, the court held that at least some of the underlying settlement was for the return of innocently, yet wrongfully, acquired property, and thus it was not insurable as a matter of public policy, but also held that an allocation was necessary to the extent that portions of the underlying settlement were covered.

U.S. Bank N.A. v. Indian Harbor Ins. Co., No. 12-CV-3175, 2014 U.S. Dist. LEXIS 173485 (D. Minn. Dec. 16, 2014)

In a dispute involving professional liability insurance, the court, interpreting Delaware law, granted summary judgment for the insured, holding that even if restitutionary payments are not insurable as a matter of law, the policy only excluded coverage for money to which the insured "is not legally entitled" in the event of a "final adjudication in the underlying action," and because the underlying litigation was resolved by settlement, this exclusion was inapplicable.

McCalla Corp. v Certain Underwriters at Lloyds, No. 13-1317-SAC, 2014 U.S. Dist. LEXIS 60309 (D. Kan. May 1, 2014)

The court granted summary judgment for an insurer under the employment practices coverage section of a policy, holding that, under Illinois law, there is no insurable interest in the proceeds of a fraud.

Bowman, Heintz, Boscia & Vician, P.C. v. Valiant Ins. Co., No. 2:13-CV-0079, 2014 U.S. Dist. LEXIS 105951 (N.D. Ind. Aug. 1, 2014)

The court granted summary judgment for the insurer, finding that the professional liability policy did not provide coverage to a law firm that was sanctioned, where the policy provided coverage for damages, but not sanctions.

Williams v. SIF Consultants of La., Inc., 133 So. 3d 707 (La. Ct. App. 2014), rehearing denied at 2014 La. App. LEXIS 986 (3 Cir. Apr. 9, 2014)

In a coverage dispute involving errors and omissions policies that defined "Loss" to exclude punitive damages, the appellate court affirmed summary judgment for the claimants and held that statutory damages did not constitute punitive damages.

Cornerstone Title & Escrow, Inc. v. Evanston Ins. Co., 555 F. App'x 230 (4th Cir. 2014)

The appellate court reversed summary judgment for the insurer, holding that, under Maryland law, a profit or advantage exclusion did not apply, even though the state's attorney general sought restitution, which the insured eventually agreed to pay, because the restitutionary payment did not necessarily represent disgorgement of the insured's own unjust enrichment.

William Beaumont Hosp. v. Fed. Ins. Co., 552 F. App'x 494 (6th Cir. 2014)

The appellate court affirmed summary judgment for the insured in a case involving an executive protection policy under Michigan law, holding that the settlement of the underlying litigation, which alleged that several hospitals conspired to suppress nurses' wages, was not for restitution of an ill-gotten gain because withholding wages is not the same as realizing a gain.

Certain Underwriters at Lloyd's London v. Lacher & Lovell-Taylor, P.C., 112 A.D.3d 434 (N.Y. App. Div. 2013), leave to appeal denied at 24 N.Y.3d 907 (2014)

The appellate court affirmed the trial court's order granting summary judgment for an insurer, holding that a claim for the return of legal fees is not a claim for "damages" in a legal malpractice action, as defined in the applicable professional liability policy.

Peerless Ins. Co. v. Pa. Cyber Charter Sch., No. 2:12-CV-1700, 2014 U.S. Dist. LEXIS 65406 (W.D. Pa. May 13, 2014), reconsideration denied by 19 F. Supp. 3d 635 (W.D. Pa. 2014)

In a case involving an errors and omissions policy, the court granted an insured's motion for summary judgment, rejecting the insurer's argument that there was no coverage because the underlying claimants sought restitution, and holding that public policy may be used to void insurance coverage only where the "insured would receive a windfall from indemnification." In rejecting the insurer's motion for reconsideration, the court held that restitutionary claims are not uniformly excluded from coverage where the restitutionary funds are offset by a benefit provided or services rendered by the insured.

TROUTMAN SANDERS

The PNC Fin. Servs. Grp., Inc. v. Hous. Cas. Co., No. 13-331, 2014 U.S. Dist. LEXIS 86518 (W.D. Pa. May 21, 2014), rev'd in part, 2014 U.S. Dist. LEXIS 85303 (W.D. Pa. June 24, 2014)

In a dispute involving professional liability coverage, a magistrate recommended that cross-dispositive motions be resolved in favor of the insured, rejecting the insurers' arguments that the settlements of the underlying lawsuits, which included allegations that the insured bank charged excessive fees, did not constitute damages under the policy, and were uninsurable as a matter of public policy. The district court reversed in part, holding that there was no coverage for restitution of excessive fees because the policy's definition of damages excluded fees for professional services payable to the insured.

Mountainside Holdings, LLC v. Am. Dynasty Surplus Lines Ins. Co., No. 2003-127, 2014 Pa. Dist. & Cnty. Dec. LEXIS 73 (C.P. Centre June 30, 2014)

In a case involving a directors and officers liability policy, the court held on summary judgment that the underlying settlement of a *qui tam* overbilling action did not constitute insurable "Loss" because insurance cannot, as a matter of law, cover disgorgement of ill-gotten gains.

John M O'Quinn P.C. v. Nat'l Union Fire Ins. Co., No. 4:00-CV-2616, 2014 U.S. Dist. LEXIS 97034 (S.D. Tex. July 17, 2014)

In a coverage dispute involving professional liability insurance, the court granted summary judgment to the insurer, holding that an arbitration award against the insured law firm ordering the return of excessive attorneys' fees was not insurable "Loss."

Insured Capacity

Blum Collins LLP v. NCG Prof'l Risks, Ltd., No. CV 12-8996, 2014 U.S. Dist. LEXIS 109915 (C.D. Cal. July 31, 2014)

The court held that coverage was unavailable under a professional liability policy for a malpractice action brought against an attorney and his current law firm for acts allegedly committed by the attorney while he was employed at his former law firm, in part due to the policy's exclusion precluding coverage for claims arising out of any insured's activities as a partner, officer, director or employee of any corporation, company or business other than that of the named insured, the attorney's current law firm.

Darwin Nat'l Assur. Co. v. Rosenthal, No. CV 13-5670, 2014 U.S. Dist. LEXIS 135207 (C.D. Cal. Sept. 24, 2014)

Where a lawyers professional liability policy precluded coverage for any claim arising out of or relating to, in whole or in part, the insured's capacity or status as an officer, director, partner, trustee, shareholder, manager or employee of a business enterprise, the court held that the policy clearly and unambiguously disallowed coverage for the insured attorney, who as an officer, shareholder and director of an investment company (a business enterprise), allegedly solicited and managed a series of real estate investments from which actions in the claim arose. The court further held, however, that the exclusion was not broad enough to extinguish the insurer's duty to defend two other insureds also implicated by the claim – the law firms named as defendants in the underlying suit – because the exclusion referenced "the insured" rather than "an" or "any" insured.

Duckson v. Cont'l Cas. Co., No. 14-1465, 2014 U.S. Dist. LEXIS 179569 (D. Minn. Dec. 8, 2014), adopted in 2015 U.S. Dist. LEXIS 859 (D. Minn. Jan. 6, 2015)

Applying Illinois law, the court held that coverage was unavailable under an attorney malpractice insurance policy to an attorney for a claim based on business activities he undertook after his employment with the insured law firm ceased.

Gomery v. Cont'l Cas. Co., No. 1:13-CV-947, 2014 U.S. Dist. LEXIS 117954 (W.D. Mich. Aug. 25, 2014)

The court held that an insurer did not have a duty to defend an insured attorney or insured law firm under a "business enterprise exclusion" in a lawyers professional liability policy for a claim involving legal malpractice allegations that were inextricably tied to and based upon the attorney's self-dealing as a member of a real estate development company.

Carlson & Lyter Distrib. v. U.S. Liab. Ins. Co., No. 13-CV-2493, 2014 U.S. Dist. LEXIS 85622 (D. Minn. June 24, 2014)

The court denied an insurers' motion to dismiss an insureds' complaint that sought, in part, a declaration that the insurer had a duty to defend and indemnify the insureds against a wrongful termination suit under an employment practices liability policy, because there was a factual dispute over whether the insureds were acting in their insured capacities when terminating the employment of the claimant or acting in their self-

interest. The fact that the claimant alleged that the insureds engaged in "self-dealing" and took actions "designed to benefit themselves" was insufficient to show that the insureds were acting in multiple capacities where other evidence, such as board minutes, indicated that they were acting in their official board capacities.

Christensen v. Darwin Nat'l Assur. Co., No. 2:13-CV-00956, 2014 U.S. Dist. LEXIS 52069 (D. Nev. Apr. 14, 2014)

A client sued his attorney, the attorney's firm, and the attorney's family trust after the attorney allegedly used his position and influence to make legal and business recommendations that caused significant financial losses to the client and gains to the attorney. The court held that the unambiguous terms of the lawyers professional liability insurance policy, including the "business enterprise exclusion," excluded coverage for the claim because the insured allegedly sought to benefit his family trust as well as his firm. Although the insured was purportedly acting as the claimant's lawyer, the "arising out of" and "in any way involving" language of the exclusion was sufficient to preclude coverage for claims arising out of transactions where an insured was acting in a dual capacity.

Gramercy Ins. Co. v. Expeditor's Express, Inc., 575 F. App'x 607 (6th Cir. 2014)

Interpreting Tennessee law, the court reversed the district court's ruling that a policy did not provide defense or indemnity coverage due to a policy provision excluding coverage for bodily injury arising out of and in the course of employment by the insured. The court explained that the insurer, who had brought a motion for judgment on the pleadings, failed to address whether the deceased claimant was actually an employee of the insured.

Am. Guar. & Liab. Ins. Co. v. Cerks, No. H-13-2665, 2014 U.S. Dist. LEXIS 113980 (S.D. Tex. Aug. 15, 2014)

A lawyer who bought malpractice insurance that did not cover claims arising from his business ventures – as opposed to his legal practice – was not entitled to defense or indemnity coverage for a suit brought by his business partner to collect on promissory notes issued by the insured, in part, because the policy excluded any claim based upon or arising out of, in whole or in part, the insured's capacity or status as an officer, director, or partner of a business enterprise, and the lawsuit arose from a joint venture to develop land, not the insured's practice of law.

Liberty Univ., Inc. v. Citizens Ins. Co. of Am., 16 F. Supp. 3d 636 (W.D. Va. 2014)

In determining whether coverage was available under a School and Educators Legal Liability Endorsement, the court held that the employees of the insured, who had allegedly discussed and urged civil disobedience and disregard of court orders, provided legal representation on behalf of the insured's law school, and made representations to courts, were acting within the course and scope of their duties for the insured because all of the foregoing actions clearly fell within the lawful discharge of duties characteristic of, distinctive or inherent to the operation and functioning of an educational institution.

Insured v. Insured Exclusions

Amerco v. Nat'l Union Fire Ins. Co., No. CV 13-2588, 2014 U.S. Dist. LEXIS 69066 (D. Ariz. May 20, 2014)

The court held that an insured versus insured exclusion barred coverage for the claims of all plaintiffs in a consolidated litigation because one plaintiff was an insured under the policy, that plaintiff was a party from the outset of the lawsuit, and the policy at issue did not contain an allocation provision.

St. Paul Mercury Ins. Co. v. Hahn, No. SACV 13-0424, 2014 U.S. Dist. LEXIS 153643 (C.D. Cal. Oct. 8, 2014)

The court held that claims by the FDIC as a receiver for the named insured against the insured's former officers were not barred from coverage under an insured versus insured exclusion eliminating coverage for claims "brought or maintained by or on behalf of any Insured … in any capacity" because that exclusion was ambiguous with regard to claims brought by the FDIC and because, even if it were not, the "shareholder exception" to the exclusion would apply.

Hawker v. Bancinsurance, Inc., No. 1:12-CV-01261, 2014 U.S. Dist. LEXIS 48649 (E.D. Cal. Apr. 7, 2014)

The court held that an insured versus insured exclusion in an employment practices liability policy which specifically excluded claims by "receivers" eliminated coverage for a lawsuit brought by the FDIC as a receiver for the failed bank insured.

Ecolite Concrete U.S.A., Inc. v. G.S. Levine Ins. Servs., Inc., Nos. D064178, D064917 & D064918, 2014 Cal. App. Unpub. LEXIS 9271 (Dec. 31, 2014)

The appellate court held that the trial court properly dismissed a negligence action against an insurance broker for failure to timely notify a claim to an insurer because the insured versus insured exclusion in the policy at issue would have precluded insurance coverage for the underlying action against the named insured by one of its former directors.

St. Paul Mercury Ins. Co. v. FDIC, 774 F.3d 702 (11th Cir. 2014)

The Eleventh Circuit held that, under Georgia law, an insured versus insured exclusion in a directors and officers liability policy that barred coverage for claims by or on behalf of any Insured was ambiguous and unenforceable with regard to claims by the FDIC as a receiver against former bank officers because cases interpreting exclusions with similar language had reached differing conclusions.

Travelers Cas. & Sur. Co. v. Bernhardt, No. 14-CV-128, 2014 U.S. Dist. LEXIS 152416 (N.D. Ill. Oct. 28, 2014)

The court held that an insured versus insured exclusion in a directors and officers liability policy precluded coverage for claims by a bank against its former officer for negligence and breach of fiduciary duty.

Bancinsure, Inc. v. McCaffree, 3 F. Supp. 3d 904 (D. Kan. 2014)

The court held that an insured versus insured exclusion in a directors and officers liability policy that specifically excluded claims by receivers eliminated coverage for a lawsuit brought by the FDIC as a receiver for the failed bank.

C.A. Jones Mgmt. Grp., LLC v. Scottsdale Indem. Co., No. 5:13-CV-00173, 2014 U.S. Dist. LEXIS 25931 (W.D. Ky. Feb. 28, 2014)

The court denied the insured's motion for preliminary injunction because the insured was unable to show that it was likely to defeat the insurer's argument that an insured versus insured exclusion barred coverage where the underlying case was filed by the majority owner of a subsidiary of an additional named insured.

The Hullverson Law Firm, P.C. v. Liberty Ins. Underwriters, Inc., 25 F. Supp. 3d 1185 (E.D. Mo. 2014)

The court held that an insured versus insured exclusion in a professional liability policy did not preclude coverage for a claim against the insured by its former partner because the plaintiff was not a partner of the firm during the relevant time period and, therefore, did not qualify as an insured under the policy.

W Holding Co. v. AIG Ins. Co., 748 F.3d 377 (1st Cir. 2014)

The court held that, under Puerto Rico law, a directors and officers liability policy's insured versus insured exclusion barring coverage for claims "brought by, on behalf of or in the right of" an insured was ambiguous with regard to claims brought against insureds by the FDIC, and therefore did not apply to preclude coverage for those claims.

Coverage for Contractual Liability

Town of Monroe v. Discover Prop. & Cas. Ins. Co., CV126026835S, 2014 Conn. Super. LEXIS 956 (Jan. 21, 2014)

The insured town was not entitled to summary judgment that its insurer was obligated to provide a defense under a public entity errors and omissions policy for a claim of negligent misrepresentation, which arose from the same facts and circumstances as the underlying plaintiff's claim for breach of contract. Because any representations or statements alleged to have been made could only arise from or be in consequence of the contract claim, the negligent misrepresentation claim came within the purview of the policy's contract exclusion.

Pub. Risk Mgmt. of Fla. v. One Beacon Ins. Co., 569 F. App'x 865 (11th Cir. 2014)

Applying Florida law, the court found that a contractual liability exclusion in a public officials errors and omissions policy did not bar coverage for breach of contract claims based on the insured's alleged mistakes, misstatements and omissions, because the exclusion applied only to intentional breaches of contract. Here, the complaint could be fairly read to allege an unintentional breach of contract and thus the insurer had a duty to defend.

Bond Safeguard Ins. Co. v. Nat'l. Union Fire Ins. Co., No. 6:13-CV-561, 2014 U.S. Dist. LEXIS 148953 (M.D. Fla. Oct. 20, 2014)

The court held that the phrase "arising out of" in a contractual liability exclusion was unambiguously broad and precluded coverage for purported tort claims that depended upon the existence of actual or alleged contractual liability. Accordingly, the contractual liability exclusion in a directors and officers liability policy barred coverage for tort claims arising out of defaults on bonds.

Idaho Trust Bank v. Bancinsure, Inc., No. 1:12-CV-00032, 2014 U.S. Dist. LEXIS 37660 (D. Idaho Mar. 20, 2014)

The court held that the liability coverage section of a bank professional liability insurance policy provided coverage for claims notwithstanding the policy's contract exclusion. Although the claims were stated to be claims for breach of a settlement agreement and breach of the duty of good faith and fair dealing, they both stemmed from an allegation that the bank promised to extend a loan and then failed to do so. Because this conduct fell squarely within the policy's definition of a lending wrongful act, application of the contractual liability exclusion would render coverage illusory.

EnTitle Ins. Co. v. Darwin Select Ins. Co., 553 F. App'x 543 (6th Cir. 2014)

The Sixth Circuit affirmed the district court's decision that under Ohio law, a professional liability policy did not provide coverage for losses arising from contractual guarantees provided by the insured. The insured's liability was not a loss resulting from a wrongful act within the meaning of the policy.

Bank of Rhode Island v. Progressive Cas. Ins. Co., 19 F. Supp. 3d 378 (D.R.I. 2014)

The court held that the underlying jury award of damages on plaintiff's breach of contract claim was indivisible from its award on the negligence and breach of fiduciary duty claims. Accordingly, the insured under a directors and officers liability policy had incurred a loss that it was legally obligated to pay, not just a loss as a result of a contractual obligation.

Lifespan Corp. v. Nat'l Union Fire Ins. Co., No. 12-300-M, 2014 U.S. Dist. LEXIS 162376 (D.R.I. Nov. 17, 2014)

An exclusion in a directors and officers liability policy for loss arising out of the insureds' contractual liability did not bar coverage where the insureds' contractual liability was released before the claims in the underlying lawsuit were made.

Transched Sys. Ltd. v. Fed. Ins. Co., No. 12-939, 2014 U.S. Dist. LEXIS 177164 (D.R.I. Dec. 22, 2014)

The court held that a claim for intentional misrepresentation was not barred by the policy's contract exclusion where the alleged intentional misrepresentations were made during the due diligence stage before the parties entered into the contract.

Singletary v. Beazley Ins. Co., Inc., 585 F. App'x 177 (4th Cir. 2014)

Interpreting South Carolina law, the Fourth Circuit affirmed the district court's decision that a management liability policy did not provide coverage for a claim for repayment by the Social Security Administration because it was a claim under an express written contract and thus excluded from the policy's coverage.

Arch Ins. Co. v. U.S. Youth Soccer Ass'n, No. 05-12-00596-CV, 2014 Tex. App. LEXIS 5068 (May 12, 2014)

The court held that an insurer owed no duty to defend claims against a nonprofit association where the underlying complaint arose solely out of the insured's alleged breach of its contractual obligations under the U.S. Soccer Federation's bylaws and policies.

Professional Services

Isaacs v. Chartis Specialty Ins. Co., 12 F. Supp. 3d 1256 (S.D. Cal. 2014)

An insurer breached its duty to defend an underlying action alleging that the insureds were negligent and breached their fiduciary duties in providing investment advice because the conduct in question potentially involved covered professional services under a "Securities Broker/Dealer Professional Liability Insurance" policy.

N. Counties Eng'g, Inc. v. State Farm Gen. Ins. Co., 224 Cal. App. 4th 902 (1st Dist. 2014), review denied at 2014 Cal. LEXIS 3782 (Cal. June 11, 2014)

The appellate court reversed the trial court's directed verdict in favor of the insurer with respect to the duty to defend after finding that the professional services exclusion in a professional liability policy did not

preclude the potential for coverage where the insured, an engineering company, was being sued in connection with the construction of a dam that allegedly caused damage to downstream tributaries and erosion in nearby waterways.

RSUI Indem. Co. v. Sempris, LLC, No. 13C-10-096, 2014 Del. Super. LEXIS 449 (Sept. 3, 2014), appeal denied at 2015 Del. LEXIS 5 (Del. Jan. 6, 2015)

A professional services exclusion in a directors and officers liability policy did not bar coverage for claims based on the Telephone Consumer Protection Act because there was no suggestion that the insured was providing professional services to others for a fee by having a third party make unsolicited calls.

Carlyle Inv. Mgmt. LLC v. Ace Am. Ins. Co., No. 2013 CA 003190 B (D.C. Super. Ct. May 15, 2014)

The court dismissed the insureds' complaint against the defendant insurer because the claims – even the so-called "management liability claims," which the insureds argued were not professional services – were clearly excluded by the unambiguous and broadly defined professional services exclusion contained in the policy.

Margulis v. BCS Ins. Co., 2014 IL App (1st) 140286

The appellate court affirmed the trial court's grant of summary judgment in favor of the insurer because the insured's automated telephone calls did not constitute negligent acts, errors or omissions arising out of the insured's performance of its business as an insurance broker or agent within the meaning of the insured's professional liability policy.

Rosalind Franklin Univ. of Med. & Sci. v. Lexington Ins. Co., 2014 IL App (1st) 113755

The insured's decision to discontinue an experimental breast cancer vaccine program constituted professional services and therefore fell within the insuring agreement of the professional liability policy covering liability "resulting from a medical incident arising out of professional services."

Std. Mut. Ins. Co. v. Lay, 2014 IL App (4th) 110527-B, appeal denied at 5 N.E.3d 1129 (Ill. 2014)

A professional services exclusion did not bar coverage to a real estate agent accused of violating the Telephone Consumer Protection Act because the violation was based on tortious advertising conduct, which was only ancillary to his performance of professional services as a real estate agent.

Wisznia Co. v. Gen. Star Indem. Co., 759 F.3d 446 (5th Cir. 2014)

Under Louisiana law, a professional services exclusion in a commercial general liability policy precluded an insured architect and engineering firm from obtaining coverage because the underlying complaint was replete with allegations that the insured had acted negligently in performance of its professional architectural services – not a single factual allegation was based on the insured's non-professional negligence.

St. Consulting Grp., Inc. v. E. Ins. Grp., LLC, 32 Mass. L. Rptr. 8 (Mass. Super. Ct. 2014)

An insurer was entitled to summary judgment because claims against the insured for its advocacy services in zoning and land use disputes fell within the policy's exclusion for liability "in any way related to" the insured's professional services.

Assurance Co. of Am. v. Am. Registry of Radiologic Techs., No. 13-1136, 2014 U.S. Dist. LEXIS 166852 (D. Minn. Dec. 1, 2014)

The court held that the insurer had no duty to defend the insured under a general liability policy's professional services exclusion because the insured accreditation agency was performing professional services in credentialing individuals and in investigating and deciding to re-certify individuals.

Gray v. Arch Specialty Ins. Co., 149 So. 3d 503 (Miss. 2014)

The underlying plaintiffs' claims for negligent hiring, negligent training and failure to implement appropriate triage protocols arose from the performance of or failure to perform medical services and, therefore, were excluded from coverage by the professional liability exclusion contained in the general liability policy.

W. Heritage Bank v. Fed. Ins. Co., 557 F. App'x 807 (10th Cir. 2014)

Pursuant to a lending services exclusion that excluded coverage for claims arising from the performance of or failure to perform lending services, under New Mexico law, an insurer had no duty to defend a suit against its insured, a bank, for fraudulently placing deeds of trust and liens on property to secure loans and wrongfully refusing to release the liens.

Bennett v. U.S. Liab. Ins. Grp., No. 3:13-cv-01565, 2014 U.S. Dist. LEXIS 57873 (D. Or. Apr. 25, 2014)

An insured's bookkeeping practices did not come within a professional liability policy's definition of professional

services because it did not pertain to her services as a training specialist or seminar conductor for others for a fee.

Mun. Revenue Serv., Inc. v. Hous. Cas. Co., No. 1:13-CV-151, 2014 U.S. Dist. LEXIS 27762 (W.D. Pa. Mar. 5, 2014)

The court refused to dismiss the insured's complaint seeking coverage under a professional liability policy for a lawsuit alleging that the insured used tax lien trade secrets improperly. Specifically, the court found that the insured provided sufficient facts to support a claim that the definition of professional services within the policy might include wrongful acts that are committed "in the course of business transactions (illegal or not)."

Rob Levine & Assocs. Ltd. v. Travelers Cas. & Sur. Co., 994 F. Supp. 2d 228 (D.R.I. 2014)

A legal services exclusion in a directors and officers liability policy did not preclude coverage for defense costs associated with allegations grounded in allegedly deceptive advertising practices by a law firm.

Shamoun & Norman, LLP v. Ironshore Indem., Inc., No. 3:14-cv-1340-G, 2014 U.S. Dist. LEXIS 152803 (N.D. Tex. Oct. 28, 2014)

An insurer had a duty to defend a suit over a law firms' fee agreement with a former client under a professional liability policy. The court held that, although professional services typically do not include billing disputes, the insurer was obligated to defend its insured in this case because the former client had brought a breach of fiduciary duty claim against the insured, and the fiduciary duty relationship only arose because the client had retained the insured to perform professional legal services.

LCS Corr. Serv., Inc. v. Lexington Ins. Co., 19 F. Supp. 3d 712 (S.D. Tex. 2014)

A professional services exclusion precluded coverage where the underlying complaint alleged that an insured prison-management company denied inmates scheduled medications. Under the plain meaning of the commercial umbrella liability policy, where an administrative decision resulted in a "failure to render professional services," the professional services exclusion applied.

John M O'Quinn PC v. Nat'l Union Fire Ins. Co., No. 4:00-cv-2616, 2014 U.S. Dist. LEXIS 97034 (S.D. Tex. July 17, 2014)

The court held that underlying lawsuits based on a law firm's improper billing practices did not constitute professional legal services within the insuring agreement of a lawyers professional liability policy, and therefore the insured had not met its burden of proving that the underlying claims fell within the coverage afforded by the policy. The court reasoned that billing practices do not require specialized knowledge and legal skill.

Independent Counsel

Travelers Indem. Co. v. Centex Homes, No. 14-0906, 2014 U.S. Dist. LEXIS 147068 (C.D. Cal. Oct. 2, 2014)

The court held that an insured's mere request for independent counsel, after perceiving a potential conflict of interest, did not constitute a breach of the duty to cooperate. In addition, the court held that an insured does not breach the duty to cooperate when it suggests that, if the insurer refuses to share in the defense provided by independent counsel, the insured would be willing to allow appointed counsel to serve as co-counsel if the insurer agrees to pay expert and vendor bills.

City Art v. Superior Ct. of Cal., NO. B256132, 2014 Cal. App. Unpub. LEXIS 8741 (2d Dist. Dec. 9, 2014)

The court held that rate limitations in California Insurance Code Section 2860 do not apply retroactively to attorneys' fees incurred prior to the time that the insurer begins paying defense costs.

Petro v. Travelers Cas. & Sur. Co., No. 3:12-CV-491, 2014 U.S. Dist. LEXIS 142627 (N.D. Fla. Sept. 24, 2014)

The court held that an insurer did not violate the requirement to provide mutually agreeable counsel where it unilaterally retained counsel, informed the insured of its selection of defense counsel, and the insured did not object.

Perma-Pipe, Inc. v. Liberty Surplus Ins. Corp., No. 13 C 2898, 2014 U.S. Dist. LEXIS 54867 (N.D. Ill. Apr. 21, 2014)

The court held that the insured was entitled to select independent counsel where there was a conflict between the interests of the insurer and insured, namely where there was a "nontrivial probability" of an excess judgment in the underlying suit. Because the insured was being sued for more than $40 million with a policy limit of $1 million per occurrence, the court held that such "nontrivial probability" existed and the insured was entitled to independent counsel.

Eye Style Optics, LLC v. State Farm Fire & Cas. Co., No. 14-2118, 2014 U.S. Dist. LEXIS 75031 (D. Kan. June 3, 2014)

The court held that insurers are not required to pay for an insured's choice of counsel if the insurer retains independent counsel to represent the insured. The retained counsel under such circumstances owes a duty of loyalty to the insured, not the insurer.

Deviney Constr. Co. v. Ace Util. Boring & Trenching, LLC, No. 3:11-CV-468, 2014 U.S. Dist. LEXIS 88658 (S.D. Miss. June 30, 2014)

The court held that, under Mississippi law, an additional insured was entitled to retain its own independent counsel where a potential conflict of interest existed between it and the insurer.

YA Global Invs., L.P. v. Mandelbaum, Salsburg, Gold, Lazris & Discenza, P.C., NO. 2:12-CV-219, 2014 U.S. Dist. LEXIS 81966 (D.N.J. June 17, 2014)

The court held that, where an insured retained its own independent counsel, no conflict of interest existed because the independent counsel did not represent the insurer; an insurer's agreement to pay some of the attorneys' fees on behalf of the insured did not create an attorney-client relationship between the attorney and the insurer.

Tower Nat'l Ins. Co. v Nat'l Bus. Capital, Inc., No. 155786/2012, 2014 N.Y. Misc. LEXIS 3414 (Sup. Ct. July 28, 2014)

The court held that, where a conflict of interest existed between an insured and an insurer who was obligated to defend, the insured was permitted to select defense counsel, with reasonable defense costs borne by the insurer. However, the insured was not entitled to independent counsel where it failed to point to any conflict of interest in which the insurer's interest in defending the underlying action against the insured conflicted with that of the insured.

Advancement Of Defense Costs

In re Hoku Corp., No. 13-40838, 2014 Bankr. LEXIS 1167 (D. Idaho Mar. 25, 2014)

The bankruptcy court granted relief from an automatic stay, allowing the insurer to advance defense costs under a directors and officers liability policy notwithstanding the debtor's interest in the policy proceeds and the potential harm to the estate.

Travelers Cas. & Sur. Co. v. Bernhardt, No. 14-CV-128, 2014 U.S. Dist. LEXIS 152416 (N.D. Ill. Oct. 28, 2014)

The court held that an insurer had no duty to advance defense costs because the policy's insured versus insured exclusion barred coverage for the named insured bank's claims against its president and CEO.

C.A. Jones Mgmt. Group, LLC v. Scottsdale Indem. Co., No. 5:13-CV-00173, 2014 U.S. Dist. LEXIS 25931 (W.D. Ky. Feb. 28, 2014)

The court held that an insurer had no duty to advance defense costs after a motion for preliminary injunction where the policy's exclusions and limitations rendered the insureds unlikely to demonstrate that their claims were covered.

Cont'l Cas. Co. v. Marshall Granger & Co., LLP, 6 F. Supp. 3d 380 (S.D.N.Y. 2014)

The court held that an insurer did not waive its right to seek rescission where it advanced defense costs, but advised the insured that it was investigating whether there was a basis to rescind the policy.

QBE Ams., Inc. v. ACE Am. Ins. Co., 44 Misc. 3d 1224(A) (N.Y. Sup. Ct. 2014)

The court held that an insurer had no duty to advance defense costs until the insured established that it had satisfied the policy's retention.

W Holding Co. v. AIG Ins. Co., 748 F.3d 377 (1st Cir. 2014)

Under Puerto Rico law, an insurer had a duty to advance defense costs because there was at least a "remote possibility" that claims against a failed bank's directors and officers ultimately would be covered.

Allocation

Amerco v. Nat'l Union Fire Ins. Co., CV 13-2588, 2014 U.S. Dist. LEXIS 69066 (D. Ariz. May 20, 2014)

In a coverage action under a directors and officers liability policy, the district court applied an insured versus insured exclusion to bar coverage for an underlying consolidated action in which there were multiple plaintiffs, only one of whom was an insured. The court rejected the named insured's argument for an allocation between covered claims asserted by non-insureds and uncovered claims

asserted by the insured plaintiff because the policy lacked an express allocation provision.

Hanes v. Armed Forces Ins. Exch., No. C 12-05410, 2014 U.S. Dist. LEXIS 106036 (N.D. Cal. July 31, 2014)

In a coverage action under a personal liability provision of an insurance policy, the court granted summary judgment to the insurer and permitted reimbursement of certain defense costs after finding that the insurer proved by a preponderance of the evidence that some of the defense costs were solely allocable to claims not even potentially covered by the policy, and where the insurer had reserved its rights to do so.

Rosalind Franklin Univ. of Med. & Sci. v. Lexington Ins. Co., 2014 2014 IL App (1st) 113755

In a coverage action under a healthcare professional services policy, the court determined that when an insured enters into a settlement that disposes of both covered and non-covered claims, the insurer's duty to indemnify encompasses the entire settlement if the covered claims were "a primary focus of the litigation." Here, the court determined that the primary focus of the underlying complaint involved specialized medical knowledge, which brought the claims within the primary policy but outside of the excess policy which contained a medical malpractice exclusion.

UnitedHealth Grp. Inc. v. Columbia Cas. Co., No. 05-CV-1289, 2014 U.S. Dist. LEXIS 134956 (D. Minn. Sept. 25, 2014)

In a coverage action for an underlying settlement of two putative class actions for $350 million, the court held that the insured had the burden of proving how much of the settlement should be allocated to covered claims.

IMO Indus., Inc. v. Transamerica Corp., 101 A.3d 1085 (N.J. App. Div. 2014)

The appellate court affirmed the trial court's ruling that defense costs incurred in the underlying asbestos lawsuit were subject to an allocation even if a portion of them ultimately were devoted to defending against claims that were determined not to be covered.

Am. Med. Response Nw., Inc. v. Ace Am. Ins. Co., No. 3:09-CV-01196, 2014 U.S. Dist. LEXIS 93771 (D. Or. July 10, 2014)

In a coverage action under a general commercial liability policy, the court determined that the insured, as a party to the underlying settlements, was in the best position to know the bases for the settlements and therefore had the burden to prove that the underlying settlements were for covered claims.

Recoupment Of Defense Costs And Settlement Payments

Certain Interested Underwriters at Lloyd's, London v. Halikoytakis, 556 F. App'x 932 (11th Cir. 2014)

Construing Florida law and a general liability policy, the court affirmed the district court's opinion that an insurer that reserved its rights to recoup defense costs for an ultimately uncovered claim could recover such costs.

Twin City Fire Ins. Co. v. Hartman, Simon & Wood, LLP, No. 1:13-CV-1608, 2014 U.S. Dist. LEXIS 64654 (N.D. Ga. Apr. 21, 2014)

The court held that an insurer could not unilaterally reserve its rights to recoup a settlement payment made under a professional liability policy, even if prior to the reservation and payment, it filed a declaratory judgment action to resolve the dispute.

Lexington Ins. Co. v. CareCore Nat'l, LLC, No. SUCV2012-01782-BLS2, 2014 Mass. Super. LEXIS 200 (July 17, 2014)

The court found that an insurer that did not reserve its right to recoup defense costs under a professional liability policy could not recoup such costs and predicted that the Massachusetts Supreme Judicial Court would not permit such recoupment even with a unilateral reservation of rights.

Select Comfort Corp. v. Arrowood Indem. Co., No. 13-CV-2975, 2014 U.S. Dist. LEXIS 173551 (D. Minn. Dec. 12, 2014)

Construing a general liability policy, the court held that, absent an express policy provision, an insurer could not unilaterally reserve the right to recoup a settlement payment.

Am. Econ. Ins. Co. v. Aspen Way Enters., No. 14-CV-09, 2014 U.S. Dist. LEXIS 166821 (D. Mont. Dec. 2., 2014)

Construing both Montana and California law, the court refused to dismiss a request for a declaratory judgment by insurers that included a request for reimbursement

of defense costs because both California and Montana law permitted insurers to reserve the right to obtain such reimbursement and seek it as part of a declaratory judgment action.

Nat'l Union Fire Ins. Co. v. Turner Constr. Co., 986 N.Y.S.2d 74 (App. Div. 2014)

Construing a general liability policy and New Jersey law, the court held that, although New Jersey law permits recoupment of uncovered defense expenses, recoupment must not contravene the terms of the policy and, under the facts, the policy at issue did not permit recoupment.

Women's Integrated Network, Inc. v. U.S. Specialty Ins. Co., No. 12-CV-7072, 2014 U.S. Dist. LEXIS 32828 (S.D.N.Y. Mar. 7, 2014)

The court held that, where a directors and officers policy contained a recoupment provision and the insurer reserved its rights with respect to recoupment, the insured must repay defense costs and *res judicata* did not preclude the insurer from seeking recoupment, notwithstanding that it already adjudicated its defense obligation in an earlier coverage action.

Prot. Strategies, Inc. v. Starr Indem. & Liab. Co., No. 1:13-CV-00763, 2014 U.S. Dist. LEXIS 56652 (E.D. Va. Apr. 23, 2014)

The court held that even though it is rare for a duty-to-defend policy to provide for recoupment, where such a policy contains an express recoupment provision it should be enforced as written when it is determined that there is no coverage for a particular claim.

Bridger Lake, LLC v. Seneca Ins. Co., No. 11-0342, 2014 U.S. Dist. LEXIS 27703 (W.D. La. Mar. 3, 2014)

Construing Wyoming law and a general liability policy, the court held that a unilateral reservation of rights letter was sufficient to permit recoupment of defense costs where there was no coverage at all for the underlying facts.

Consent

Petro v. Travelers Cas. & Sur. Co. of Am., No. 3:12-CV-491, 2014 U.S. Dist. LEXIS 142627 (N.D. Fla. Sept. 24, 2014)

An insurer was entitled to summary judgment on the insureds' breach of contract and bad faith claims under a non-profit management and organization liability policy based on the insureds' failure to secure the insurer's written consent before settling a claim related to the insureds' failure to reconstruct its condominium association building in a timely manner following a hurricane.

Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co., 11 F. Supp. 3d 1184 (N.D. Ga. 2014)

The court held that an insurer under a directors and officers liability policy was not required to pay the full amount of a settlement where the insured decided unilaterally to settle a claim for a higher amount than the insurer had agreed to fund, because the additional amount constituted a voluntary payment by the insured. In Piedmont Office Realty Trust v. XL Specialty Ins. Co., 769 F.3d 1291 (11th Cir. 2014), the Eleventh Circuit certified to the Supreme Court of Georgia the question of whether a court can determine as a matter of law that an insured who seeks (but fails) to obtain the insurer's consent before settling is flatly barred – whether consent was withheld reasonably or not – from bringing suit for breach of contract or bad faith, or if the issue of whether the insurer unreasonably withheld consent must be resolved first.

Rosalind Franklin Univ. of Med. & Sci. v. Lexington Ins. Co., 2014 IL App (1st) 113755

An insurer could not deny coverage based on a voluntary payment provision in a professional liability policy because the insurer learned that settlement negotiations had been ongoing and had multiple opportunities to raise consent-to-settle or voluntary payment defenses but chose not to do so until after the insured had executed a final settlement agreement. Accordingly, the court found that the insurer had waived its ability to deny coverage on these grounds after the settlement agreement was executed.

C.A. Jones Mgmt. Group, LLC v. Scottsdale Indem. Co., No. 5:13-CV-00173, 2014 U.S. Dist. LEXIS 25931 (W.D. Ky. Feb. 28, 2014)

The insured sought an injunction against its insurer for its failure to provide a defense for several actions arising under a business and management indemnity policy. The court rejected the request for an injunction, finding that the policyholder had failed to obtain its insurer's prior written consent before incurring defense costs and, as a result, these defense costs were not covered.

Morgan Stanley Inv. Mgmt. Inc. v. Zurich Am. Ins., No. 652329/2013 (N.Y. Sup. Ct. Mar. 13, 2014)

A provision in a directors and officers liability policy requiring that the insured obtain the insurer's written consent before incurring any defense costs or claim expenses was deemed unambiguous and enforceable under New York law and resulted in the court granting the insurer's motion to dismiss, where the insured incurred close to $1.5 million in defense costs in connection with an SEC investigation before placing the insurer on notice of the claim.

Lessard v. Cont'l Cas. Co., No. 1:14-CV-63, 2014 U.S. Dist. LEXIS 115953 (E.D. Va. Aug. 19, 2014)

The court held that a directors and officers liability insurer owed no coverage for a bank's underlying lawsuit against an insured officer because of the insured's failure to give timely notice and failure to secure the insurer's consent prior to engaging in settlement negotiations.

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