



# ***D&O and Professional Liability***

## **2011 | A Year In Review**

2011 was another active year for courts confronted with issues relating to directors and officers and other professional liability insurance coverage, with at least five federal circuit courts, seven state supreme courts and numerous other courts issuing decisions of note. Notice, particularly in the context of timeliness and claims made policies, was once again a heavily litigated topic that resulted in numerous decisions in a wide range of cases. The assessment of an insured's prior knowledge of potential claims, and whether claims were related, both continued to be the focus of numerous coverage cases. Courts also continued to scrutinize the relief sought by third party claimants, and whether insurers may recoup defense and settlement payments. Below, we review a selection of the notable cases from 2011. We expect that these issues will continue to be important to insurers, policyholders and courts analyzing directors and officers and other types of professional liability policies in 2012 and beyond.

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### **NOTICE**

*BEI Sensors & Sys. Co. v. Great Am. Ins. Co.*, No. C 09-5819  
SBA, 2011 U.S. Dist. LEXIS 27996 (N.D. Cal. Mar. 4, 2011)

An insurer's late notice defense was rejected under a crime protection policy requiring notice of loss "as soon as possible" where the insurer failed to present evidence of prejudice resulting from the insured's four-month delay in providing notice of the loss.

*Jennings Constr. Serv. Corp. v. Ace Am. Ins. Co.*, 783 F. Supp. 2d 1209 (M.D. Fla. 2011)

Under both Florida and Texas law, an insurer was entitled to disclaim coverage under a claims made and reported errors and omissions policy without showing prejudice, where notice was given after the expiration of the policy.

*Cuthill & Eddy, LLC v. Cont'l Cas. Co.*, 784 F. Supp. 2d 1331 (M.D. Fla. 2011)

An insurer was entitled to disclaim coverage under a claims made and reported notice provision in a professional liability policy where the insured timely gave notice of a claim to the

insurer's agent because the policy required that notice be given to the insurer, not the agent.

*Leeds v. First Mercury Ins. Co.*, No. 10-22729-CV-KING, 2011 U.S. Dist. LEXIS 78998 (S.D. Fla. July 20, 2011)

There was no coverage under a claims made lawyers professional liability policy where the insureds failed to give the insurer notice a claim within ten days of receipt by the insureds, as required by the policy. The insured attorneys waited eight months after exchanging settlement documents and otherwise attempting to resolve a claim against them before notifying the insurer of the claim, which the court found to be an unreasonable delay as a matter of law. The insureds were not able to rebut the presumption of prejudice because the delay prevented the insurer from investigating the claim and participating in the defense and settlement of the matter.

*DS Waters of Am., Inc. v. Twin City Fire Ins. Co.*, No. 1:09-CV-1819-TWT, 2011 U.S. Dist. LEXIS 48688 (N.D. Ga. May 5, 2011)

An insurer was entitled to deny coverage where a policy's notice provision required that notice be given to the insurer no later than sixty days after its General Counsel, Chief Financial Officer, or the Human Resources Manager became aware of a claim, but the insured failed to give notice until nearly eight months after the Chief Financial Officer and General Counsel became aware of a complaint against the insured.

*Blue Cross of Idaho Health Serv. v. Atl. Mut. Ins. Co.*, No. 1:09-CV-246-CWD, 2011 U.S. Dist. LEXIS 4892 (D. Idaho Jan. 19, 2011)

A commercial general liability insurer was estopped from asserting a late notice defense where it failed to raise late notice in its initial coverage correspondence and subsequently participated in the defense of the underlying action.

*Ashby v. Bar Plan Mut. Ins. Co.*, 949 N.E.2d 307 (Ind. 2011), rehearing denied, 2011 Ind. LEXIS 995 (Ind. Nov. 1, 2011)

Notice by a claimant was not sufficient under the reporting requirement of a claims made lawyer's professional liability policy, but the court reversed summary judgment for the insurer because there were questions of fact regarding whether the insurer was estopped from denying coverage where the insurer did

not issue a reservation of rights letter explaining that coverage could be denied based on inadequate notice.

*Jenkins v. Cumis Ins. Soc'y, Inc.*, No. 49A04-1006-PL-371, 2011 Ind. App. Unpub. LEXIS 1262 (Ind. Ct. App. Sept. 9, 2011)

There was no coverage under a claims made directors, volunteers and employees policy for a claim made against an insured former chief operating officer after the policy period expired. Notice of a claim against a former chief executive officer did not constitute notice of a similar subsequent claim against the chief operations officer, even though, according to the chief operating officer's argument that the allegations in the prior suit against the former chief executive officer formed the basis for the current allegations against the chief operating officer. Accordingly, no claim was made against the chief operating officer during the policy period, and she was not covered by the policy for the claim was made against her.

*Wellpoint, Inc. v. Nat'l Union Fire Ins. Co.*, 952 N.E.2d 254 (Ind. Ct. App. 2011), rehearing denied, No. 49A05-1011-PL-670, 2011 Ind. App. LEXIS 1732 (Ind. Ct. App. Sept. 14, 2011)

Claims made after the inception of a claims made reinsurance policy that were related to prior claims made before the policy's inception were not excluded from coverage under the policy's notice provision. The court rejected the excess insurer's attempt to apply a prior notice exclusion where its policy did not express any such exclusion.

*Fed. Ins. Co. v. Lexington Ins. Co.*, 941 N.E.2d 996 (Ill. App. Ct. 2011), appeal denied, 949 N.E. 2d 658 (Ill. 2011)

An insured's telephonic notice of a claim to the broker designated to receive notice under an excess policy did not satisfy that policy's notice of circumstance provision, which required notice to be in writing. Moreover, the insured did not tell the broker that it should put the excess carrier on notice but left it up to the broker to decide which insurers to notify, and the broker notified only the primary carrier in writing. The notice to the primary insurer was not imputed to the excess insurer even though the primary and excess insurers were affiliated business entities.

*Travelers Ins. Co. v. Maplehurst Farms, Inc.*, 953 N.E.2d 1153 (Ind. App. 2011), rehearing denied, 2011 Ind. App. LEXIS 1831 (Ind. Ct. App. Oct. 21, 2011)

An insured could not recover costs and expenses incurred prior to giving its insurer notice of the underlying environmental claim. Pre-notice, pre-tender defense costs were disallowed.

*State v. Nat'l Union Fire Ins. Co.*, 56 So. 3d 1236 (La. App. 2011), rehearing denied, 2011 La. App. LEXIS 368 (La. App. 1 Cir. Mar. 28, 2011), writ denied, 63 So. 3d 1023 (La. 2011)

Whether an insured's seven-year delay in providing notice of a claim prejudiced an excess liability insurer that issued comprehensive general liability and road and bridge hazard liability coverage was a disputed issue of fact and could not be decided on cross-motions for summary judgment.

*Comena v. City of Baton Rouge/Parish of E. Baton Rouge*, No. 08-714-RET-SCR, 2011 U.S. Dist. LEXIS 63874 (M.D. La. Apr. 11, 2011)

Notice of a claim in a renewal application did not satisfy the reporting provision in a claims made public officials liability policy.

*First American Title Ins. Co. v. Titan Title, LLC*, No. 09-485-BAJ-DLD, 2011 U.S. Dist. LEXIS 134032 (M.D. La. Nov. 21, 2011)

A claims made and reported insurer was not required to provide coverage based on notice provided after the policy period. The court further highlighted that Louisiana does not deem claims made policies to be per se impermissible as against public policy.

*Murray Architects, Inc. v. Scottsdale Ins. Co.*, No. 11-150, 2011 U.S. Dist. LEXIS 135326 (E.D. La. Nov. 23, 2011)

An insured was denied coverage under a claims made and reported policy when it failed to report the claim to its insurer during the policy period.

*Sherwood Brands, Inc. v. Great Am. Ins. Co.*, 13 A.3d 1268 (Md. 2011)

Pursuant to Maryland Code, Insurance Article § 19-110, a directors and officers and employment practices

liability insurer was required to demonstrate that it was prejudiced by an insured's late notice more than 90 days after the policy period under a claims made and reported policy, despite the policy's requirement that notice be provided no later than 90 days after the end of the policy period.

*Webb Operating Co. v. Zurich Am. Ins. Co.*, No. 11-10157, 2011 U.S. Dist. LEXIS 73675 (E.D. Mich. July 8, 2011)

An insurer was entitled to deny coverage under the notice provision of a claims made storage tank system third party liability and cleanup policy without showing prejudice where the insured became aware of a fuel release during the policy period, but failed to provide notice to the insurer until after the policy period.

*Lexington Ins. Co. v. United Health Group*, No. 09cv10504-NG, 2011 U.S. Dist. LEXIS 14929 (D. Mass. Feb. 15, 2011)

Although loss run reports potentially could potentially satisfy a claims made managed care professional liability policy's reporting requirement under Minnesota law, the particular loss run reports in question did not adequately notify the insurer of the claim, and the insurer was prejudiced as a matter of law as a result of the subsequent late notice.

*Owatonna Clinic-Mayo Health System v. Medical Protective Co. of Fort Wayne, Ind.*, 639 F.3d 806 (8th Cir. 2011)

Under Minnesota law, an insured's failure to strictly comply with a claims made notice provision in a medical malpractice policy did not vitiate coverage when the failure to comply went to the content of the notice, and not the timing of the notice, because the notice gave the insurer sufficient information to conclude that the insured had presented a claim for arguable coverage.

*XL Specialty Ins. Co. v. Progressive Cas. Ins. Co.*, 411 Fed. App'x 78 (9th Cir. Jan. 20, 2011)

Under Montana law, an aircraft liability insurer was required to demonstrate it was prejudiced as a result of the insured's late notice of a claim. The insurer could not do so where it was provided with notice four months before the underlying action went to trial, and it declined to participate in the defense.



*Las Vegas Metro. Police Dep't v. Coregis Ins. Co.*, 256 P.3d 958 (Nev. 2011)

The court found that summary judgment was improperly granted in favor of an insurer that issued an occurrence-based law enforcement liability policy where there were genuine issues of material fact as to whether notice was late. The court also adopted a notice-prejudice rule for Nevada, requiring that an insurer that denies coverage of a claim based on the insured party's late notice must show that it had been prejudiced by the late notice.

*Atl. Health Sys. v. Nat'l Union Fire Ins. Co.*, No. 08-1661 (GEB), 2011 U.S. Dist. LEXIS 39797 (D.N.J. Apr. 11, 2011), affirmed, No. 11-2060, 2012 U.S. App. LEXIS 4085 (3rd Cir. N.J. Feb. 29, 2012)

An insured's notice of a claim on a renewal application sent to an underwriter did not constitute notice of the claim to the insurer for the purpose of complying with a claims made and reported policy's notice provision.

*Structure Tone, Inc. v. Eurotech Constr. Corp.*, No. 116648/2009, 2011 NY Slip Op. 32725U (N.Y. Sup. Ct. Oct. 13, 2011)

Where an insured gave timely notice of an occurrence but failed to give timely notice of a suit, the insured was entitled to coverage under the occurrence-based liability policy because the insurer did not demonstrate that it was prejudiced from the untimely notice of suit. However, there was no coverage under a different insurer's policy where that insurer first learned of both the occurrence and the suit when it was served with process in the coverage action.

*Mt. Hawley Ins. Co. v. Abraham Little Neck Devel. Group, Inc.*, No. 09-CV-3463, 2011 U.S. Dist. LEXIS 135900 (E.D.N.Y. Nov. 21, 2011)

An insurer was not obligated to demonstrate prejudice caused by untimely notice when the policy period at issue pre-dated the effective date of New York legislation requiring insurers to demonstrate prejudice if reported claims are untimely; accordingly, the insurer properly denied coverage under a commercial general liability policy requiring notice of occurrences "as soon as practicable."

*City of New York v. QBE Ins. Corp.*, No. 403092/2008, 2011 NY Slip Op. 32986U (N.Y. App. Div. Nov. 14, 2011)

An additional insured was not entitled to coverage under a comprehensive general liability policy requiring

notice "as soon as practicable" of any occurrence where such notice was not provided until two months after the insureds received notice of a claim. Because the insurance policy was issued in 2005, prior to the 2009 amendment to Insurance Law § 3420, the insurer did not need to demonstrate that it was prejudiced by the late notice in order to deny coverage.

*Tower Insurance Co. of New York v. NHT Owners LLC*, 90 A.D.3d 532 (N.Y. App. Div. 1st Dep't Dec. 20, 2011)

An insurer was obligated to indemnify and defend insureds when notice of an occurrence was provided 62 days after the occurrence, and the policy required that notice be provided as soon as practicable, which means within "a reasonable period of time" under New York Law. Further, the disclaimer of coverage was untimely as a matter of law where it was sent 33 days after the insurer received notice because the sole ground for the insurer's disclaimer was the insureds' delay in notifying it of the occurrence.

*Penn Traffic Co. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 79 A.D.3d 1729 (N.Y. App. Div. Dec. 30, 2011)

There was no coverage under a claims made executive and organization liability policy where the insured's failure to provide written notice of claims during the reporting period and extended reporting period constituted a failure to comply with a condition precedent that vitiated the contract.

*Kubit v. MAG Mut. Ins. Co.*, 708 S.E.2d 138 (N.C. Ct. App. 2011)

A liability insurer was not required to demonstrate it was prejudiced by an insured's late notice of a lawsuit against it where the insured did not provide any explanation for its eight-month delay in providing notice.

*Employers' Fire Ins. Co. v. ProMedica Health System, Inc.*, No. 3:11 CV 923, 2011 U.S. Dist. LEXIS 150225 (N.D. Ohio Dec. 31, 2011)

An insured's failure to notify its insurer of a claim prior to the expiration of an extended reporting period precluded coverage under a claims made policy.

*Nationwide Mut. Fire Ins. Co. v. Nova Real Estate LLC*, No. 09-0303, 2011 U.S. Dist. LEXIS 20601 (E.D. Pa. Mar. 1, 2011)

An insurer was prejudiced as a matter of law by an insured's late notice under a business owner's liability



policy requiring notice of an occurrence or suit “as soon as practicable” where the insured failed to provide notice until after the settlement of the underlying action.

*E. Tex. Med. Ctr. Reg'l Healthcare Sys. v. Lexington Ins. Co.*, No. 6:04-CV-165, 2011 U.S. Dist. LEXIS 18918 (E.D. Tex. Feb. 25, 2011)

An insurer failed to establish it was prejudiced by the insured's late notice where the insured provided notice eight months after the underlying action was filed and seven months after the expiration of the claims made excess medical malpractice policy.

*Minn. Lawyers Mut. Ins. Co. v. Batzli*, 442 Fed. App'x 40 (4th Cir. Aug. 4, 2011)

Under Virginia law, a law firm insured under a lawyer's professional liability policy had provided timely notice of a malpractice claim arising out of the insured's handling of a divorce settlement because the insured neither knew, nor reasonably should have known, that a claim for damages would be made. Notwithstanding the fact that the insured improperly drafted a settlement agreement, there was evidence that the client was comfortable with the result obtained, and that the insured had obtained a favorable settlement for his client.

*Moody v. Am. Guar. & Liab. Ins. Co.*, 804 F. Supp. 2d 1123 (W.D. Wash. 2011)

An insurer was entitled to deny coverage under a claims made and reported attorneys professional liability policy without showing prejudice where notice was given after the expiration of the policy.

## RELATED CLAIMS

*Feldman v. Illinois Union Ins. Co.*, 198 Cal. App. 4th 1495 (Cal. App. 6th Dist., Sept. 6, 2011)

An amended cross-complaint that added new counts against additional defendants simply expanded on the initial cross-complaint and, therefore, related back to the initial cross-complaint. Because the initial cross-complaint was filed before policy inception, coverage was barred for the amended cross-complaint.

*Federal Ins. Co. v. DBSI, Inc.*, No. 09-52031, 2011 Bankr. LEXIS 2727 (Bankr. D. Del., July 22, 2011)

RICO and fraudulent transfer actions commenced by

a bankruptcy trustee after the expiration of a directors and officers liability policy were covered under the policy because they related back to actions filed during the policy period that arose out of the same courses of conduct, including misrepresentations of accountable reserves and misrepresentations of the insured company's financial status.

*United Westlabs, Inc. v. Greenwich Ins. Co.*, No. 09C-12-048 MMJ, 2011 Del. Super. LEXIS 261 (Del. Super., June 13, 2011), affirmed by No. 337, 2011, 2012 Del. LEXIS 130 (Feb. 28, 2012)

Under a policy covering liability for cyber and technology activities, coverage was barred for an action filed against the insured during the policy period because the wrongful acts alleged were part of a continuous series of related acts that had been alleged in an action filed before the policy inception.

*Continental Cas. Co. v. Howard Hoffmann & Assoc.*, 955 N.E.2d 151 (Ill. App. 1st Dist., Aug. 15, 2011), appeal denied, *Continental Cas. Co. v. Hoffman (Estate of Goldston)*, 963 N.E.2d 244 (Ill. 2012)

Under a lawyer's professional liability policy, coverage for twelve actions by parties seeking recovery of funds embezzled by a law office employee were based on the same series of related acts by the employee, hence the single “per claim” liability limit applied.

*Wellpoint, Inc. v. National Union Fire Ins. Co.*, 952 N.E.2d 254 (Ind. Ct. App., July 20, 2011), rehearing denied by No.49A05-1011-PL-670, 2011 Ind. App. LEXIS 1732 (Ind. Ct. App. Sept. 14, 2011)

Under a health insurer's claims made errors and omissions liability reinsurance policy, coverage was not barred for ten suits alleging improper denial of reimbursement to providers because the policy's related claims provision was not intended to retrospectively exclude coverage based on claims that preceded an insurer's relationship with the insured.

*Breck & Young Advisors, Inc. v. Lloyds of London Syndicate 2003*, No. 09-2516-JAR, 2011 U.S. Dist. LEXIS 29109 (D. Kan., Mar. 21, 2011)

Under New York law, twenty-six separate investor claims alleging that various brokers in one office sold the investors unsuitable investment products, and



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churned their accounts, shared a sufficient factual nexus such that they involved interrelated wrongful acts under the broker dealer professional liability policy.

*Breck & Young Advisors, Inc. v. Lloyds of London Syndicate* 2003, No. 09-2516-JAR, 2011 U.S. Dist. LEXIS 116173 (D. Kan., Oct. 6, 2011)

Under New York law, coverage was not barred under a broker dealer professional liability policy for an arbitration alleging a common scheme among insured brokers because the current arbitration did not relate back to two earlier, pre-policy period arbitrations, which had not alleged common schemes.

*Baldwin v. Lawyers Mut. Ins. Co. of Kentucky*, No. 2010-CA-592-MR, 2011 Ky. App. Unpub. LEXIS 371 (Ky. Ct. App., Apr. 29, 2011)

Under a lawyer's professional liability policy, a malpractice suit related back to an earlier claim made by the lawyer seeking coverage for costs awarded in relation to a motion to strike because both claims were based on the same alleged negligence in the same case being handled by the lawyer.

*Michigan Millers Mut. Ins. Co. v. Fidelity and Deposit Co. of Maryland*, 809 F. Supp. 2d 703 (W.D. Mich., Aug. 15, 2011)

Coverage was not barred under a policy providing professional services liability coverage to an insurer where an amended complaint filed during the claims made policy period alleged that an insurance company negligently handled the defense of an underlying action. The court held that the amended complaint did not relate back to the initial complaint filed before policy inception because the initial complaint did not allege any professional services claims.

*UnitedHealth Group, Inc. v. Columbia Cas. Co.*, No. 05-CV-1289, 2011 U.S. Dist. LEXIS 148422 (D. Minn., Dec. 27, 2011)

Two suits against a health insurer by healthcare providers were interrelated with an earlier suit because each of the suits included central allegations that the health insurer "downcoded" provider claims to less expensive billing codes, which established a common nexus among the suits.

*Gladstone v. Westport Ins. Co.*, No. 10-652, 2011 U.S. Dist. LEXIS 132100 (D.N.J., Nov. 16, 2011)

Under a lawyer's professional liability policy, coverage

was barred for a lawsuit that alleged the attorney committed malpractice in the handling of a trial because the lawsuit related back to an earlier action, filed prior to the policy's inception, which alleged the lawyer's negligence in handling the same trial.

*Continental Cas. Co. v. Jones*, No. 3:09-CV-1004-JFA, 2011 U.S. Dist. LEXIS 100082 (D.S.C., Sept. 2, 2011), amended by 2012 U.S. Dist. LEXIS 20663 (Feb. 17, 2012)

Coverage was barred under an accountant's professional liability policy for claims made to recover funds stolen by the firm owner because each instance of theft was related to the other instances of theft in the firm owner's common scheme to steal the funds.

*Reeves County, Texas v. Houston Cas. Co.*, No. 08-09-00256-CV, 356 S.W.3d 664 (Tex. App. 8th Dist., Sept. 14, 2011)

Coverage was barred under a non-profit organization liability policy for a lawsuit filed against the insured county sheriff alleging that he impeded the business operations of a bail bond firm because the lawsuit alleged facts regarding an earlier suit involving the same parties and connected wrongful acts.

## PRIOR KNOWLEDGE, KNOWN LOSS, AND RESCISSION

*Professional Asset Strategies, LLC v. Continental Cas. Co.*, 447 Fed. App'x. 97 (11th Cir. Nov. 17, 2011)

Under Alabama law, an insurer was entitled to summary judgment based on a prior knowledge provision in its professional liability insurance policy because an objective person in an insured employee's position should have expected that his theft of money from client accounts might form the basis of a claim. Other insureds could not benefit from the "innocent insured" clause in the policy because it was the prior knowledge that defeated coverage, not the "criminal, dishonest, illegal, fraudulent or malicious" nature of the acts.

*Upper Deck Co. v. Endurance Am. Specialty Ins. Co.*, No. 10-cv-1032, 2011 U.S. Dist. LEXIS 148668 (S.D. Cal. Dec. 15, 2011)

An insurer was entitled to rescind multiple professional liability policies based on the insured's failure to disclose that it had been preliminarily enjoined from engaging in

counterfeiting and distribution related activities.

*Medical Protective Co. v. Erfani*, No. 09-cv-2833 DMS (CAB), 2011 U.S. Dist. LEXIS 100740 (S.D. Cal. Sept. 8, 2011), reconsideration denied, 2011 U.S. Dist. LEXIS 139562 (S.D. Cal. Dec. 5, 2011)

An insurer was not entitled to summary judgment for rescission of a professional liability insurance policy because it was not shown that a misrepresentation in an application for reinstatement of a non-renewed policy was material to a guaranteed extension offer that required no applications or representations.

*Hartford Steam Boiler Group v. SVB Underwriting, Ltd.*, No. 3:04cv2127, 2011 U.S. Dist. LEXIS 53743 (D. Conn. May 19, 2011)

A prior knowledge exclusion did not bar coverage for wrongful death and personal injury claims under an errors and omissions policy because an objective professional possessing the insured's knowledge would not have reasonably expected that an explosion would have led to litigation against the insured.

*Capital Specialty Insurance Corp. v. Sanford Wittels & Heiser, LLP*, 793 F. Supp. 2d 399 (D.D.C. 2011)

An insured attorney's prior knowledge that its clients' class action claim was dismissed due to the insured's error in missing a filing deadline barred coverage for legal malpractice action under a professional liability insurance policy.

*Cuthill & Eddy, LLC v. Cont'l Cas. Co.*, 784 F. Supp. 2d 1331 (M.D. Fla. 2011)

An insurer was entitled to summary judgment based on the fact that, prior to the inception of the professional liability insurance policy, the insured's employees had knowledge of acts and/or omissions that might reasonably have been expected to form the basis of a claim.

*Rockhill Ins. Co. v. Coyote Land Co.*, Case No. 3:09cv556/MCR/EMT, 2011 U.S. Dist. LEXIS 11040 (N.D. Fla. Feb. 4, 2011)

An insurer was entitled to summary judgment based on the fact that no coverage existed for a pollution claim under a site-specific pollution liability policy because the insured was involved in a similar lawsuit prior to the inception of the policy that made it foreseeable to the insured that the underlying claim would be brought.

*AXIS Insurance Co. v. Farah & Farah, P.A., et. al.*, No. 3:10-cv-393-J-37JBT, 2011 U.S. Dist. LEXIS 130332 (M.D. Fla. Nov. 10, 2011)

An insurer was entitled to deny coverage under a professional liability policy for an underlying legal malpractice claim because it was undisputed that, prior to the policy's inception, an insured former attorney believed that premature filing of the clients' medical negligence complaint reasonably could be expected to be the basis of a malpractice claim. The court rejected the notion that the policy's definition of "insured" is ambiguous in light of the application. The court declined to decide whether the prior knowledge standard is subjective or objective but concluded that a second insured lacked the requisite knowledge, regardless.

*Darwin National Assurance Company v. Hellyer*, No. 10 C 50224, 2011 U.S. Dist. LEXIS 60592 (N.D. Ill. June 7, 2011)

A prior knowledge condition in a lawyer's professional liability policy precluded coverage for a malpractice claim based on a mortgage subordination agreement that the insured allegedly advised his clients to sign so that the insured's company could borrow more money to purchase property from his clients, while simultaneously reducing the extent of his clients' security interest. In so acting to advance his own interests at the expense of his clients, the insured had an objective basis to believe he had breached a professional duty and that his conduct might form the basis for a malpractice claim.

*Bancinsure, Inc. v. U.K. Bancorporation Inc./United Kentucky Bank of Pendleton County, Inc.*, No. 11-109-DLB-CJS, 2011 U.S. Dist. LEXIS 132613 (E.D. Ky. Nov. 16, 2011)

Applying the adverse interest exception to imputing an agent's knowledge to its principal, the court held that an insurer was not entitled to rescind a financial institution bond and extended professional liability policy based on a false statement made in the common application where the signor committed the undisclosed embezzlement.



*McKeen v. Continental Casualty Company*, No. 2:10-cv-10624, 2011 U.S. Dist. LEXIS 97046 (E.D. Mich. Aug. 30, 2011)

A lawyer's professional liability insurance policy excluded coverage for a malpractice action where the insured law firm had prior reason to believe that a claim might be made where it knew that its client's case was dismissed based on the insured's failure to comply with discovery orders and that the dismissal was affirmed on appeal.

*First Bancshares, Inc. v. St. Paul Mercury Insurance Co.*, No. 10-3370, 2011 U.S. Dist. LEXIS 105405 (W.D. Mo. Sept. 16, 2011)

Although a claimant never directly threatened the insured with a lawsuit, the claimant's allegations in proceedings before the Missouri Division of Employment Security that the insured illegally terminated her employment were sufficient to bar coverage under an employment practices liability policy's prior knowledge provision.

*Mutual Real Estate Holdings, LLC v. Houston Casualty Company*, No. 10-cv-236, 2011 U.S. Dist. LEXIS 100072 (D.N.H. Sept. 6, 2011), reconsideration denied, 2011 U.S. Dist. LEXIS 118548 (D.N.H. Oct. 12, 2011)

A professional liability policy excluded coverage for a claim on grounds that the insured had knowledge of the alleged wrongful acts prior to the policy's inception date, despite the fact that the insured believed that its former client's accusations lacked merit.

*Federal Ins. Co. v. SafeNet, Inc.*, 817 F.Supp.2d 290 (S.D.N.Y. Sept. 9, 2011)

Under Maryland law, an insurer was entitled to rescind an excess directors and officers policy as to the insured public company and its chief financial officer based on misrepresentations in the company's public filings after the chief financial officer pleaded guilty to securities fraud and stated that she caused the company's public filings to be inaccurate. The policy defined "Application" to include public filings, stated that the policy would be void as to any insured who knew that the facts in the Application were not accurate and complete and as to any insured to whom such knowledge is imputed, and provided that the chief financial officer's knowledge was imputed to other insureds.

*Unencumbered Assets Trust v. Great American*, 817 F.Supp.2d 1014 (S.D. Ohio Sept. 16, 2011)

A material issue of fact existed regarding whether an insurer knew of its grounds for rescinding an excess directors and officers policy when it accepted premiums for tail coverage and, thereby, waived its right to rescind. The insurer otherwise would be entitled to rescind the policy based on material misstatements in the application that were, under the terms of the policy's severability clause, imputed to the other insureds for purposes of determining the validity of the policy.

*Schwartz Manes Ruby & Slovin, L.P.A. v. Monitor Liability Managers, LLC*, No. 1:09-cv-790, 2011 U.S. Dist. LEXIS 91570 (S.D. Ohio Aug. 17, 2011)

A professional liability insurance policy did not cover a legal malpractice action because it was reasonably foreseeable that a claim may be brought where the insured law firm knew that its failure to appear at trial led to a judgment being entered on behalf of its former client, and that the former client's new counsel expressed his belief that the insured was responsible for the adverse judgment.

*Continental Casualty Company v. Jones*, No.3:09-cv-1004, 2011 U.S. Dist. LEXIS 100082 (D.S.C. Sept. 2, 2011), amended by 2012 U.S. Dist. LEXIS 20663 (D.S.C. Feb. 17, 2012)

A professional liability policy did not cover an insured accounting firm's claim where an individual member of the firm, who also was an insured under the policy, had knowledge of his own criminal acts that might reasonably be expected to be the basis of a claim, and the policy's "innocent insureds" provision did not save coverage.

*Bryan Bros., Inc. v. Cont'l Cas. Co.*, 660 F.3d 827 (4th Cir. 2011)

Under Virginia law, an insurer was entitled to summary judgment based on the fact that no coverage existed for an employee fraud claim under a professional liability policy because the insured had knowledge before inception of the policy that an employee's theft could be the basis for claims.



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

*Century Surety Co. v. Environmental Property Investigations*, No. 10-cv-01932-PAB-BNB, 2011 U.S. Dist. LEXIS 93298 (D. Co. Aug. 22, 2011)

An insurer's duty to defend was triggered under an insuring provision limiting coverage to wrongful acts that occurred on or after August 1, 2008 when, although the underlying complaint alleged that the project at issue was complete prior to this retroactive date, the insured also allegedly made misrepresentations sometime after August 1, 2008.

*DS Waters of America v. Twin City Fire Ins. Co.*, No. 1:09-CV-1819-TWT, 2011 U.S. Dist. LEXIS 48688 (N.D. Ga. May 5, 2011)

A policy's prior acts exclusion did not bar coverage for a class action lawsuit when it was unclear whether any alleged wrongful acts took place before the prior acts date even though the proposed class period began before the prior acts date.

*Lafayette Life Ins. Co. v. Arch Ins. Co.*, 784 F. Supp. 2d 1034 (N.D. Indiana 2011)

A series of similar claims against a life insurance company, made both before and after the inception of the policy, did not trigger the prior and pending litigation exclusion or the prior notice exclusion of a life insurer's errors and omissions policy when the exclusions did not incorporate the policy definition of "related claim" and were otherwise ambiguous, and the prior claims involved different suits by different life insurance policy holders. In addition, the prior notice provision did not apply because, although the prior claims were reported to another insurer, the insurer did not establish that the claims were reported to a previous errors and omissions insurer.

*Town of Saugus v. Zurich American Ins. Co.*, 791 F. Supp. 2d 274 (D. Mass. 2011)

A prior and pending litigation exclusion in a public official liability policy barred coverage for a lawsuit claiming that the city wrongfully demolished property and wrongfully enforced a tax lien for the cost of the demolition where the same parties were involved in litigation regarding the proprietary of the underlying tax lien prior to the inception of the policy.

*Michigan Millers Mutual Ins. Co. v. Fidelity and Deposit Co. of Maryland*, 809 F. Supp. 2d 703 (W.D. Mich. Aug. 15, 2011)

A prior and pending litigation exclusion barring payment for any loss, including defense expenses in connection with any professional services claim "based on or attributable to or arising from prior or pending litigation as of [December 13, 2002]" was not triggered because the prior lawsuit filed against the insured did not involve a professional service.

*Mutual Real Estate Holdings, LLC v. Houston Casualty Co.*, No. 10-cv-236-LM, 2011 U.S. Dist. LEXIS 100072 (D. N.H. Sept. 6, 2011), reconsideration denied, 2011 U.S. Dist. LEXIS 118548 (D.N.H. Oct. 12, 2011)

A letter from homebuyers to their agent listing defects with the home, stating that the buyers incurred costs in addressing the defects, and inquiring whether the agent had insurance coverage, qualified as a claim made prior to the inception of the policy and the resulting lawsuit against the agent by the homebuyers, therefore, was not covered under the agent's claims made policy.

*Cumberland County Guidance Center v. Scottsdale Ins. Co.*, No. A-4591-08T3, A-4817008T3, 2011 N.J. Super. Unpub. LEXIS 3066 (N.J. Super. Ct. App. Div. Dec. 16, 2011), reconsideration denied, 2012 N.J. LEXIS 384 (N.J. Mar. 26, 2012)

A claims made professional liability policy that included a provision that limited coverage to wrongful acts that occurred on or after the stated retroactive date was clear and unambiguous and, therefore, the policy did not provide coverage for the insured's alleged failure to report child abuse that took place prior to the retroactive date. The court further held that a state law's reporting requirement did not create a continuing duty to report that would extend the wrongful act past the retroactive date.

*Northport Land Corp. v. Zurich North America Ins.*, No. 14123-2008, 2011 NY Slip Op 30137U (N.Y. Sup. Ct. Jan. 4, 2011)

An insuring provision limiting coverage to "releases" that occurred on or after October 20, 2005 did not provide coverage for a storage tank leak where the chemical detected in the leak had been barred from use prior to October 20, 2005, which confirmed that the leak occurred prior to that date.



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## DISHONESTY, PERSONAL PROFIT AND INTENTIONAL ACTS EXCLUSIONS

*Wojtunik v. Kealy*, No. CV-03-2161, 2011 U.S. Dist. LEXIS 36229 (D. Ariz. Mar. 31, 2011)

A stipulated judgment in an underlying securities litigation was not a “final adjudication” that triggered the fraud exclusion in a directors and officers liability policy.

*Wintermute v. Kansas Bankers Sur. Co.*, 630 F.3d 1063 (8th Cir. Jan. 6, 2011)

Under Arkansas law, a directors and officers liability policy’s personal profit and fraud/dishonesty exclusions were not triggered without a final adjudication, or undisputed allegations, because the personal profit exclusion contained “gaining in fact” language, and the fraud/dishonesty exclusion did not apply to insureds who were “not involved in the dishonest act.” Without some evidentiary proof, the insurer owed the insured a duty to defend.

*Cont’l Cas. Co. v. Kriz*, No. 3:09-cv-00835, 2011 U.S. Dist. LEXIS 33555 (D. Conn. Mar. 29, 2011)

A dishonesty exclusion barred indemnification for a judgment obtained against the insured because the conduct alleged in the underlying civil actions arose out of the criminal conspiracy that formed the basis of the insured’s guilty plea in a related criminal action.

*Federal Ins. Co. v. Safenet, Inc., et al.*, 817 F. Supp. 2d 290 (S.D.N.Y. Sept. 9, 2011)

Under Maryland law, a directors and officers liability policy’s fraud/dishonesty exclusion that required an adjudicated judgment excluded coverage for a company’s chief financial officer who pled guilty to deliberate wrongful conduct. The exclusion did not preclude coverage for the insured organization, however, because the judgment could not be imputed to the insured organization where the policy’s imputation provision imputed only the “facts pertaining to and knowledge possessed by” the chief financial officer to the organization.

*Scottsdale Ins. Co. v. The RiverBank*, 815 F. Supp. 2d 1074 (D. Minn. Sept. 7, 2011)

A business and management indemnity policy precluded coverage for a negligence claim against an insured company because the insured entity’s chief executive officer pled guilty to a criminal charge of “theft-false

representation,” and the negligence count against the company was based on the same alleged criminal conduct.

*United States Liability Ins. Co. v. Goldin Metals, Inc., et al.*, No. 1:10-cv-175, 2011 U.S. Dist. LEXIS 138590 (S.D. Miss. Nov. 30, 2011)

Because the “in fact” language in a dishonesty and personal profit exclusion was ambiguous as to the need for a final adjudication against the insureds, an insurer was not entitled to summary judgment on the applicability of the exclusion.

*B & R Consol., L.L.C. v. Zurich Am. Ins. Co.*, 934 N.Y.S.2d 32, 2011 N.Y. Slip Op. 51142U (N.Y. Sup. Ct. June 22, 2011)

A professional liability policy’s fraud/dishonesty exclusion was not triggered by an order granting summary judgment against the insured in the underlying action because the court had only concluded that the insured “breached its fiduciary duty” and did not adjudicate whether the insured “misappropriated funds,” even though the court mentioned the word “misappropriation” in the order.

*Unencumbered Assets v. Great American Ins. Co., et al.*, 817 F. Supp. 2d 1014 (S.D. Ohio Sept. 16, 2011)

An excess directors and officers liability policy did not provide coverage for a lawsuit because the underlying policy’s dishonesty exclusion was triggered by the criminal convictions of the individual insureds for their participation in a multi-billion dollar fraud, and the individual insureds’ actions were imputed to the insured entity.

*Executive Risk Indemnity, Inc. v. Charleston Area Med. Ctr., Inc.*, No. 2:08-cv-810, 2011 U.S. Dist. LEXIS 51239 (S.D.W.Va. May 12, 2011)

A directors and officers liability policy’s fraud/dishonesty exclusion was not triggered by the jury’s finding of willful and wanton conduct when those findings clearly applied only to the assessment of punitive damages and attorneys’ fees, and not to the underlying causes of action that did not concern fraud or dishonesty.

*State of Wisconsin v. GE-Milwaukee, LLC*, 808 N.W.2d 734 (Wis. Ct. App. Dec. 6, 2011)

A fraud/dishonesty exclusion with no “in fact” or “final adjudication” requirement precluded coverage for the

operative complaint in the underlying lawsuit alleging that the insureds conducted dishonest and fraudulent dating services because all of the claims asserted either “arise out of” or were “contributed to by” the dishonest or fraudulent acts or omissions of the insureds.

## RESTITUTION, DISGORGEMENT AND DAMAGES

*Chong v. Medmarc Cas. Ins. Co.*, 642 F.3d 941 (11th Cir. 2011)

The U.S. Court of Appeals for the Eleventh Circuit held that, under Florida law, the erroneous disbursement of client funds from a client trust account by an attorney was covered loss under a professional liability policy because the clients’ claims against the attorney as a result of the erroneous disbursement were for damages, not restitution.

*Chubb Custom Ins. Co. v. Grange Mut. Cas. Co.*, No. 2:07-cv-1285, 2011 U.S. Dist. LEXIS 111583 (S.D. Ohio Sept. 29, 2011)

The settlement of a suit against an insured insurance company for allegedly using software programs to improperly retain sums that should have been paid in settlements constituted an insurable loss under a professional liability policy, despite the claimant’s request for restitutionary relief because the court determined that the claimant was, in substance, seeking actual damages, and the money at issue was not wrongfully acquired.

*Clermont v. Continental Cas. Co.*, 778 F. Supp. 2d 133 (D. Mass. 2011)

A fee dispute filed against an attorney was not covered under a professional liability policy because the definition of “damages” in the policy specifically excluded “legal fees, costs and expenses paid or incurred or charged by the Insured[.]”

*Continental Casualty Co. v. Duckson*, No. 11 C 459, 2011 U.S. Dist. LEXIS 131566 (N.D. Ill. Nov. 15, 2011)

A professional liability carrier had no duty to defend or reimburse “claim expenses,” including defense expenses, in connection with a lawsuit brought by the Securities Exchange Commission against an investment fund’s counsel, which sought declaratory judgment, injunctive relief, disgorgement of ill-gotten gains, civil

penalties, and officer-director bars. Additionally, the return of profits obtained illegally does not constitute covered damages under Illinois law.

*Flagship Credit Corp. v. Indian Harbor Ins. Co.*, No. H-10-3616, 2011 U.S. Dist. LEXIS 46279 (S.D. Tex. Apr. 29, 2011)

An insurer had no indemnity obligation under a professional services liability policy for the settlement of an underlying lawsuit alleging violations of the Texas Business and Commercial Code because the settlement constituted a “penalty,” which was excluded from the policy’s definition of “loss.” The court also rejected the insured’s argument that a payment is only a penalty if it is paid to a governmental entity, noting that the definition of “loss” excluded all penalties imposed by law.

*In re Ancillary Receivership of Reliance Insurance Company*, 81 A.D.3d 533 1326 (N.Y. App. Div. 1st Dep’t Feb. 22, 2011)

Because an environmental liability policy defined damages as a monetary judgment or compensatory damages, the amount deducted as a set off against the insured company in a contractual dispute did not constitute covered damages under the policy.

*JPMorgan Securities Inc. v. Vigilant Ins. Co.*, 91 A.D.3d 226 (N.Y. App. Div. 1st Dep’t Dec. 13, 2011)

A \$250 million settlement between two Bear Stearns entities and the Securities Exchange Commission was not insurable loss under a professional liability policy because the settlement payment was for the disgorgement of funds gained through knowing and intentional illegal late trading for preferred customers by the Bears Stearns entities.

*Passaic Valley Sewerage Commissioners v. St. Paul Fire and Marine Ins. Co.*, 21 A.3d 1151 (N.J. 2011)

Where a liability policy defined “loss” as “money damages,” which in turn was defined as “monetary compensation for past harms or injuries,” the insurer had no obligation to indemnify the insured for the value of a settlement consisting of services and transferred assets.



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*U.S. Bank Nat'l Assoc. v. Federal Ins. Co.*, No. 10-3472, 664 F.3d 693 (8th Cir. Dec. 13, 2011)

Coverage was not available under a directors and officers policy because a \$56 million stipulated judgment against an insured officer did not constitute "loss" under the policy where the insured had been absolved from liability for the judgment pursuant to an assignment agreement with the claimant.

*Wojtunik v. Kealy*, No. CV-03-2161, 2011 U.S. Dist. LEXIS 36229 (D. Ariz. Mar. 31, 2011)

A stipulated judgment in a securities fraud action was insurable loss under a directors and officers policy because the damages suffered by the plaintiff arose from the sale of his company in exchange for worthless stock, rather than from restitutionary or disgorgement-type relief that might render the settlement uninsurable.

*XL Specialty Ins. Co. v. Loral Space & Comm., Inc.*, 82 A.D.3d 108 (N.Y. App. Div. 1st Dep't Feb. 17, 2011)

Attorneys' fees paid by an insured company to counsel for plaintiffs in a shareholder derivative action were covered damages under a management liability and company reimbursement policy because they were tantamount to a monetary judgment within the "creative, equitable remedy" crafted by the Delaware Chancery Court.

## INSURED V. INSURED EXCLUSIONS

*Wojtunik v. Kealy*, No. CV-03-2161-PHX-PGR, 2011 U.S. Dist. LEXIS 36229 (D. Ariz. Mar. 31, 2011)

A lawsuit by a company's purported president was not excluded from coverage under a directors and officers policy because the plaintiff had not been elected in accordance with the corporate bylaws and, therefore, had not been "duly elected or appointed," as required in the policy's definition of "insured."

*Fed Ins. Co. v. DBSI, Inc. (In re DBSI, Inc.)*, No. 08-12687, 2011 Bankr. LEXIS 2727 (Bankr. D. Del. July 22, 2011)

An action by the bankruptcy trustee of the named insured against several former directors and officers was not excluded from coverage by the directors and officers liability policy's insured v. insured exclusion because the

exclusion explicitly exempted claims by a bankruptcy trustee against an "insured person."

*Yessenow v. Executive Risk Indem., Inc.*, 953 N.E.2d 433 (Ill. App. 2011)

An insured v. insured exclusion did not exclude coverage for a claim by a court-appointed trustee against former directors and officers of the named insured because there was no sign of collusion and because a case brought by a court-appointed trustee is different than a case brought by a debtor-in-possession (for which the exclusion would apply). The court noted that a court-appointed trustee "is acting with the imprimatur of the court, reducing the fear of collusion ...."

*Truck Ins. Exch. v. Cassady*, No. 11-C-1812, 2011 U.S. Dist. LEXIS 122052 (N.D. Ill. Oct. 21, 2011)

An insured v. insured exclusion in the directors and officers coverage part of a general liability policy issued to a condominium association precluded coverage for a construction defect claim brought by one named insured against named additional insureds.

*Greenman-Pedersen, Inc. v. Travelers Cas. & Sur. Co. of America*, No. 10 Civ. 2777, 2011 U.S. Dist. LEXIS 90202 (S.D.N.Y. Aug. 9, 2011)

An insured v. insured exclusion in a directors and officers liability policy precluded coverage for claims against the named insured's officers despite the fact that most or all of the wrongdoing asserted against those officers allegedly occurred before they were insureds.

*American Security Bank & Trust Co. v. Progressive Cas. Ins. Co.*, No. 3:11-cv-00096, 2011 U.S. Dist. LEXIS 68231 (M.D. Tenn. June 24, 2011)

A claim was excluded from coverage by a directors and officers liability policy's insured v. insured exclusion even though the plaintiff director was bringing his action as a shareholder, which arguably would place the claim within the exception to the exclusion for derivative actions, because the action was brought with the assistance of a director (the plaintiff himself) and the exception explicitly stated that it did not apply when the action was brought with the assistance of an insured.



## CONTRACTUAL LIABILITY

*Gold v. Consol. Ins. Co. (In re Romeo Montessori Sch. Ass'n)*, 450 B.R. 667 (Bankr. E.D. Mich. 2011)

Under an errors and omissions policy, there was no coverage for claimants' proofs of debt for pre-paid tuition that were filed in a bankruptcy proceeding against a bankrupt school. The court held that coverage was not available because the policy excluded coverage for claims alleging breach of contract, and the proofs of debt were grounded in contract, even though they did not explicitly so indicate.

*Foodtown Ins. Co. v. Nat'l Union Fire Ins. Co.*, 412 Fed. App'x 502 (3d Cir. 2011).

Under New Jersey law, a contract exclusion in a directors and officers policy did not bar coverage for a breach of fiduciary duty claim because such claim did not arise out of a contract.

*General Casualty Co. of Wisconsin v. Rainbow Insulators, Inc.*, 798 N.W.2d 320 (Wisc. Ct. App. Mar. 31, 2011).

In a contractor's errors and omissions policy, a contract exclusion for failure to perform a contract barred coverage for breach of contract claim alleging negligence.

## PROFESSIONAL SERVICES

*Professional Asset Strategies, LLC v. Cont'l Cas. Co.*, 447 Fed. App'x 97 (11th Cir. Nov. 17, 2011)

For the purpose of applying a professional liability policy's prior knowledge exclusion that precluded coverage for claims arising from professional services that the insured had reason to believe might result in a claim prior to the policy's inception, an investment advisor's theft of funds from his grandparents' account, which was held by another entity, constituted professional services under Alabama law even though the insured acted outside the scope of his authority.

*White v. Arch Ins. Co.*, No. CV-11-00230-PHX-NVW, 2011 U.S. Dist. LEXIS 74175 (D. Ariz. July 8, 2011)

An insurance agent's professional liability policy did not cover the insurance agent's failure to advise himself to purchase additional insurance because he was

not providing services "to others," as required by the definition of professional services.

*Spa de Soleil, Inc. v. Gen. Star Indemn. Co.*, 787 F. Supp. 2d 1091 (C.D. Cal. 2011)

Although coverage under a commercial general liability policy was not triggered by allegations of breach of contract, the court ruled that the act of creating formulas for cosmetic products constituted professional services under a professional services endorsement.

*The Upper Deck Co. v. Endurance Am. Spec. Ins. Co.*, No. 10-cv-1032, 2011 U.S. Dist. LEXIS 148668 (S.D. Cal. Dec. 15, 2011)

A professional liability policy did not provide coverage for an underlying settlement reached between an insured trading card and sports memorabilia producer and the underlying claimant, also a trading card manufacturer, which brought a suit after the insured unlawfully printed counterfeit copies of the claimant's trading cards. The hiring of a third party to create counterfeit trading cards did not constitute professional services which was defined as the design and distribution of sports and entertainment trading cards (among other things).

*Tagged, Inc. v. Scottsdale Ins. Co.*, No. JFM-11-127, 2011 U.S. Dist. LEXIS 75262 (S.D.N.Y. May 27, 2011)

Under California law, the court held that a directors and officers policy issued to a social networking website excluded coverage for a claim alleging that the website's management falsely represented the content protections for children because the allegations involved the professional service of regulating the content of the website.

*Md. Cas. Co. v. Fl. Atl. Orthopedics, P.L.*, 771 F. Supp. 2d 1328 (S.D. Fla. 2011), affirmed, *Md. Cas. Co. v. Fl. Atl. Orthopedics, P.L.*, 2012 U.S. App. LEXIS 3397 (11th Cir. Feb. 22, 2012)

A professional services exclusion in a commercial general liability policy issued to a medical clinic precluded coverage for a premises liability claim based on the allegation that the medical clinic's elevator was too small to permit the transport of patients from the second floor of the medical clinic to an emergency medical center in the event of emergency. The court held that the transportation of patients in case of emergency is part of professional medical services.



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*Chong v. Medmarc Cas. Ins. Co.*, 642 F.3d 941 (11th Cir. 2011)

Under Florida law, an attorney's negligent distribution of money in a trust fund account qualified as a professional service covered under a legal professional liability policy.

*Auto-Owners Ins. Co. v. E.N.D. Services, Inc.*, No. 10-2387, 2011 U.S. Dist. LEXIS 144585 (M.D. Fla. Dec. 15, 2011)

A professional services exclusion in a commercial general liability policy barred indemnity coverage for a judgment in a lawsuit alleging failure to properly inspect and disclose defects to a residential home prior to sale because: (1) the policy's definition of professional services included a reference to inspections; (2) the insured's contract with the buyer stated that it would provide services that would exceed professional standards; (3) the State of Florida regulates home inspectors and requires them to be licensed; (4) home inspections require specialized skill; and (5) professional home inspector organizations that promulgate home inspection standards have long existed.

*Blue Cross of Idaho Health Serv., Inc. v. Atl. Mut. Ins. Co.*, No. 1:09-CV-246-CWD, 2011 U.S. Dist. LEXIS 4892 (D. Idaho Jan. 19, 2011)

Coverage was not excluded by a professional services exclusion to a commercial general liability policy where the policy failed to define professional services, and the activity at issue in the underlying lawsuit, credentialing physicians, was not the insured's main service, which was to provide health care.

*Clermont v. Cont'l Cas. Co.*, 778 F. Supp. 2d 133 (D. Mass. 2011)

An attorney was not entitled to coverage under a professional liability policy for a dispute with his former law firm over an award in a contingency fee case in which he lost \$433,333.33 because an attorney fee-sharing agreement is a business decision, as opposed to a professional service, and because the insuring clause was drafted narrowly.

*Safeco Ins. Co. of Ill. v. Skar*, No. 10-CV-4789, 2011 U.S. Dist. LEXIS 82548 (D. Minn. July 27, 2011)

The professional services exclusion in a homeowner's policy applied to a claim against a real estate agent who, while allegedly trying to sell a home, actually used the home for "illegal, extreme, and outrageous sexual

escapades and unauthorized computer access."

*Behrens v. Arch Ins. Co.*, 631 F.3d 895 (8th Cir. 2011)

Under Nebraska law, there was no coverage under an errors and omissions policy for a registered representative of a broker-dealer who was sued by the SEC and others over allegations that he engaged in a Ponzi-like scheme because the insurance policy excluded coverage for claims based upon the sale of any securities not authorized by the broker-dealer. Accordingly, it was irrelevant whether the sale of promissory notes was a professional service.

*Lisette Valentin-Rivera v. N.J. Prop.-Liab. Ins. Guar. Assoc.*, No. A-1925-09T1, 2011N.J. Super. Unpub. LEXIS 745 (N.J. Super. Ct. App. Div., Mar. 25, 2011), cert. denied, 27 A.3d 949 (N.J. Sept. 9, 2011)

A medical center's professional liability policy was not illusory merely because it excluded coverage for the rendering of or failure to render professional services by a physician, because a nurse or a physician's assistant can perform acts that would be considered a professional service.

*Lowe v. Cuyahoga Cnty. Bd. Of Comm'rs*, No. 1:08-cv-1339, 2011 U.S. Dist. LEXIS 12609 (N.D. Oh. Feb. 9, 2011)

Coverage was not excluded under a policy's professional services exclusion where jail officials were alleged to have failed to ensure that an inmate was provided with refills of prescription drugs, because such a task is considered administrative, and not a professional service.

*Brown v. Oklahoma Farm Bureau Mut. Ins. Co.*, 261 P.3d 622 (Okla. Ct. App. 2011)

The professional services exclusion in a commercial general liability policy applied to a claim against a home inspector for failing to identify defects during an inspection.

*Hartford Cas. Ins. Co. v. Dental Org. For Conscious Sedation, LLC*, No. 10-3483, 2011 U.S. Dist. LEXIS 36052 (E.D. Pa. Apr. 1, 2011)

A professional services exclusion in a business liability policy did not defeat the insurer's duty to defend a products liability action against a manufacturer of sedatives used in dental procedures because the alleged manufacturing of a defective product is not a professional service.

*Hartford Cas. Ins. Co. v. New Hope Healthcare, Inc.*, 803 F.Supp.2d 339 (E.D. Pa. Mar. 16, 2011)

Coverage was excluded by a business liability policy's exclusion for professional services where a personal care home allegedly failed to comply with statutory professional health care standards. Coverage was not excluded, however, where the personal care home allegedly failed to supervise and monitor its residents because the policy's definition of professional services was ambiguous.

*American Western Home Ins. Co. v. Donnelly Distribution, Inc.*, No. 11-1415, 2011 U.S. Dist. LEXIS 85473 (E.D. Pa. Aug. 2, 2011)

The professional services exclusion in a commercial liability policy did not apply to a paper distributor's act of leaving plastic ties on the street because the act was "physical or manual," and not "predominantly mental or intellectual."

*Am. Western Home Ins. Co. v. Donnelly Distribution, Inc.*, No. 11-1415, 2011 U.S. Dist. LEXIS 106039 (E.D. Pa. Sept. 15, 2011)

There was a duty to defend under a homeowner's policy for a lawsuit alleging negligence relating to the insured leaving plastic ties on the curb outside his home. Even though the ties were left there by employees of the insured's paper delivery company, and the policy excluded "professional services," which was defined as "paper distributor," the exclusion only applied to the "predominantly mental or intellectual" aspects of the insured's job as a paper distributor.

*Indian Harbor Ins. Co. v. Satterfield & Pontikes Constr., Inc.*, No. H-10-4681, 2011 U.S. Dist. LEXIS 88557 (S.D. Tex. Aug. 10, 2011)

A claim that a general contractor failed to pay for additional work performed by a subcontractor due to the general contractor's failure to provide adequate plans resulted, in part, from an error or omission in professional services and therefore was covered under a professional liability policy.

*Chi. Ins. Co. v. The Ctr. for Counseling and Health Res.*, No. C10-0705 RSM, 2011 U.S. Dist. LEXIS 35616 (W.D. Wash. Mar. 31, 2011)

The preparation of bills and invoices was not considered to be a professional service for purposes of an errors and omissions policy. Accordingly, a counseling clinic

was not entitled to insurance coverage when the clinic was sued in a class action lawsuit over its billing practices.

*Evanston Ins. Co. v. Clark County*, No. 10-5625, 2011 U.S. Dist. LEXIS 131828 (W.D. Wash. Nov. 14, 2011)

There was a duty to defend a county, which was an additional insured under a commercial general liability policy held by a medical facility that evaluated prison inmates, with regard only to allegations that related to the general policies of the facility and not to any particular patient. There was no duty to defend allegations related to the failure to properly complete medical forms because, although administrative in nature, the activity was part of the performance of medical services for a particular patient.

*Charleston Area Medical Center, Inc. v. National Union Fire Ins.*, No. 2:09-cv-00573, 2011 U.S. Dist. LEXIS 58520 (S.D. W. Va. June 1, 2011)

A medical and professional services exclusion in a directors and officers policy did not apply where a nursing assistant molested patients, because that activity did not qualify as professional services under the exclusion.

## INDEPENDENT COUNSEL

*Travelers Property v. Centex Homes*, No. C 10-02757 CRB, 2011 U.S. Dist. LEXIS 36128 (N.D. Cal. Apr. 1, 2011)

An insurer's reservation of rights under a construction policy based on whether damages occurred outside the policy period does not create a conflict of interest that entitles an insured to the appointment of independent counsel.

*Endurance Amer. Spec. Co. v. Lance-Kashian & Co.*, No. CV F 10-1284 LJO BAM, 2011 U.S. Dist. LEXIS 129330 (E.D. Cal. Nov. 8, 2011), costs and fees proceeding, 2011 U.S. Dist. LEXIS 138236 (E.D. Cal. Dec. 1, 2011)

An insured, under a management, professional, employment practices and fiduciary liability policy, failed to show that it was entitled to independent counsel – or that there was a conflict that would give rise to the



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right to independent counsel – where the insurer had consented to the retention of defense counsel selected by the insured. The insurer also has no obligation, in these circumstances, to advise the insured of its right to independent counsel or to obtain a waiver.

## ADVANCEMENT OF DEFENSE COSTS

*Connolly v. Admiral Ins. Co. (In re Sonic Blue)*, No. C 09-4853 JF, 2011 U.S. Dist. LEXIS 30155 (N.D. Cal. Mar. 4, 2011)

Despite a California law requiring directors and officers insurers to pay legal expenses as they are incurred, the insurer was not entitled to recover defense costs advanced after it had filed a complaint for rescission of its directors and officers liability policy because the policy was no longer operative, as a matter of law, after the insurer gave notice of rescission, and continued payments thus were undertaken voluntarily.

*Liberty Mut. Ins. Co. v. Pella Corp.*, 650 F.3d 1161 (8th Cir. 2011)

Under Iowa law, an insurer had no duty to reimburse defense costs under a general commercial liability policy where the underlying suits did not allege an “occurrence.” In reaching its decision, the court concluded that, like the duty to defend, the duty to reimburse is determined by looking at the allegations in the complaint to determine if they state a covered claim.

## ALLOCATION

*Endurance Am. Specialty Co. v. Lance-Kashian & Co.*, No. CV F 10-1284 LJO BAM, 2011 U.S. Dist. LEXIS 129330 (E.D. Cal. Nov. 8, 2011)

A duty to defend management liability policy’s allocation provision, and not the “reasonably related” test, governed the allocation of defense costs between insureds and non-insureds. The allocation provision required an allocation between insured and uninsured loss, but provided that the insurer shall not seek to allocate claim expenses and shall pay 100% of claim expenses where a covered matter remains within the claim. The court held that while the allocation provision required the insurer to pay 100% of the insured’s claim expenses, but that it did not obligate the insurer to pay defense costs of non-insureds and that an allocation

was mandated under the circumstances.

*Deutsche Bank Trust Co. Americas v. Royal Surplus Lines Ins. Co.*, No. 06C-09-261 JAP, 2011 Del. Super. LEXIS 89 (Del. Super. Ct. Feb. 25, 2011)

Under New York law, the excess “other insurance” clauses in the various general liability policies effectively canceled each other out and, therefore, the primary insurers were required to share equally in defense costs during the time period in which they were on the risk.

*AIG Premier Ins. Co. v. RLI Ins. Co.*, 812 F.Supp.2d 1315 (M.D. Fla. Sept. 14, 2011)

Under both Florida and New York law, the excess “other insurance” clauses in two umbrella liability policies were mutually repugnant and the insurers, therefore, were required to contribute their pro rata share of the underlying settlement determined by the policy limits in relation to the loss.

*Fed. Ins. Co. v. Firemen’s Ins. Co. of Wash., DC*, No. 08:09-CV-2361-AW, 2011 U.S. Dist. LEXIS 74386 (D. Md. July 11, 2011), reconsideration denied, 2011 U.S. Dist. LEXIS 129798 (D. Md. Nov. 9, 2011)

A general liability insurer was required to defend both an insured and a non-insured entity, because the “reasonably related” test was found to extend beyond covered and uncovered claims to apply to the allocation of defense expenses among covered and uncovered parties, and the claims against the covered and uncovered parties were found to be reasonably related.

*Fieldston Prop. Owners Ass’n, Inc. v. Hermitage Ins. Co., Inc.*, 945 N.E.2d 1013 (N.Y. Feb. 24, 2011)

Where both a directors and officers liability policy and a general liability policy provided coverage for certain claims in the underlying actions, the excess “other insurance” clause in the directors and officers liability policy required that the duty to defend general liability policy, which had an “other insurance” clause stating that such insurance was primary except in certain circumstances, was required to provide coverage for defense costs in the underlying actions.

*Weinstein & Riley, P.S. v. Westport Ins. Corp.*, No. C08-1694JLR, 2011 U.S. Dist. LEXIS 26369 (W.D. Wash. Mar. 14, 2011)

A professional liability insurer was not entitled to allocate defense costs in a lawsuit under a duty to defend



policy because the court found that fees incurred in the defense of the uncovered claims were “reasonably related” to the defense of the potentially covered claim. Certain defense costs incurred in a second lawsuit also were found to be “reasonably related” to the defense of the potentially covered claim in the first lawsuit even though the second lawsuit did not contain any potentially covered claims.

## RECOUPMENT OF DEFENSE COSTS AND SETTLEMENT PAYMENTS

*Phillips & Associates, P.C. v. Navigators Ins. Co.*, 764 F. Supp. 2d 1174 (D. Ariz. 2011)

Under Arizona and California law, a professional liability insurer may unilaterally reserve the right to recoup amounts paid in defending and settling an underlying action if it later prevails in a coverage dispute with the insured.

*American Modern Home Insurance Co. v. Fahmian*, 194 Cal. App. 4th 162 (2011), review denied, 2011 Cal. LEXIS 6760 (Cal. June 29, 2011)

In the context of a personal injury claim submitted under a homeowners’ insurance policy, the court held that an insurance company may obtain reimbursement from its insured for a policy limits settlement when it is determined the underlying claim was not covered by the policy so long as the insurance company (1) made a timely and express reservation of rights, (2) provided express notification to the insured of the insurer’s intent to accept the proposed settlement offer, and (3) made an express offer that the insured could assume its own defense.

*Nationwide Mut. Ins. Co. v. Mortensen*, No. 3:00-CV-1180, 2011 U.S. Dist. LEXIS 77356 (D. Conn. July 18, 2011)

The court refused to allow a commercial liability insurer to recoup its defense costs because there had been a potential that the claims at issue were covered when the insurer undertook the defense pursuant to a reservation of rights letter.

*Scottsdale Ins. Co. v. R.I. Pools Inc.*, No. 3:09-CV-01319, 2011 U.S. Dist. LEXIS 90380 (D. Conn. Aug. 15, 2011)

A commercial general liability insurer was permitted to recoup its defense costs relating to certain claims that the court had decided, in an earlier declaratory judgment

action, the insurer had no duty to defend. Expenses associated with settlements and claims investigations were excluded from such reimbursement.

*Welch Foods Inc. v. Nat’l Union Fire Ins. Co.*, No. 09-12087, 2011 U.S. Dist. LEXIS 17134 (D. Mass. Feb. 9, 2011), affirmed, 659 F.3d 191 (1st Cir. 2011)

Under Massachusetts law, where a media perils and professional errors and omissions liability insurance policy at issue was silent on the question of reimbursement, the court concluded that the insurer was not entitled to reimbursement because it bore the responsibility of making the determination to defend, as well as the concomitant risk of that determination if its decision to advance fees was incorrect.

*Electric Ins. Co. v. Marcantonis ex rel. Marcantonis*, No. 09-5076, 2011 U.S. Dist. LEXIS 24817 (D. N.J. Mar. 11, 2011)

After holding that a homeowners’ insurer did not have a duty to defend, the Court allowed the insurer to recoup the costs of the defense where the insurer “declined to exercise the ‘contractual right of control’ it would have had if it had conceded coverage.”

*Fieldston Property Owners Assn., Inc. v. Hermitage Ins. Co.*, 945 N.E.2d 1013 (N.Y. 2011)

A commercial general liability carrier was not entitled to reimbursement of defense costs from a directors and officers liability insurer that afforded concurrent coverage for the loss. Although most of the claims were not covered by the commercial general liability policy and were covered by a directors and officers liability policy, the court concluded that the existence of one covered claim required the commercial general liability insurer to defend the actions in their entirety with no right of recoupment from the directors’ and officers’ liability insurer for uncovered claims.

*U.S. Specialty Insurance Company v. Liberty Partners, L.P., et al.*, No. 11-3736, 2011 U.S. Dist. LEXIS 128948 (S.D.N.Y. Nov. 8, 2011)

The court suggested that the private equity professional and management liability insurer might be granted additional relief in the form of restitution so long as it results in “the most expeditious and just conclusion of the controversy.”



**TROUTMAN  
SANDERS**

*National Surety Corp. v. Immunex*, 256 P.3d 439 (Wash. Ct. App. 2011), *reconsideration denied*, 2011 Wash. App. Lexis 1695 (Aug. 24, 2011), *review granted* 2012 Wash. LEXIS 33 (Jan. 4, 2012)

Because the umbrella and excess liability policy did not permit the insurer to recoup costs paid under an offer to defend its insured with a reservation of rights, the trial court did not err in ordering the insurer to reimburse the insured for defense costs until the date that the trial court resolved the disputed coverage.

## CONSENT

*Freedman v. United National Ins. Co.*, No. CV 09-5959-AHM, 2011 U.S. Dist. LEXIS 25490 (C.D. Cal. Mar. 1, 2011)

Under California law, a professional liability insurance policy's "hammer clause" can be invoked only if the insured unreasonably refused to consent to a settlement.

*MBIA, Inc. v. Fed. Ins. Co.*, 652 F.3d 152 (2d Cir. 2011)

Under Connecticut law, an insured did not breach the consent clauses in two directors and officers liability insurance policies where it notified the insurers about the proposed settlement in more than sufficient time for the insurers to determine whether or not to grant consent to settle.

*Rolyn Companies, Inc. v. R&J Sales of Texas, Inc.*, 412 Fed. App'x 252 (11th Cir. Feb. 2, 2011)

Under Florida law, a voluntary-payment provision in a commercial general liability policy required the insured to obtain the insurer's consent before incurring costs relating to repairing damages to a residential building that were caused by a subcontractor.

*State Farm Fire & Cas. Co. v. King Sports, Inc.*, No. 1:10-cv-131-TCB, 2011 U.S. Dist. LEXIS 140441 (N.D. Ga. Dec. 7, 2011)

An insurer's obligations under a business liability policy were discharged where the insured failed to notify the insurer or seek the insurer's approval before reaching a settlement.

*Pekin Ins. Co. v. Xdata Solutions, Inc.*, 958 N.E.2d 397 (Ill. App. 2011)

Where an insurer denied coverage and the insured settled the underlying lawsuit, the insured was not

required to obtain the insurer's consent before settlement and did not breach the voluntary payment provision in the policy.

*Travelers Ins. Co. v. Maplehurst Farms, Inc.*, 953 N.E.2d 1153 (Ind. Ct. App. Aug. 24, 2011), *rehearing denied*, No. 49A04-1006-PL-394, 2011 Ind. App. LEXIS 1831 (Ind. Ct. App. Oct. 21, 2011)

An insured could not recover costs and expenses incurred prior to giving its insurer notice of the underlying environmental claim. Pre-notice, pre-tender defense costs were disallowed.

*Federal Ins. co. v. SafeNet, Inc.*, 817 F.Supp.2d 290 (S.D.N.Y. Sept. 9, 2011)

Failure to comply with consent-to-settle provisions in two excess directors and officers liability claims made insurance policies prevented an insured from recovering losses stemming from a \$25 million class action settlement.

*Putman v. Alea London Ltd.*, No. 2:09-CS-1740-MBS, 2011 U.S. Dist. LEXIS 12223 (D.S.C. Feb. 4, 2011)

A settlement agreement entered into by an insured was unenforceable against the insurer where the insured failed to comply with the consent-to-settlement provision in the commercial general liability policy that required the insured to first receive consent from the insurer before making any payments or incurring any expenses.

*Allen Butler Constr., Inc. v. American Economy Ins. Co.*, No. 07-10-0490-CV 2011 Tex. App. LEXIS 9768 (Tex. App. Amarillo Dec. 13, 2011)

Under Texas law, prejudice is required to establish an insurer's defense of settlement without consent. The court found that prejudice was established where the insureds unilaterally settled the underlying claim, even before the lawsuit was filed, without consulting the insurer. Because the insureds already had admitted liability, the insurer had no opportunity to lessen its financial exposure, and thus had been prejudiced.

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