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D&O and Professional Liability

2013 | A Year In Review

2013 was an active year for courts considering issues affecting directors and officers and professional liability insurers. Twenty-six federal courts of appeal, seven state supreme courts and dozens of other courts issued notable decisions this year. There were a large number of decisions with varying fact patterns in cases involving notice issues, particularly timeliness, as well as prior notice/prior knowledge, including rescission. This year also saw significant litigation regarding whether claims were related, 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 2014 and beyond.

In This Issue

Notice

Sharp Realty & Mgmt., LLC v. Capitol Specialty Ins. Corp., 503 Fed. App'x 704 (11th Cir. 2013)

Under Alabama law, an insured forfeited coverage by failing to comply with the notice provisions of a claims-made errors and omissions policy. The insured's unexplained eight-month delay in providing notice of the underlying lawsuit was unreasonable as a matter of law and the insurer was not required to demonstrate prejudice. Even though the term "condition precedent" was not used in the notice provision, timely notice was a condition precedent because the policy provided that "[n]o action may be brought against the Company unless the Insured has fully complied with all terms and conditions of this Policy."

D & D Parks Constr., Inc. v. Century Sur. Co., No. 3:12-CV-03167, 2013 U.S. Dist. LEXIS 81141 (W.D. Ark. June 10, 2013)

An insurer was not obligated to provide coverage for a claim under a claims-made commercial general liability policy because the insured did not provide the insurer with notice

of the claim until after judgment was entered in the underlying lawsuit. The insurer was not required to show prejudice for the late notice because the insured's compliance with the notice provision was a condition precedent to coverage.

PCCP LLC v. Endurance Am. Specialty Ins. Co., No. 12-CV-0447 YGR, 2013 U.S. Dist. LEXIS 114400 (N.D. Cal. Aug. 13, 2013)

An insurer properly denied coverage under a claims-made-and-reported professional and executive liability policy where the insured failed to provide notice within the relevant policy period. The insurer was not required to show that it was prejudiced from the late notice because the notice-prejudice rule does not apply to claims-made-and-reported policies under California law.

Ace Capital Ltd. v. ePlanning, Inc., No. 2:12-CV-01511 JAM-AC, 2013 U.S. Dist. LEXIS 32613 (E.D. Cal. Mar. 7, 2013)

Claims based on lawsuits filed after the expiration of a claims-made-and-reported errors and omissions policy did not trigger coverage under the policy because they could not have been timely reported. Even if the insured had purchased a twelve-month extended report period for the policy, the earliest underlying lawsuit would still fall at least two months outside the claims-made period.

Stresscon Corp. v. Travelers Prop. Cas. Co. of Am., Nos. 11CA1239 and 11CA1582, 2013 Colo. App. LEXIS 1451 (Ct. App. Sept. 12, 2013)

An insured's failure to notify its insurer before entering into a pre-suit settlement was not a bar to coverage under a claims-made-and-reported commercial general liability policy where the insured successfully rebutted the presumption that the insurer was prejudiced by the lack of notice.

Lake Buena Vista Vacation Resort v. Gotham Ins. Co., No. 6:12-CV-1680-Orl-31DAB, 2013 U.S. Dist. LEXIS 144729 (M.D. Fla. Oct. 7, 2013)

An insured was not entitled to coverage under a claims-made-and-reported title agent's professional liability policy where the insured provided the insurer with notice only of possible claims against it in the future during the policy period, rather than notice of actual claims made within the policy period as required by the policy's reporting requirements.

Northland Ins. Co. v. Bob Trucking II, Inc., No. 12-CV-10201, 2013 U.S. Dist. LEXIS 122217 (N.D. Ill. Aug. 27, 2013)

An insured forfeits coverage when it fails to provide its insurer with notice within a reasonable amount of time. The insured was issued a commercial automobile liability policy, which required the insured to provide the insurer with prompt notice of an "accident" or "loss." The insured's delayed notice of nearly two years was unreasonable and resulted in the forfeiture of coverage.

Koransky, Bouwer & Poracky, P.C. v. Bar Plan Mut. Ins. Co., 712 F.3d 336 (7th Cir. 2013)

Under Indiana law, an insurer properly denied coverage under a claims-made-and-reported professional liability policy based on the insured's failure to comply with the policy's discovery clause requiring the insured to report any specific incident, act or omission which may give rise to a claim. The insurer was not required to demonstrate prejudice in order to enforce the reporting requirement.

First Am. Title Ins. Co. v. Cont'l Cas. Co., 709 F.3d 1170 (5th Cir. 2013)

Under Louisiana law, a claimant suing under Louisiana's Direct Action Statute could not recover from an insurer when neither the claimant nor the insured complied with the reporting requirement in the claims-made-and-reported lawyer's professional liability policy.

St. Paul Surplus Lines Ins. Co. v. Settoon Towing, LLC (In re Settoon Towing, LLC), 720 F.3d 268 (5th Cir. 2013)

Under Louisiana law, an insurer was not required to show prejudice in order to deny coverage for liability arising out of an oil spill which the insured did not report within 30 days, as required by a pollution buy-back clause of an umbrella policy. The policy contained a pollution exclusion and a negotiated pollution buy-back provision, which allowed coverage arising from the release of pollutants under certain circumstances if the release was reported to the insurers within 30 days after the insured learned of such release. Because the insured did not give notice of the oil spill to the insurer until 37 days after the insured learned of the oil spill, coverage was barred by the pollution exclusion.

Fin. Indus. Regulatory Auth. v. Axis Ins. Co., No. PWG-12-1053, 2013 U.S. Dist. LEXIS 82343 (D. Md. June 12, 2013)

An insurer was not required to demonstrate prejudice to support a late notice defense under a claims-made-and-reported policy. The court found that although Section 19-110 of the Maryland Insurance Code requires an insurer to show prejudice in order to disclaim coverage based on late notice under a true claims-made policy, it does not require an insurer to show prejudice to disclaim coverage based on late notice under a claims-made-and-reported policy.

McDowell Bldg., LLC v. Zurich Am. Ins. Co., No. RDB-12-2876, 2013 U.S. Dist. LEXIS 132854 (D. Md. Sept. 17, 2013)

A professional liability insurer was required to demonstrate prejudice in order to deny coverage under a claims-made-and-reported policy where the claim was made during the policy period and the insured reported the claim several years after the 60-day notice period. The court found that the prejudice requirement under Section 19-110 of the Maryland Insurance Code applied because the relevant policy language suggested that the triggering event was the assertion of the claim against the insured and not the reporting of the claim to the insurer.

Minn. Lawyers Mut. Ins. Co. v. Baylor & Jackson, PLLC, 531 Fed. App'x 312 (4th Cir. 2013)

Under Maryland law, an insurer was not obligated to provide coverage under a claims-made-and-reported legal malpractice policy because the insureds did not timely report the possibility of a claim to the insurer. The insureds notified the insurer of the possibility of the underlying malpractice claim in 2009, but a reasonable lawyer would have considered the possibility of a malpractice claim in 2006 after the state trial court refused to credit an unexecuted affidavit pursuant to state procedural rules and granted summary judgment to the adversary of the insureds' clients. The Fourth Circuit also ruled that the insurer demonstrated actual prejudice such that, if Section 19-110 of the Maryland Insurance Code applied, the insurer's disclaimer of coverage comported with Maryland law.

Park W. Galleries, Inc. v. Ill. Nat'l Ins. Co., No. 11-15047, 2013 U.S. Dist. LEXIS 164898 (E.D. Mich. Nov. 20, 2013)

An insured was not entitled to coverage under a claims-made-and-reported miscellaneous professional liability policy where the insured provided notice to the insurer of claims "related to" claims filed and reported prior to the policy period's inception date.

Lemons v. Mikocem, LLC, No. 12-11474, 2013 U.S. Dist. LEXIS 133976 (E.D. Mich. Sept. 19, 2013)

An insured's notice of circumstances potentially giving rise to employment claims, provided to the insurer within the policy period, was insufficient to preserve coverage under a claims-made policy requiring notice of circumstances for those claims other than employment-related claims.

Fifth Third Mortg. Co. v. Lamey, No. 12-2923 (JNE/TNL), 2013 U.S. Dist. LEXIS 67449 (D. Minn. May 13, 2013)

Under Minnesota law, an insured's late notice defeats coverage only if there is prejudice to the insurer or where notice is actually a condition precedent to coverage (*i.e.*, a claims-made policy).

Secure Energy, Inc. v. Phila. Indem. Ins. Co., No. 4:11CV1636 TIA, 2013 U.S. Dist. LEXIS 69320 (E.D. Mo. May 16, 2013)

An insurer was not required to demonstrate that it was prejudiced by an insured's failure to provide timely notice under a claims-made policy. Under Missouri law, an insurer is required to show prejudice to support a late notice defense under an occurrence-based policy, but an insurer is not required to show prejudice to support a late notice defense under a claims-made policy.

Clauson & Atwood v. Professionals Direct Ins. Co., 2013 DNH 75 (D.N.H. 2013)

An insurer was not required to provide coverage for an underlying malpractice claim that was reported during the policy period, but was made before the inception of the relevant claims-made-and-reported professional liability policy. The policy provided coverage only for claims that are both "made" and "reported" during the policy period.

Liberty Ins. Underwriters, Inc. v. Perkins Eastman Architects, P.C., 101 A.D.3d 650 (N.Y. App. Div. 2012)

An insured architectural firm provided adequate notice of a potential claim to its errors and omissions insurer under a claims-made professional liability policy because the notice was not limited to architectural

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errors and was sufficiently related to the subsequent lawsuit arising out of the firm's work as the contract administrator for the underlying project.

Sirius XM Radio Inc. v. XL Specialty Ins. Co., 650831/2013, 2013 N.Y. Misc. LEXIS 5201 (Sup. Ct. Nov. 7, 2013)

The court held that an insured provided sufficient notice to its insurer under a claims-made management liability and company reimbursement policy where the insured previously notified the insurer of earlier claims arising from the same "interrelated wrongful acts" as defined by the policy.

Indian Harbor Ins. Co. v. City of San Diego, No. 12 Civ. 5787 (JGK), 2013 U.S. Dist. LEXIS 137873 (S.D.N.Y. Sept. 25, 2013)

The insurer was not obligated to indemnify its insured under a claims-made-and-reported pollution and remediation legal liability policy where the insured notified its insurer of the pollution liability claims two months after they were filed, which was not "as soon as practicable" as defined under the policy.

Steinfelder v. Catlin Specialty Ins. Co., No. 12-CV-2970-JKB, 2013 U.S. Dist. LEXIS 69231 (D. Md. May 15, 2013)

Under New York law, notice of a claim that was sent from an insured independent contractor to the broker-dealer for whom he worked, which the broker-dealer then forwarded to the insurer, satisfied the notice provision of a claims-made-and-reported errors and omissions policy. Although the insured did not provide direct notice of the claim to the insurer, actual notice through an intermediary was found sufficient to satisfy the notice requirement of the errors and omissions policy.

Anderson v. Cincinnati Ins. Co., No. 1:12-156-HMH, 2013 U.S. Dist. LEXIS 15366 (W.D.N.C. Feb. 5, 2013)

A one-year supplemental extended reporting period was found not to begin until after the expiration of the claims-made policy's automatic 60-day extended reporting period due to inconsistencies between the policy form and extended reporting endorsement.

Pelagatti v. Minn. Lawyers Mut. Ins. Co., No. 11-7336, 2013 U.S. Dist. LEXIS 90041 (E.D. Pa. June 25, 2013)

An insurer properly denied coverage under a legal malpractice insurance policy because the insured failed to provide the insurer with notice of a potential malpractice claim in a renewal application. The evidence showed that the insured was objectively aware of the circumstances surrounding the potential claim and that a reasonable attorney with the insured's knowledge would have reported the potential claim when reapplying for insurance. The insurer was not required to show that it was prejudiced by the late notice of the potential claim because the notice-prejudice rule does not apply to claims-made policies under Pennsylvania law.

GS2 Eng'g & Envtl. Consultants, Inc. v. Zurich Am. Ins. Co., No. 3:12-CV-02934-CMC, 2013 U.S. Dist. LEXIS 95137 (D.S.C. July 9, 2013)

No coverage was available for a claim that was first made during the policy period of a claims-made-and-reported policy but was not reported until approximately 47 days into the next successive policy period. The policy was unambiguous that the automatic extended reporting period did not apply because the policy at issue was renewed, not terminated. The district court also held that, even if the automatic extended reporting period did apply, notice was untimely since the claim was first reported more than 30 days after the close of the relevant policy period.

Starr Indem. & Liab. Co. v. SGS Petroleum Serv. Corp., 719 F.3d 700 (5th Cir. 2013)

Under Texas law, an insurer was not required to show prejudice in order to deny coverage for liability arising out of a toxic spill which the insured did not report within 30 days, as required by a pollution buy-back clause of an umbrella policy. The policy contained a pollution exclusion and a negotiated pollution buy-back provision, which allowed coverage arising from the release of pollutants under certain circumstances if the release was reported to the insurers within 30 days after the insured learned of such release. Because the insured did not give notice of the toxic spill to the insurer until 59 days after the insured learned of the spill, coverage was barred by the pollution exclusion.

Burris v. Versa Prods. Inc., No. 07-3938 (JRT/JJK), 2013 U.S. Dist. LEXIS 120849 (D. Minn. Aug. 26, 2013)

Under Wisconsin law, an insured's failure to provide its insurer with timely notice of a claim more than four years after that claim was made did not bar coverage under a claims-made policy because the insured rebutted the presumption that the insurer was prejudiced by the untimely notice. The insured was able to rebut the presumption of prejudice by demonstrating that the insurer

may have had, and may still have, a full opportunity to participate in discovery and settlement negotiations.

Related Claims

Sharp Realty & Mgmt., LLC v. Capitol Specialty Ins. Corp., 503 F. App'x 704 (11th Cir. 2013)

Under Alabama law, coverage was barred because related erroneous acts constituted a single erroneous act under an errors and omissions policy, and, thus, all claims arising out of the erroneous act were made on the date the first claim was made against the insured. The insured was served with claims based on the results of an audit conducted by a forensic accountant prior to the inception of the policy and received written notice of claims based on a second audit during the policy period. All of the claims in the underlying action were based on related erroneous acts, because the same claimant sued the same defendant for the same type of wrongdoing at the same location over an overlapping period of time and both audits examined whether the insured collected rent and fees from the same tenants in accordance with the same leases.

Flowers v. CAMICO Mut. Ins. Co., No. A134890, 2013 Cal. App. Unpub. LEXIS 4091 (Cal. Ct. App. June 12, 2013)

A single per-claim limit of liability in a professional liability policy applied because the alleged acts, errors, and omissions giving rise to the underlying lawsuit were "related" within the meaning of the policy's provisions regarding "claims." Despite the insured accounting firm's various engagements for the plaintiffs, the allegations against the firm remained the same and resulted in the same injury to the plaintiffs. "Claim" incorporated malpractice that was logically and causally connected, and thus several instances of misconduct serving the same client and based on a retained services agreement were one claim under the policy even if arising from advice covering various features of the professional relationship.

Lexington Ins. Co. v. Lexington Healthcare Grp., Inc., 68 A.3d 1121 (Conn. 2013)

The court held that the acts, errors or omissions underlying the victims' personal representatives' claims against the insured were not "related medical incidents" under a professional liability policy because the phrase "related medical incidents" did not clearly and unambiguously encompass incidents in which multiple losses were suffered by multiple people, when each loss has 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. Thus, a single policy limit applied to each claim individually rather than to all of the claims collectively.

Zodiac Grp., Inc. v. Axis Surplus Ins. Co., No. 13-10941, 2013 U.S. App. LEXIS 21370 (11th Cir. Oct. 22, 2013)

Under Florida law, coverage under a professional liability policy for attorney's fees and expenses the insureds incurred defending against a federal lawsuit filed during the policy period was barred because the wrongful acts alleged in a state complaint filed before the policy period and those alleged in the federal complaint constituted one wrongful act. They were all "clearly related by common facts, circumstances, transactions, events and/or decisions" because they all related to the insured's alleged efforts to falsely imply that the claimant endorsed or was associated with its psychic services after the termination of their endorsement agreement, despite the fact that the state complaint was brought against the named insured and the federal complaint was brought against the named insured and the individual insureds.

MF Nut Co. v. Cont'l Cas. Co., No. 11-00004 LEK-BMK, 2013 U.S. Dist. LEXIS 5894 (D. Haw. Jan. 15, 2013)

The court held that the broad definition of "interrelated wrongful acts" in an employment practices liability policy was not ambiguous. The insurer did not have a duty to defend because all of the EEOC charges filed by employees against the insured, which were filed both before the policy's inception and during the policy period, and the acts underlying the complaint brought by the EEOC, arose from "interrelated wrongful acts" and constituted a single claim first made prior to the policy's inception.

Biochemics, Inc. v. Axis Reinsurance Co., No. 13-10691-RWZ, 2013 U.S. Dist. LEXIS 111218 (D. Mass. Aug. 7, 2013)

The insureds' motion for partial summary judgment and motion to stay discovery under a directors and officers liability policy were denied because the question of whether SEC subpoenas issued before the policy period sought information about wrongful acts that shared a "common nexus" with later misrepresentations alleged

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by the SEC in an enforcement action could not be resolved until the parties engaged in sufficient discovery. The insurer was permitted to rely on extrinsic evidence to deny a duty to defend based on facts irrelevant to the merits of the underlying litigation, such as whether the underlying wrongful acts were related to prior wrongful acts.

Park W. Galleries, Inc. v. Ill. Nat'l Ins. Co., No. 11-15047, 2013 U.S. Dist. LEXIS 164898 (E.D. Mich. Nov. 20, 2013)

Coverage was not available under a professional liability policy for a consolidated multi-district class action lawsuit because some of the claims asserted were first made before the policy period and the remaining claims related back to those uncovered claims. The court held that the related claims exclusion barred coverage for several of the consolidated lawsuits that were filed during the policy period because those lawsuits involved "similar issues of fact and law" as the consolidated lawsuits that were filed before the inception of the policy. The court also held that another consolidated case that was filed during the policy period was a claim first made before the inception of the policy because the plaintiffs in the lawsuit sent pre-inception correspondence that constituted a "claim" as defined by the policy.

Kilcher v. Cont'l Cas. Co., No. 12-1825 ADM/JJK, 2013 U.S. Dist. LEXIS 46658 (D. Minn. Apr. 1, 2013)

The court held that because most or all of the plaintiffs' claims did not share causal or logical connections, the plaintiffs stated more than one insurance claim under an errors and omissions policy. Although the plaintiffs' claims had similarities, they existed "in parallel and not in connection to each other" because each plaintiff formed a separate relationship with the insured, resulting in separate injuries.

Bar Plan Mut. Ins. Co. v. Chesterfield Mgmt. Assocs., 407 S.W.3d 621 (Mo. Ct. App. 2013), transfer denied, No. SC93426, 2013 Mo. LEXIS 271 (Mo. Oct. 1, 2013)

A later count added to a legal malpractice action via an amended petition was related to the counts alleged in the initial suit, and, therefore, coverage under the subsequent year of the professional liability policy was not available. The court noted that the multiple insureds, claims, and claimants provisions in the 2008 and 2009 policies were clear and unambiguous. Although the acts or omissions underpinning a claim for breach of fiduciary duty first made during the 2009 policy period were different from the acts or omissions supporting the counts for breach of contract and negligence made during the 2008 policy period, the acts or omissions were related because they were all part of the insureds' representation in a real estate transaction.

Regal-Pinnacle Integrations Indus., Inc. v. Phila. Indem. Ins. Co., No. Civ. A. 12-5465 (NLH/JS), 2013 U.S. Dist. LEXIS 56941 (D.N.J. Apr. 22, 2013)

Coverage was barred under a commercial lines policy's express language pertaining to interrelated wrongful acts and prior and pending litigation. Given the substantial overlap of factual allegations and causes of action in the two underlying suits, a subsequent civil action alleging wrongful and discriminatory conduct related to employment and termination by the insured's food service equipment and supply manufacturer was based upon and interrelated with an earlier administrative action regarding gender discrimination and wrongful termination that took place prior to the start of the policy period.

Szaferman, Lakind, Blumstein & Blader PC v. Westport Ins. Corp., 518 F. App'x 107 (3d Cir. 2013)

Under New Jersey law, the court held that there was no basis to preclude enforcement of the interrelated wrongful acts provision because any subjective misunderstanding that may have occurred regarding the unambiguous language could not rise to the level of showing that reasonable expectations were frustrated. Also, despite the bare allegations contained in a 2007 counterclaim, it was evident that a 2009 complaint and the counterclaim referred to the "same nucleus of events."

Am. Guarantee & Liab. Ins. Co. v. Chi. Ins. Co., 963 N.Y.S.2d 642 (N.Y. App. Div. 2013)

The legal malpractice claims in lawsuits filed under one insurer's professional liability policy period were not the same or related to the claims in lawsuits filed during another insurer's professional liability policy period because there were substantial differences between the victims, including the amounts of their claims and the fact that the financial services professional who allegedly committed the fraud was not the same in each circumstance. Thus, the former insurer was not required to reimburse the latter insurer for payments made on their mutual insured's behalf.

Dormitory Auth. v. Cont'l Cas. Co., No. 12 Civ. 281(KBF), 2013 U.S. Dist. LEXIS 31999 (S.D.N.Y. Mar. 5, 2013)

The insured's design error resulting in an issue with a building's ice control, which was not raised in a demand

for damages brought during the professional liability policy period, did not arise from and was not related to the same wrongful act or omission as the design error relating to an exterior wall's steel girt tolerances, which was alleged in the demand. Being part of an overall exterior wall structure was not sufficient to render one design error resulting in one completely different set of problems, designed by different teams, stemming from different causes, and resolved independently, as related to another design error.

Sirius XM Radio Inc. v. XL Specialty Ins. Co., No. 650831/2013, 2013 N.Y. Misc. LEXIS 5201 (Sup. Ct. Nov. 7, 2013)

A management liability and company reimbursement insurer's motion to dismiss based on lack of timely notice of the underlying claims was denied. The complaints in the five underlying actions alleged wrongdoing by the directors and officers of the insured in connection with approval of a merger and alleged mismanagement after approval. The court noted that the insured provided timely notice of the first two claims, and the other three claims were interrelated with the first claim. The court disagreed with the insurer's argument that the interrelated claims provision of the policy determined when a claim was deemed made against an insured and had no bearing on the policy's separate notice requirement.

Brecek & Young Advisors, Inc. v. Lloyds of London Syndicate 2003, 715 F.3d 1231 (10th Cir. 2013)

Under New York law, the court held that claims asserted in an arbitration initiated during the policy period of a professional liability policy arose from wrongful acts interrelated to the wrongful acts committed outside the policy period as asserted in two prior arbitrations. All three arbitrations shared a "sufficient factual nexus" for many reasons, including virtually identical respondents, approximately the same period for all of the alleged misconduct, the same allegation that the respondents allegedly sold unsuitable investment products, and the same theories of liability.

Gastar Exploration Ltd. v. U.S. Specialty Ins. Co., 412 S.W.3d 577 (Tex. App. 2013)

The court held that an exclusion regarding prior or pending litigation restored coverage that would have otherwise been barred by a policy condition regarding interrelationship of claims, which operated as an exclusion, in directors and officers liability policies. The two provisions conflicted with each other, or at best created an ambiguity when read together, and, thus, the court adopted the interpretation that most favored coverage for the insured.

Carolina Cas. Ins. Co. v. Omeros Corp., No. C12-287RAJ, 2013 U.S. Dist. LEXIS 38811 (W.D. Wash. Mar. 11, 2013)

The court held that a *qui tam* claim made and reported after the expiration of the policy period applicable to the directors and officers liability coverage of a management liability insurance policy and an anti-retaliation claim made during the policy period applicable to the employment practices liability coverage of the policy were based on related wrongful acts because the insured's alleged false reporting was a common event that logically connected the claims. However, the court held that the single-claim clause did not govern when applying policy exclusions unrelated to the claims-made nature of the policy.

Prior Knowledge, Known Loss, And Rescission

Known Litig. Holdings, LLC v. Navigators Ins. Co., 934 F. Supp. 2d 409 (D. Conn. 2013)

An action to recover insurance proceeds could proceed despite an insurers' motion to dismiss based on the known loss doctrine (among other grounds) because it was uncertain from the record who knew what about an underlying scheme to defraud and when they knew it.

Zurich Am. Ins. Co. v. Diamond Title of Sarasota, No. 8:10-CV-383-T-30AEP, 2013 U.S. Dist. LEXIS 170981 (M.D. Fla. Dec. 4, 2013)

An insurer was entitled to rescind a title agent's errors and omissions policy because of the insured's failure to disclose in the policy application her involvement in an ongoing criminal conspiracy.

Darwin Nat'l Assuruance Co. v. Brinson & Brinson, No. 6:11-CV-1388-Orl-36DAB, 2013 U.S. Dist. LEXIS 77635 (M.D. Fla. June 3, 2013)

An insurer was entitled to summary judgment on the issue of rescission of a lawyers' professional liability insurance policy because the insured had failed to disclose known bar complaints and denied known

circumstances that could result in a claim against the law firm or its attorneys. The insurer was not estopped by initially appointing defense counsel under a reservation of rights where the insured was not prejudiced by initially receiving a defense to which it was not entitled.

AXIS Ins. Co. v. Farah & Farah, P.A., 503 Fed. App'x 947 (11th Cir. 2013)

Under Florida law, a prior knowledge exclusion in a law firm's insurance policy precluded coverage for an underlying malpractice action brought against the law firm because an attorney that was previously affiliated with the law firm knew of a probable malpractice claim. The prior knowledge exclusion was not limited to the knowledge of attorneys that were part of the firm at the time that the application was prepared.

Ill. State Bar Ass'n. Mut. Ins. Co. v. Law Office of Tuzzolino & Terpinas, No. 1-12-2660, 2013 Ill. App. LEXIS 816 (Ill. App. Ct. Nov. 22, 2013)

In reversing the trial court's grant of summary judgment, the appellate court held that an insurer could rescind coverage under a lawyers' malpractice policy for an insured who made material misrepresentations on the policy application. The appellate court, however, also held that under both the policy's severability provision and under the auspices of the "individual insured" doctrine, that the insurer could not rescind coverage for other insureds who had not made misrepresentations.

Essex Ins. Co. v. Galilee Med. Ctr. SC, No. 11-CV-6934, 2013 U.S. Dist. LEXIS 152591 (N.D. Ill. Oct. 23, 2013)

An insurer was allowed to rescind its professional liability policy where the insured medical center made material misrepresentations on its policy application regarding its practice of providing weight loss injections to patients.

Empire Indem. Ins. Co. v. Chi. Province of the Soc'y of Jesus, 990 N.E.2d 845 (Ill. App. Ct. 2013)

Several insurers had no duty to defend or indemnify an insured for claims alleging that the insured reasonably should have anticipated that a teacher had sexually abused students at a high school operated by the insured, because these allegations were sufficient in triggering an exclusion that barred coverage for expected or intended injuries by the insured. A provision in one policy that barred coverage for injuries resulting from sexual abuse known to a supervisor also was applicable because the complaints alleged that previous reports of abuse had been made to the principal and others.

Koransky, Bouwer & Poracky, P.C. v. Bar Plan Mut. Ins. Co., 712 F.3d 336 (7th Cir. 2013)

Under Indiana law, a professional liability insurer was entitled to summary judgment based on an exclusion for acts or omissions predating the policy period if, "before the Policy effective date," the law firm "knew, or should reasonably have known, of any circumstance, act or omission that might reasonably be expected to be the basis of that Claim." A reasonable attorney would have realized that a property buyer he represented might bring a claim against him because, as a result of the attorney's mistake, the seller refused to complete a negotiated sale and filed a lawsuit.

Clark Sch. for Creative Learning, Inc. v. Phila. Indem. Ins. Co., 734 F.3d 51 (1st Cir. 2013)

Applying Massachusetts law, the First Circuit affirmed the district court's holding that coverage for the insured school under a directors and officers liability policy was precluded by a "Known Circumstances" exclusion and rejected the insured's argument that the plain language of the policy must give way to the reasonable expectations of the insured because the exclusion was unambiguous.

Lexington Ins. Co. v. Integrity Land Title Co., Inc., 721 F.3d 958 (8th Cir. 2013)

Applying Missouri law, the Eighth Circuit affirmed the district court's holding that a prior knowledge exclusion precluded coverage under an errors and omissions policy where the insured land title agent had knowledge at the time of the policy's inception that a future indemnification demand by a title insurer was likely.

Cont'l Cas. Co. v. Marshall Granger & Co., LLP, 921 F. Supp. 2d 111 (S.D.N.Y. 2013)

An insurer was not precluded from seeking rescission of an accountants professional liability policy based on an "Innocent Insureds" provision in the policy because that provision could not reasonably be construed as a severability clause relating to misrepresentations in the application. However, because it appeared that the insurer had not yet provided to the insured its files regarding its underwriting decision as to the policy, the insurer's summary judgment motion was found to be premature.

Henderson/Vance Healthcare, Inc. v. Cincinnati Ins. Co., No. 5:13-CV-68-BO, 2013 U.S. Dist. LEXIS 137692 (E.D.N.C. Sept. 25, 2013)

The court rejected the insurers' motion to dismiss and held that the policies' prior knowledge exclusions were not implicated, despite the underlying complaint stating that it "arises out of" a prior mediated settlement agreement between the insured and underlying claimant, because the insured could not have reasonably foreseen that litigation would stem from the settlement agreement and some of the alleged wrongful acts were distinct from the settlement agreement.

Chi. Ins. Co. v. Capwill, 514 Fed. App'x 575 (6th Cir. 2013)

Under Ohio law, an insurer was properly permitted to amend its declaratory judgment action to include a request for rescission of an accounting malpractice policy upon learning that the insured had lied on the policy application, and was properly granted summary judgment on the rescission claim in light of undisputed testimony from the insurer's former head of underwriting stating that had the insurer known the truth, it would not have issued or renewed the insurance policies at issue.

Fishman v. The Hartford, No. 12-3779, 2013 U.S. Dist. LEXIS 140286 (E.D. Pa. Sept. 27, 2013)

The court granted the insurer's motion for judgment on the pleadings and held that, applying a mixed subjective/objective standard, the prior knowledge provision of the lawyers' errors and omissions policy barred coverage because the insured attorney should have foreseen that his failure to file a civil rights lawsuit would lead to a malpractice claim against him.

Greenwich Ins. Co. v. Joe Garrell, Case No. 4:11-CV-02743-RBH, 2013 U.S. Dist. LEXIS 31491 (D.S.C. Mar. 7, 2013)

Where a professional liability insurance policy contained a prior knowledge condition, and there were triable issues of fact concerning whether the insured had been on notice of an act or omission that could be the basis of a claim, the insurer's motion for judgment on the pleadings and the insured's summary judgment concerning the duty to defend were both denied.

Arboretum Nursing & Rehab. Ctr. of Winnie, Inc. v. Homeland Ins. Co., No. V-10-69, 2012 U.S. Dist. LEXIS 175421 (S.D. Tex. Dec. 11, 2012)

Under the eight-corners rule, a prior knowledge exclusion in a professional liability policy did not eliminate an insurer's duty to defend where the underlying complaint did not allege the requisite facts. The exclusion turned on the prior knowledge of "the insured," the only person whose knowledge was imputable to the insured entity was the person who signed the application, and that person was not specifically mentioned in the underlying complaint.

Prosperity Mortg. Co. v. Certain Underwriters at Lloyd's London, No. GLR-12-2004, 2013 U.S. Dist. LEXIS 98286 (D. Md. July 15, 2013)

Applying Virginia law, the court granted the insurer's motion for judgment on the pleadings, holding that the insurer was entitled to rescind a bankers' professional liability policy because the insured made material misrepresentations in the policy application by omitting information regarding a demand made to the insured which the court found might reasonably have been expected to give rise to a claim.

Capitol Specialty Ins. Co. v. Zhang, No. C11-41 TSZ, 2013 U.S. Dist. LEXIS 141151 (W.D. Wash. Sept. 30, 2013)

The court rejected the insurer's motion for summary judgment on the issue of rescission, holding that the insurer did not demonstrate as a matter of law that the insured made representations in the commercial general liability policy application with "the intent to deceive."

Laufman v. Safeco Ins. Co. of Am., 833 N.W.2d 873 (Wis. Ct. App. 2013)

An insurer was entitled to summary judgment that a prior knowledge exclusion in a private company directors and officers and corporate liability policy barred coverage for an action based on the insured drawing down a lake above its dam, where the insured had reason to believe its failure to maintain the dam would result in a drawdown order if it was unable to transfer ownership, and admitted in a deposition that it assumed it would be sued if it drew down the lake.

Kraft v. Thompson, 828 N.W.2d 594 (Wis. Ct. App. 2013)

Under the four-corners rule, a prior knowledge condition precedent in a professional liability insurance policy did not eliminate an insurer's duty to defend where the

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underlying complaint did not allege all requisite facts. The insurer breached its duty when it unilaterally withdrew its defense based on extrinsic facts without first seeking a judicial resolution of the coverage issue.

Prior Acts, Prior Notice, And Pending And Prior Litigation

Genesis Ins. Co. v. Magma Design Automation, Inc., 506 Fed. App'x 679 (9th Cir. 2013)

Applying California law, the Ninth Circuit found that an exclusion for any claim based on or arising from any wrongful act that had been the subject of notice "under any policy" for which the current policy was a renewal or replacement did not apply based on the appellate court's prior determination that the insured did not give proper notice under the prior policy at issue.

Bank of Camilla v. St. Paul Mercury Ins. Co., 939 F. Supp. 2d 1299 (M.D. Ga. 2013), aff'd, 531 Fed. App'x 993 (11th Cir. 2013)

A pending and prior litigation exclusion in a bankers professional liability policy applying to, among other things, loss arising out of or attributable to any "Lending Act" taking place prior to a certain date, applied to a lawsuit that included allegations that the insured conspired with investors in a scheme involving wrongfully extending credit to the investors prior to the date stated in the policy.

Park W. Galleries, Inc. v. Ill. Nat'l Ins. Co., No. 11-15047, 2013 U.S. Dist. LEXIS 164898 (E.D. Mich. Nov. 20, 2013)

A prior acts exclusion in a professional liability policy barring coverage for claims "arising out of any wrongful act which occurred prior to the retroactive date" did not apply to an entire purported class action because certain class members' allegations could be based on conduct occurring after that date. A pending and prior litigation exclusion applying more broadly to any claim "relating to the essential facts, circumstances or situation" underlying a prior action, however, did apply to the entire class because all of the class members' claims were based on the same underlying circumstances.

Regal-Pinnacle Integrations Indus., Inc. v. Phila. Indem. Ins. Co., No. 12-5465 (NLH/JS), 2013 U.S. Dist. LEXIS 56941 (D. N.J. Apr. 22, 2013)

A pending and prior litigation exclusion in a commercial lines liability policy that applied to any claim arising out of or attributable to "any litigation or demand against an Insured pending" before a certain date barred coverage for an employment suit that followed an administrative action from the same claimant based on the same allegations and seeking the same relief.

Prop. & Cas. Ins. Co. of Hartford v Levitsky, 40 Misc. 3d 1201(A) (N.Y. Sup. Ct. 2013), aff'd 110 A.D.3d 503 (N.Y. App. Div. 2013)

A professional liability insurer was not obligated to defend or indemnify an insured attorney and his law firm in a malpractice action because the insured failed to provide timely notice of a potential claim. Although the law firm was aware that it allowed the statute of limitations to expire in an underlying action it was handling for the claimant, the law firm did not report the potential malpractice claim to the insurer until after approximately a year and ten months later after it lost on a dispositive motion, which resulted in the dismissal of the underlying action.

Keizer Campus Operations, LLC v. Lexington Ins. Co., No. 6:13-CV-00165-AA, 2013 U.S. Dist. LEXIS 127335 (D. Or. Sept. 5, 2013)

A prior acts exclusion in a healthcare professional liability policy did not bar coverage for a lawsuit when the insured was covered by several consecutive claims-made policies from the same insurer, meaning one of the policies was in effect when the alleged wrongful conduct occurred and coverage could thus only be barred if the insurer could show prejudice due to the delayed notice of the claim.

TIG Ins. Co. v. Tyco Int'l Ltd., 919 F. Supp. 2d 439 (M.D. Pa. 2013)

A prior notice provision in an excess policy barring coverage for "[a]ny claims resulting from an occurrence of which the Named Insured had actual or constructive notice prior to the commencement of coverage" applied to litigation related to a fire that occurred prior to the inception of the policy, and the court rejected the argument that the exclusion should only apply if the insured had knowledge that a claim may reach into the excess carrier's layer of coverage.

Amerisourcebergen Corp. v. ACE Am. Ins. Co., No. 02679, 2013 Phila. Ct. Com. Pl. LEXIS 249 (Pa. Ct. Com. Pl. July 16, 2013)

Under a digital technology and professional liability policy, a *qui tam* complaint that was filed under seal

before the policy was issued but served during the policy period could not be considered a claim made prior to the inception of the policy when "claim" was defined as a civil proceeding commenced by service of a complaint. The policy's pending and prior litigation exclusion applied to the *qui tam* action, however, because the exclusion barred coverage not for "claims," but for any litigation pending against the insured when the policy incepted.

Gastar Exploration Ltd. v. U.S. Specialty Ins. Co., 412 S.W.3d 577 (Tex. App. 2013)

In considering whether related claims should be deemed a single claim made prior to the inception of a directors and officers liability policy on November 1, 2008, an appellate court determined that the interrelated claim provision was ambiguous when read in conjunction with a pending and prior litigation exclusion barring coverage for claims "arising out of . . . any pending or prior litigation as of 5/31/2000," and, accordingly, found that the exclusion controlled so that the interrelated claims provision could work to bar coverage only for claims made before May 31, 2000.

Dishonesty And Personal Profit Exclusions

Axis Reinsurance Co. v. Telekenex, Inc., 913 F. Supp. 2d 793 (N.D. Cal. 2012)

The court upheld an "Unlawful Advantage Exclusion" in a directors and officers liability policy precluding coverage for losses involving "the gaining of any profit, remuneration, or advantage to which the Insured was not legally entitled" and granted partial summary judgment in favor of an insurer for an underlying judgment involving the insured's misappropriation of confidential information from customers in order to improve its own business.

Colony Ins. Co. v. Fladseth, No. C 12-1157 CW, 2013 U.S. Dist. LEXIS 48552 (N.D. Cal. Apr. 3, 2013)

A personal profit exclusion precluded coverage for damages arising out of the insureds' unlawful "gaining of a profit or advantage to which they were not entitled, by categorizing overhead expenses as costs, by charging clients rates higher than the statutory limit and by telling their clients that this was proper."

Nat'l Bank of Cal. v. Progressive Cas. Ins. Co., 938 F. Supp. 2d 919 (C.D. Cal. 2013)

The court held that the language of a "Fraud Exclusion Modification" in a directors and officers liability policy precluded coverage for an underlying arbitration award for claims of "fraud, conspiracy to defraud, violation of Cal. Bus. & Prof. Code § 17200, breach of fiduciary duty, intentional infliction of emotional distress, and tort of another."

Hackstaff Law Grp., LLC v. Hartford Cas. Ins. Co., No. 12-CV-2128-RPM, 2013 U.S. Dist. LEXIS 81839 (D. Colo. June 11, 2013)

A "fraud or dishonest acts" exclusion precluded coverage under the terms of a lawyers professional liability policy for underlying conduct involving allegations that the lawyers at issue conspired to design a sham transaction.

Land v. Auto-Owners Ins. Co., 511 Fed. App'x 795 (10th Cir. 2013)

Applying Colorado law, the Tenth Circuit held that the underlying RICO and Colorado Organized Crime and Control Act allegations did not fall solely and entirely within the exclusions in the insurance policy prohibiting coverage for intentionally fraudulent or criminal acts.

First Bank of Del., Inc. v. Fid. & Deposit Co. of Md., No. N11C-08-221 MMJ CCLD, 2013 Del. Super. LEXIS 465 (Del. Super. Ct. Oct. 30, 2013)

An insured bank was entitled to coverage under a "D&O SelectPlus Insurance Policy" for assessments that the bank paid to credit card companies due to a data breach incident caused by hackers. The policy's exclusion for liability associated with the "fraudulent use [of] data" did not apply because the exclusion would render illusory the coverage for unauthorized data use.

Max Specialty Ins. Co. v. A Clear Title & Escrow Exch., LLC, No. 8:12-CV-727-T-26MAP, 2013 U.S. Dist. LEXIS 82553 (M.D. Fla. June 12, 2013)

An exclusion for "criminal, fraudulent or dishonest acts" in a "Title Agents, Abstractors and Escrow Agents Professional Liability Insurance Policy" precluded coverage for an underlying lawsuit alleging that an insured stole money from an escrow account while serving as an escrow agent.

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Certain Interested Underwriters v. AXA Equitable Life Ins. Co., No. 10-62061-CV-Hurley/Hopkins, 2013 U.S. Dist. LEXIS 159639 (S.D. Fla. Nov. 7, 2013)

A "criminal conduct" exclusion in an insurance broker's professional liability policy precluded coverage for an insurance broker who pleaded guilty to fraudulent activity associated with placing life insurance policies.

Nat'l Reimbursement Grp., Inc. v. Gemini Ins. Co., No. 5:13-CV-145 (MTT), 2013 U.S. Dist. LEXIS 118435 (M.D. Ga. Aug. 21, 2013)

The court found that coverage for an insured's "embezzlement" was precluded under the terms of a professional liability policy with an exclusion for claims "[a] rising out of any actual or alleged . . . [c]riminal, fraudulent, dishonest, or knowingly wrongful act or omission committed by or with the knowledge of any Insured."

AL Long Ford, Inc. v. Universal Underwriters Grp., No. 10-CV-13084, 2013 U.S. Dist. LEXIS 45059 (E.D. Mich. Mar. 29, 2013)

An exclusion for "any dishonest, fraudulent or criminal acts committed by any [insured]" precluded coverage for an underlying action that included allegations of fraud and misrepresentation in a contractual dispute between an auto dealership and a credit union.

Silverman Neu, LLP v. Admiral Ins. Co., 933 F. Supp. 2d 463 (E.D.N.Y. 2013)

A "Wrongful Act Exclusion" in a professional liability policy precluded coverage for an underlying class action seeking to recover payments made to certain credit counseling companies on the basis of "fraud and misrepresentation" allegations.

Automax Hyundai S., LLC v. Zurich Am. Ins. Co., 720 F.3d 798 (10th Cir. 2013)

Applying Oklahoma law, the court reversed a lower court's grant of summary judgment in favor of the insurer and held that certain of the underlying claims potentially could be covered by a "Statute and Title E&O" policy containing an exclusion for "any dishonest, fraudulent or criminal acts."

Leb. Sch. Dist. v. Neth. Ins. Co., No. 1:12-CV-988, 2013 U.S. Dist. LEXIS 21581 (M.D. Pa. Jan. 25, 2013)

The court held that coverage for an insured's improper retention of excessive truancy fines was precluded under an errors and omissions policy containing an "Illegal Profit or Advantage Exclusion" that barred coverage for any insured who "commits a 'wrongful act' that gains . . . a profit or advantage of which the insured or other person or organization was not legally entitled."

Pulliam v. Travelers Indem. Co., 743 S.E.2d 117 (S.C. Ct. App. 2013)

The court held that an exclusion in a directors and officers liability policy endorsement for "any dishonest, fraudulent, criminal or malicious act, error or omission" did not preclude coverage for underlying claims alleging that a property association put the developer's interests ahead of the owners' by failing to properly maintain the property or establish a reserve fund.

Farkas v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 518 Fed. App'x 178 (4th Cir. 2013)

Applying Virginia law, the Fourth Circuit upheld a lower court's determination that coverage for defense costs associated with an insured's conviction on charges of bank, wire and securities fraud was precluded under the terms of a directors and officers liability policy due to exclusions for claims arising from illegal profits, criminal, fraudulent or dishonest acts or claims associated with the willful violation of any statute or rule of law.

MSO Wash., Inc. v. RSUI Grp., Inc., No. C12-6090 RJB, 2013 U.S. Dist. LEXIS 65957 (W.D. Wash. May 8, 2013)

The court granted an insurer's motion for summary judgment and held that it had no duty to defend or indemnify its insured for alleged violations of the False Claims Act due to the "dishonesty exclusion" in three "Medical Professional Liability" policies.

Restitution, Disgorgement and Damages

Cohen v. Lovitt & Touché, Inc., 308 P.3d 1196 (Ariz. Ct. App. 2013)

Although the court did not determine whether amounts a hotel had to pay in connection with an underlying class action for violating a statute requiring tips to be paid directly to its employees constituted uninsurable restitution pursuant to a directors and officers policy, it held that Arizona does not accept a *de facto* rule that restitutionary payments are uninsurable as a matter of law. Rather, a court must apply a factor-weighing test comparing public

policy concerns to the state's "strong preference for contract enforcement."

Screen Actors Guild, Inc. v. Federal Ins. Co., No. 11-07123 DMG (VBKx), 2013 U.S. Dist. LEXIS 100638 (C.D. Cal. July 11, 2013)

Where insured, Screen Actors Guild, was contractually obligated to account for and distribute foreign levy funds to a plaintiff class of actors, the court held that there was no coverage under a directors and officers policy for amounts the insured paid to settle actors' claims seeking unpaid benefits the insured had contractually agreed to pay.

Exec. Risk Specialty Ins. Co. v. First Health Grp. Corp., No. 09C-09-027, 2013 Del. Super. LEXIS 170 (Del. Super. Ct. May 7, 2013)

The insurer owed no coverage to the insured preferred provider organization (PPO) for its violation of Louisiana's PPO Act because the managed care organization errors and omissions policy defined "loss" to exclude "fines, penalties, or multiplied damages."

Fid. Bank v. Chartis Specialty Ins. Co., No. 1:12-CV-4259-RWS, 2013 U.S. Dist. LEXIS 110935 (N.D. Ga. Aug. 7, 2013)

A directors and officers insurer did not have to indemnify the insured bank for a settlement of the underlying action, which involved allegations that the insured charged its customers for overdrafts in such a way that amounted to a usurious interest charge in violation of Georgia law. The settlement was uninsurable restitution because the insured was deducting for its own use funds from its customers' accounts in a manner that was not legally authorized. To require the insurer to indemnify the bank for such amounts would result in a windfall to the insured.

Standard Mut. Ins. Co. v. Lay, 989 N.E.2d 591 (Ill. 2013)

An insurer could not disclaim coverage under a commercial general liability policy for statutory damages under the Telephone Consumer Protection Act ("TCPA") because the TCPA is a remedial and not a punitive statute, and the $500 liquidated damages per violation are not punitive damages.

Carolina Cas. Ins. Co. v. Merge Healthcare Solutions Inc., 728 F.3d 615 (7th Cir. 2013)

Under Illinois law, the state court's use of a multiplier in calculating attorneys' fees did not implicate the "multiplied portion of multiplied damages" exclusion in a directors and officers liability policy's "loss" definition.

Zayed v. Arch Ins. Co., 932 F. Supp. 2d 956 (D. Minn. 2013)

Under Minnesota law, claims for restitution are not uninsurable as a matter of law. A court must instead look to the terms of the insurance policy. Here, where a directors and officers liability policy defined "loss" broadly, "loss" clearly encompassed $1 million the defendant had to pay investors it had defrauded under a Ponzi scheme. Nevertheless, the insurer was entitled to disclaim coverage because damages resulting from intentional acts are uninsurable as a matter of Minnesota law.

Columbia Cas. Co. v. Hiar Holding, LLC, 411 S.W.3d 258 (Mo. 2013)

Although "damages" do not typically include fines or penalties, the insurer could not disclaim coverage under a commercial general liability policy for the insured's payment of a statutory damage award under the Telephone Consumer Protection Act ("TCPA") because the TCPA's $500-per-occurrence award serves more than purely punitive or deterrent goals. A portion of the fixed $500 amount represented a liquidated sum for uncertain and hard-to-quantify actual damages, such as loss of use of equipment and phone lines for outgoing and incoming faxes, paper and ink expenses, and the resultant inconvenience and annoyance of unsolicited fax advertisements.

BancInsure, Inc. v. First Interstate Bank, No. CV-11-58-BLG-RKS, 2013 U.S. Dist. LEXIS 160724 (D. Mont. Sept. 23, 2013)

The underlying action ordering a bank to return funds it had removed from a borrower's account was not a covered "loss" under a directors and officers policy because "the jury simply made the Bank return what the Bank wrongfully took."

J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 21 N.Y.3d 324 (2013)

Although the court held that the insurer had to indemnify Bear Stearns for an underlying settlement that included $160 million characterized as "disgorgement," such payments were not "disgorgement" – and thus constituted "loss" under a directors and officers policy –

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because they represented illicit profits obtained by Bear Stearns' customers rather than gains enjoyed by Bear Stearns itself. Because Bear Stearns was not seeking recoupment for the turnover of its own improperly acquired profits – which the court recognized would be uninsurable restitution – it would not be unjustly enriched by securing indemnity.

Entitle Ins. Co. v. Darwin Select Ins. Co., No. 1:11-CV-01193, 2013 U.S. Dist. LEXIS 14218 (N.D. Ohio Feb. 1, 2013)

Amounts the insured title insurance company paid under Closing Protection Letters ("CPL") to reimburse clients for any loss stemming from its agent's fraud, dishonesty or negligence in handling closings did not constitute "loss" under a professional liability policy. "Loss" did not include amounts due under any contract, and the CPLs were a contractual debt the insured voluntarily accepted, not a loss resulting from a wrongful act within the meaning of the policy.

Singletary v. Beazley Ins. Co., No. 2:13-CV-1142-DCN, 2013 U.S. Dist. LEXIS 158038 (D.S.C. Nov. 5, 2013)

The insurer had no obligation to pay under a management liability insurance policy that excluded from "loss" damages owed under a contract. It was undisputed that the insured contractually agreed to reimburse the Social Security Administration ("SSA") for any misused funds, thus the underlying claim for repayment by the SSA was under an express written contract and excluded from "loss" under the policy.

Insured Capacity

Hansen v. Sentry Ins. Co., No. 12-CV-466-JD, 2013 U.S. Dist. LEXIS 57275 (D.N.H. Apr. 22, 2013)

An insured corporate officer was not entitled to defense of an underlying action under a commercial general liability policy when the insured officer's alleged conduct was adverse to the insured organization's interests. The court found that a corporate officer "could not have been acting in an insured capacity while allegedly acting against the interests of the named insured."

Fed. Ins. Co. v. Sandusky, No. 4:11-CV-02375, 2013 U.S. Dist. LEXIS 29740 (M.D. Pa. Mar. 1, 2013)

An insured executive was not entitled to a defense under either the directors and officers liability or the employment practices liability coverage sections of the policy because the alleged misconduct of child molestation did not arise in the insured's capacity as an employee or executive of the insured organization. The policy defined "Insured Capacity" as the "position or capacity of an Insured Person that causes him or her to meet the definition of Insured Person." The court did not find the language to be ambiguous in limiting coverage to those acts conducted by an insured acting in his or her capacity as such.

Carter v. Westport Ins. Corp., No. B-09-99, 2013 U.S. Dist. LEXIS 152388 (S.D. Tex. Oct. 23, 2013)

An insurer was found to have no duty to defend the policyholder's employee pursuant to an errors and omissions policy when he was alleged to have been performing services solely on behalf of another, non-insured agent.

Insured v. Insured Exclusions

Vierramoore, Inc. v. Continental Cas. Co., 940 F. Supp. 2d 1270 (E.D. Cal. 2013)

An Insured vs. Insured Exclusion that barred coverage for claims "by or derivatively on behalf of the Named Entity or Subsidiary," and for "any Loss of Property Manager based upon, directly or indirectly arising from, or in any way involving . . . any Claim brought by or derivatively on behalf of the Named Entity Insured" precluded coverage for an underlying suit brought by the named insured against its Property Manager.

Progressive Cas. Ins. Co. v. Fed. Deposit Ins. Corp., 926 F. Supp. 2d 1337 (N.D. Ga. 2013)

An insurer's motion for summary judgment was denied because there were questions of fact as to whether an ambiguity existed under the directors and officers liability policy's Insured vs. Insured Exclusion, which excluded coverage for any claim "by, on behalf of, or at the behest of the [Named Insured]."

Davis v. BancInsure, Inc., No. 3:12-CV-113, 2013 U.S. Dist. LEXIS 46249 (N.D. Ga. Mar. 20, 2013)

An Insured vs. Insured Exclusion that barred coverage for any claim "by, or on behalf of, or at the behest of, any other Insured Person, the Company or any successor, trustee, assignee or receiver" precluded coverage for a potential action by the FDIC against former directors and officers of the insured bank.

St. Paul Mercury Ins. Co. v. Miller, No. 2:12-CV-225 (RWS), 2013 U.S. Dist. LEXIS 116877 (N.D. Ga. Aug. 19, 2013)

An Insured vs. Insured Exclusion in a directors and officers liability policy was not ambiguous and barred coverage for a claim by the FDIC, acting as a receiver for a failed bank, against the bank's former employees.

Nationwide Mut. Fire Ins. Co. v. Frye, No. 1:11-CV-1135, 2013 U.S. Dist. LEXIS 170360 (M.D.N.C. Dec. 2, 2013)

A "Co-Insured Exclusion" in a homeowner's policy, which barred coverage for bodily injury to an insured, precluded coverage for a bodily injury claim brought by a minor who was a resident of a home owned by the Named Insured against another resident of that home.

Kollman v. Nat'l Union Fire Ins. Co., No. 08-36017, 2013 U.S. App. LEXIS 21304 (9th Cir. Oct. 21, 2013)

Under Oregon law, an Insured vs. Insured Exclusion did not preclude coverage for a claim because the claimant was not an insured under the relevant policy, but rather was an officer of the entity in question before it became an insured.

The Landing Counsel of Co-Owners v. Fed. Ins. Co., No. 12-CV-2760, 2013 U.S. Dist. LEXIS 127989 (S.D. Tex. Sept. 9, 2013)

An Insured vs. Insured Exclusion that barred coverage for any claim "brought or maintained by or on behalf of any insured in any capacity" precluded coverage for a cross claim brought by a member of the Named Insured's board of directors against the Named Insured.

Coverage for Contractual Liability

Landmark Am. Ins. Co. v. Indus. Dev. Bd. of Montgomery, No. 2:13-CV-230-WC, 2013 U.S. Dist. LEXIS 128041 (M.D. Ala. Sept. 9, 2013)

A contract exclusion barred coverage for underlying contract-based claims against the insureds. The plain language of the contract exclusion barring coverage for claims "arising out of or based upon any actual or alleged liability of the Insured Organization assumed or asserted under . . . any contract or agreement" was not limited to indemnity agreements. In the absence of ambiguity in the policy, the reasonable expectations doctrine did not apply.

Scottsdale Ins. Co. v. Ala. Mun. Ins. Corp., No. 2:11-CV-668-MEF, 2013 U.S. Dist. LEXIS 131779 (M.D. Ala. Sept. 16, 2013)

A contract exclusion in a professional liability policy issued to a municipal insurer barred coverage for the municipal insurer's settlement of a lawsuit alleging it failed to settle an underlying action against its policyholder town within the limits of the underlying policy.

Screen Actors Guild, Inc. v. Fed. Ins. Co., No. CV 11-07123 DMG (VBKx), 2013 U.S. Dist. LEXIS 100638 (C.D. Cal. July 11, 2013)

An award of underlying class counsel attorneys' fees was not covered under a directors and officers liability policy because the fee award did not arise from a covered claim. The claim did not result from a wrongful act but rather from the Screen Actors Guild's pre-existing obligation to distribute royalties to its members.

MarineMax, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A., No. 8:10-CV-1059-T-33AEP, 2013 U.S. Dist. LEXIS 14641 (M.D. Fla. Feb. 4, 2013)

A contract exclusion in a professional liability policy excluded coverage for liability assumed under contract but did not bar coverage for a claim of negligent misrepresentation because the insured could have had liability for the negligent misrepresentation claim in the absence of a contract.

Public Risk Mgmt. of Fla. v. One Beacon Ins. Co., No. 6:13-CV-1067-Orl-31TBS, 2013 U.S. Dist. LEXIS 150091 (M.D. Fla. Oct. 18, 2013)

A public officials' errors and omissions policy did not provide coverage for a claim alleging failure to pay money owed under a contract. Coverage was not available both because the failure to pay was not a loss arising from a wrongful act and because the policy contained an exclusion for intentional breaches of contract.

City of Warren v. Int'l Ins. Co. of Hannover, Ltd., 524 Fed. App'x 254 (6th Cir. 2013)

Under Michigan law, an exclusion barred coverage for a claim under 42 U.S.C. § 1983. The policy at issue excluded coverage for "Public Officials' Errors and Omissions arising out of . . . [f]ailure to perform or breach of contractual obligation." Because the Section 1983 claim arose out of the City's failure to pay royalty amounts due under a contract, no coverage was available under the policy and the insurer also was not obligated to reimburse the City for its defense costs.

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Northstar Educ. Fin., Inc. v. St. Paul Mercury Ins. Co., No. A12-0959, 2013 Minn. App. Unpub. LEXIS 32 (Minn. Ct. App. Jan. 14, 2013)

A directors and officers liability policy did not provide coverage for an insured's breach of contract and statutory violations relating to the alleged breach of contract. Although the common law prohibition on coverage for breach of contract claims was inapplicable because the underlying claimants also brought statutory claims, the insurer was entitled to recover defense costs advanced because of a policy exclusion that barred coverage for loss on account of any claim "based upon, arising out of, or attributable to liability of the Company under any contract or agreement," provided that the Company "would have been liable for such Loss in the absence of the contract or agreement."

EnTitle Ins. Co. v. Darwin Select Ins. Co., No. 1:11-CV-01193, 2013 U.S. Dist. LEXIS 14218 (N.D. Ohio Feb. 1, 2013), appeal docketed, No. 13-3269 (6th Cir. Mar. 8, 2013)

A professional liability policy did not provide coverage for amounts payable under contracts because the liability was not a loss resulting from a wrongful act within the meaning of the policy.

TranSched Sys. Ltd. v. Fed. Ins. Co., No. 12-939-M, 2013 U.S. Dist. LEXIS 108736 (D.R.I. Aug. 2, 2013)

A contract exclusion in a directors and officers liability policy did not, as a matter of law, bar coverage for a claim of intentional misrepresentation where the alleged misrepresentations occurred prior to the formation of the contract and the plaintiff pled sufficient facts indicating that the insured could have been liable for alleged misrepresentations in the absence of the contract.

Cousins Submarines, Inc. v. Fed. Ins. Co., No. 12-CV-387-JPS, 2013 U.S. Dist. LEXIS 17306 (E.D. Wis. Feb. 8, 2013)

A contract exclusion in a corporate liability policy barred coverage for liability under contract, including damages resulting from intentional misrepresentation, except to the extent that the claimants' damages occurred prior to entering into the contracts.

Professional Services

Britz Fertilizers, Inc. v. Nationwide Agribusiness Ins. Co., No. 1:10-CV-02051-AWI-MJS, 2013 U.S. Dist. LEXIS 144232 (E.D. Cal. Oct. 3, 2013)

The court held that, although professional services are not limited to services that are rendered for a fee, and can include any work that is done in anticipation of financial gain, the insurer could not disclaim coverage because the underlying complaint alleged activities other than those that fell within the professional services exclusion.

Scottsdale Ins. Co. v. Coapt Sys., Inc., No. C-12-1780 MMC, 2013 U.S. Dist. LEXIS 86414 (N.D. Cal. June 18, 2013)

Underlying claims against the insured and individual directors and officers relating to defective facial implants and alleged fraudulent transfer of assets were not barred under a policy's "professional services" exclusion because the court determined that not all "sales and marketing activities constitute professional services, nor did [the insurer] cite to any authority holding a business engaged in the sale and marketing of products used by professionals is, by reason of such sales activity, itself rendering 'professional services.'"

Nat'l Reimbursement Grp. Inc. v. Gemini Ins. Co., No. 5:13-CV-145 (MTT), 2013 U.S. Dist. LEXIS 118435 (M.D. Ga. Aug. 21, 2013)

The insured was not entitled to coverage under a professional liability policy for its employee's embezzlement of funds because the employee remained an insured within the meaning of the policy, which defined "Insured" to include any employee "while rendering professional services." The employee was providing professional services (billing services) for a fee, and the fact that she embezzled funds while engaged in billing services did not change the employee's status as an insured.

Wisznia Co., Inc. v. Gen. Star Indem. Co., No. 11-2657, 2013 U.S. Dist. LEXIS 139451 (E.D. La. Sept. 26, 2013)

A professional services exclusion precluded an insured architect and engineering firm from obtaining overage under its commercial general liability policy because the underlying complaint was replete with allegations that the insured had acted negligently in performance of its service. Not a single factual allegation was based on the insured's non-professional negligence.

Land Innovators Co. L.P. v. Amerisure Mut. Ins. Co., No. 1:12-CV-175-JMS-TAB, 2013 U.S. Dist. LEXIS 101621 (S.D. Ind. July 22, 2013)

The court held that an insurer was obligated to defend its insured under a general liability policy because

the broad allegations levied against the insured that it negligently designed, developed, engineered, investigated, graded, constructed, supervised, marketed, brokered and/or sold could not all be said to fall within the professional services exclusion as a matter of law.

Pias v. Cont'l Cas. Ins. Co., No. 2:13-CV-00182-PM-KK, 2013 U.S. Dist. LEXIS 110665 (W.D. La. Aug. 3, 2013)

An insured was not entitled to coverage under a professional liability policy for a dispute over legal fees with his former client because fee disputes did not fall within the policy's meaning of "legal services."

Jackson Nat'l Life Ins. Co. v. Catlin Specialty Ins. Co., No. 12-1406 (RHK/FLM), 2013 U.S. Dist. LEXIS 120858 (D. Minn. Aug. 26, 2013)

An insurer had no obligation to indemnify its insured because the underlying judgment, not all of the underlying counts, was based on the insured's breach of contract and not any of the other conduct. Because the judgment was predicated solely on the breach of contract, it did not arise out of "the rendering or failing to render Professional Services" and was thus not covered.

Beazley Ins. Co. v. Am. Econ. Ins. Co., No. 2:12-CV-01720-JCM-VCF, 2013 U.S. Dist. LEXIS 71699 (D. Nev. May 21, 2013)

A professional services exclusion contained in an insured architect's commercial general liability policy barred coverage for lawsuits stemming from a three-vehicle accident relating to the insured's design of a center median because the suits only contained allegations of professional wrongdoing.

St. Paul Fire & Marine Ins. Co. v. Del Webb Communities, Inc., No. 2:12-CV-00674-KJD-CWH, 2013 U.S. Dist. LEXIS 37903 (D. Nev. Mar. 19, 2013)

Underlying claims in a class action lawsuit asserting defective design of fifteen single family homes were barred by the architectural professional services exclusion contained in an excess policy issued to a developer and home construction company.

Entitle Ins. Co. v. Darwin Select Ins. Co., No. 1:11-CV-01193, 2013 U.S. Dist. LEXIS 14218 (N.D. Ohio Feb. 1, 2013)

Underlying claims against a title insurer for losses stemming from the title insurance company's agent's misappropriation of client funds constituted "Professional Services" under a professional liability insurance policy, although coverage was ultimately barred based on the application of other policy provisions.

Encore Receivable Mgmt. v. Ace Prop. & Cas. Ins. Co., No. 1:12-CV-297, 2013 U.S. Dist. LEXIS 93513 (S.D. Ohio July 3, 2013)

The court held that an insurer was obligated to defend the insured call center against personal and advertising injury claims, and that a professional services exclusion did not apply. Broadly defining professional services to include call centers, rather than services that are traditionally considered professional (e.g., doctors), would be an insurer-friendly interpretation that is inconsistent with Ohio precedent.

Hanover Am. Ins. Co. v. Saul, No. CIV-12-0922-HE, 2013 U.S. Dist. LEXIS 29739 (W.D. Okla. Mar. 5, 2013)

An underlying claim alleging sexual assault of a minor by a chiropractor's ex-husband did not involve a "professional service" under the chiropractor's professional liability policy because the alleged negligence relating to the chiropractor's ex-husband did not constitute "an omission, act or error committed within the scope of her practice as a chiropractor."

Lexington Ins. Co. v. Charter Oak Fire Ins. Co., No. 2876 EDA 2012, 2013 Pa. Super. LEXIS 3146 (Pa. Super. Ct. 2013)

The court reversed the trial court and concluded that a professional services exclusion did not relieve the insurer of its duty to defend because, reading the complaint in its broadest terms, it was not possible to determine the precise allegations directed against the insured.

BCS Ins. Co. v. Big Thyme Enterprises, Inc., No. 3:12-CV-933-JFA, 2013 U.S. Dist. LEXIS 20051 (D.S.C. Feb. 14, 2013)

Underlying claims alleging violation of the Telephone Consumer Protection Act did not involve a "professional service" under an agents and brokers professional liability policy because the sending of unsolicited faxes did not qualify as "specialized services rendered to a [c]lient as a licensed, Life, Accident and Health Insurance Agent."

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Axis Surplus Ins. Co. v. Halo Asset Mgmt., LLC, No. 3:12-CV-2419-G, 2013 U.S. Dist. LEXIS 139065 (N.D. Tex. Sept. 27, 2013)

An insurer had no duty to defend its insured under a professional liability policy because the underlying allegations did not constitute "mortgage broker services" within the meaning of "Insured Services." Simply because the proposed investment scheme was supposed to involve mortgages did not necessitate a finding that the claims fell within the meaning of "Insured Services" as defined in the policy.

Admiral Ins. Co. v. Marsh, No. 3:12-CV-601-JAG, 2013 U.S. Dist. LEXIS 90002 (E.D. Va. Jun. 26, 2013)

Where an insured agreed to handle litigation against its client in exchange for the client's agreement not to sue the insured, such agreement constituted a service performed for "remuneration" and thus was considered a "professional service" under the policy.

Bayley Constr. v. Great Am. E&S Ins. Co., No. C13-0114JLR, 2013 U.S. Dist. LEXIS 157279 (W.D. Wash. Nov. 1, 2013)

An insurer had a duty to defend its insured, a general construction contractor, under a professional liability policy against claims that the insured failed to pay the statutory prevailing wage, because given the numerous attendant responsibilities for a general contractor, failure to pay employees the required wage could fall within the meaning of "professional services," as was required in order for the insured to obtain coverage under the policy.

Independent Counsel

Nat'l Union Fire Ins. Co. of Pittsburgh v. Seagate Tech. Inc., No. C 04-01593 WHA, 2013 U.S. Dist. LEXIS 89242 (N.D. Cal. June 21, 2013)

Two years after denying coverage, the insurer reversed its coverage position. It then argued that because the insured had been reimbursed by its other liability insurer at Cal. Civil Code Section 2860 rates for those two years, the insured had been "appropriately reimbursed for its defense of the Underlying Action" and, thus, the insurer owed nothing. The court disagreed, stating that an insurer who wrongfully denies coverage may not rely on Section 2860 after the fact, once it has agreed to provide a defense. Allowing the insurer to piggyback its contractual obligations onto the other carrier's payments at Section 2860 rates would defeat the statute's purpose of encouraging insurers to pay because it would allow a defaulting insurer to escape liability when another insurer fulfills its own obligations.

Arrowood Indemn. Co. v. Bel Air Mart, No. 2:11-CV-00976-JAM-DAD, 2013 U.S. Dist. LEXIS 78535 (E.D. Cal. June 4, 2013)

An insurer agreed to defend its insured under a reservation of rights that triggered the insured's right to independent counsel. The insurer and the insured subsequently disputed the insurer's allocation of covered and uncovered fees and costs as well as the reasonableness and necessity of certain of the fees and costs incurred by independent counsel. The parties also disputed whether Cal. Civil Code Section 2860's arbitration requirement extended to the allocation and reasonableness disputes. The court held that because reasonableness of fees and allocation bear directly on the amount of legal fees owed, taking these two issues out of the scope of arbitration would unnecessarily separate related and dependent determinations and create judicial inefficiency.

Swanson v. State Farm Gen. Ins. Co., 219 Cal. App. 4th 1153 (Cal. Ct. App. 2013)

The court held that, after an insurer withdrew its *Cumis*-triggering reservation of rights, it no longer had an obligation to allow the insured to control the litigation or an obligation to pay the attorneys' fees of the insured's independent counsel. The court further held that the insurer had not waived its rights under *Cumis* or Cal. Civil Code Section 2860 by failing to reserve them.

Fed. Ins. Co. v. MBL, Inc., 219 Cal. App. 4th 29 (Cal. Ct. App. 2013)

A third-party defendant-insured in an environmental contamination action was not entitled to independent counsel because the insured failed to establish any conflict of interest as a result of its liability insurers' agreement to defend subject to a reservation of rights on various issues, including property damage occurring outside their respective policy periods and an absolute pollution exclusion. The issue of when the alleged damages occurred was irrelevant to defense counsel jointly retained by multiple insurers, all of whom had an interest in defeating liability. Further, defense counsel had no control over whether the absolute pollution condition barred coverage because that was an issue strictly of contract interpretation.

J.R. Mktg., LLC v. Hartford Cas. Ins. Co., 216 Cal. App. 4th 1444 (Cal. Ct. App. 2013), review granted in Hartford Casualty Ins. Co. v. J.R. Mktg., LLC, 308 P.3d 860 (Cal. 2013)

Where an insurer breached its duty to defend, the court held that it had forfeited all right to control the defense of its insured and, thus, it could not bring a reimbursement action against independent counsel for allegedly charging excessive, unreasonable or unnecessary fees to the insured. Under California law, an insurer who breaches its duty to defend may not thereafter impose on its insured its own choice of defense counsel, fee arrangement or strategy; nor can it maintain a direct suit against independent counsel for reimbursement of fees and costs charged by such counsel where the insurer considers those fees and costs unreasonable or unnecessary.

Univ. of Miami v. Great Am. Assurance Co., 112 So. 3d 504 (Fla. Dist. Ct. App. 2013)

Where two insureds were named as defendants in a suit and defense counsel, in the defense of both co-defendants, would have to argue conflicting legal positions (that each of its clients was not at fault, and the other was), the court held that the conflict of interest between the legal defenses of the common insureds required the insurer to provide indemnification for independent counsel's attorneys' fees and costs.

Auto-Owners Ins. Co. v. Lake Erie Land Co., No. 2:12-CV-184 JD, 2013 U.S. Dist. LEXIS 114481 (N.D. Ind. Aug. 13, 2013)

The insured, who sought defense and indemnity coverage under its commercial general liability policy, was entitled to independent counsel because the allegations brought by the claimant in the underlying action potentially triggered the policy's Expected/Intended Harm Exclusion and because the claimant sought treble and punitive damages, which would only be awarded upon a showing of willful conduct by the insured.

Advancement Of Defense Costs

FDIC v. OneBeacon Midwest Ins. Co., No. 11 C 3972, 2013 U.S. Dist. LEXIS 34169 (N.D. Ill. Mar. 12, 2013)

Prior to the conclusion of an underlying action, an insurer was permitted to bring a declaratory judgment action seeking a ruling that it was not liable for the defense costs it was currently advancing to the insured under a directors and officers policy. The court found that the insurer's obligation to advance defense costs and its duty to indemnify any eventual judgment in both cases were intertwined since the core issue as to the payment of defense costs was the same: Does the D&O policy cover the defendants' losses? The court concluded that the insurer's amended complaint was not barred and was "ripe for adjudication" because it would be unfair to require the insurer to wait until the conclusion of the liability action and run the risk that the insureds would be unable to satisfy a judgment for reimbursement of defense costs.

Northstar Educ. Fin., Inc. v. St. Paul Mercury Ins. Co., No. A12-0959, 2013 Minn. App. Unpub. LEXIS 32 (Minn. Ct. App. Jan. 14, 2013)

An insured was not required to pay pre-judgment interest on the defense costs advanced by an insurer under a directors and officers policy because the court held that "[t]he advancement of defense costs before it can be determined if the insured is due the costs under the policy is a risk contractually allocated to the insurer." However, the insurer was entitled to interest on the advanced defense costs accrued between the time of the award and the entry of the judgment.

Associated Cmty. Bancorp, Inc. v. St. Paul Mercury Ins. Co., No. 864107/2012, 2013 N.Y. Misc. LEXIS 352 (N.Y. Sup. Ct. Jan. 10, 2013)

An insurer was not required to advance defense costs after a finding that there was no coverage under professional liability policies. The court determined, "[i]f there is no potential for coverage under the policy, there is no duty to advance defense costs."

Allocation

Nat'l Bank of Cal. v. Progressive Cas. Ins. Co., 938 F. Supp. 2d 919 (C.D. Cal. 2013)

In a coverage action where an insurer argued that it was entitled to allocate 20 percent of loss between covered and uncovered defense costs based on the insured's relative legal exposure in connection with six separate lawsuits, the district court denied cross-motions for summary judgment because there was insufficient evidence on the record to establish whether the insurer had correctly determined what portion of the legal expenses were not covered or that the coverage decision was reasonable.

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Facility Invs., LP v. Homeland Ins. Co., 741 S.E.2d 228 (Ga. Ct. App. 2013)

In a coverage action where a professional liability insurer agreed to defend its insured in an underlying action subject to a reservation of rights and agreed to accept the claimants' settlement demand, the court found that the insurer was not entitled to demand that the settlement be allocated between covered and uncovered claims because it did not specifically reserve its rights under the allocation provision, and instead, upon learning that the insured would not agree to allocate the settlement, waived any right to seek allocation by not denying coverage or suing the insured for declaratory judgment.

Maplewood Partners, L.P. v. Indian Harbor Ins. Co., No. 08-23343-CIV-Hoeveler, 2013 U.S. Dist. LEXIS 103309 (S.D. Fla. July 16, 2013)

In a coverage action brought by insureds to challenge their insurers' partial allocation of claims made under an allocation provision in a financial and professional services indemnity policy, the district court held that the insureds waived their right to assert that certain documents were privileged from discovery because they had the burden of proving that a claim against them was covered by the policy and they placed the coverage questions relating to allocation "at issue" by bringing the coverage action. The district court also rejected the insureds' argument that the allocation clause was a coverage exemption, which would have made it the insurer's burden to prove its applicability.

UnitedHealth Grp., Inc. v. Columbia Cas. Co., 941 F. Supp. 2d 1029 (D. Minn. 2013)

In a coverage action where the insured sought coverage for the costs it incurred in settling several claims brought against it and where the underlying settlement failed to allocate between covered and uncovered matters, the insured bore the burden of proof on allocation between covered and uncovered claims, including claims that fell within an exclusion. The district court found that there were compelling reasons to impose the allocation burden on the insured because the insured controlled the underlying litigation and negotiated the underlying settlement. Although the insured could still prevail even though the settlement itself did not provide the allocation, its expert witness on the antitrust claims, which were covered under the policies, did not have sufficient expertise to evaluate the relative strength of the antitrust claims compared to the other underlying claims.

Carolina Cas. Ins. Co. v. Nanodetex Corp., 733 F.3d 1018 (10th Cir. 2013)

Under New Mexico law, an insurer was required to provide coverage for an underlying judgment rendered against its insured under a management liability policy because no element of the damages award could have been solely attributed to the excluded theory of liability. No burden of allocation existed and coverage was extended to the full amount of the damages.

World Harvest Church v. Grange Mut. Cas. Co., No. 13AP-290, 2013 Ohio App. LEXIS 5994 (Ohio Ct. App. Dec. 24, 2013)

Where an insured settled an action after an adverse jury verdict against it, and the verdict did not indicate the amount awarded for claims that were covered under a comprehensive general liability policy, the court held that although the insured generally bears the burden both of establishing coverage, as well as allocating between covered and uncovered claims, where the insurer with a duty to defend fails to ask for a special jury verdict form or special jury interrogatories, or advise the insured of the need to do so, the burden shifts to the insurer.

Automax Hyundai S., LLC v. Zurich Am. Ins. Co., 720 F.3d 798 (10th Cir. 2013)

Under Oklahoma law, a liability insurer who breached its duty to defend its insured in an underlying action bore the burden of allocating a settlement for that underlying action between covered and uncovered loss.

Exec. Risk Indem., Inc. v. Cigna Corp., 74 A.3d 179 (Pa. Super. Ct. 2013)

Where the insured settled class action claims against it that included some allegations that were covered under a professional liability policy, and some that were excluded, the appellate court affirmed a trial court's determination, after an evidentiary hearing, that the burden of proof was on the insured to demonstrate which portions of the settlement were for covered loss, in part, because the insured controlled the settlement and had more access to the reasons for settlement. The court also found that the insured failed to demonstrate that it sustained enough covered loss to trigger coverage under the excess insurer's policy.

Cousins Submarines, Inc. v. Fed. Ins. Co., No. 12-CV-387-JPS, 2013 U.S. Dist. LEXIS 17306 (E.D. Wis. Feb. 8, 2013)

Where the court determined that some of the claims that the insured faced during an underlying lawsuit were covered by a directors and officers and liability policy, and others were not, and where the policy provided for allocation between covered loss and non-covered loss based on the relative legal exposure of the parties to such matters, the court found that it was the insurer's burden to establish proper allocation, and denied summary judgment for the insurer.

Recoupment Of Defense Costs And Settlement Payments

Attorneys Liab. Prot. Soc'y, Inc. v. Wynne, No. CV-12-218-PHX-SMM, 2013 U.S. Dist. LEXIS 124623 (D. Ariz. Aug. 29, 2013)

The court held that a professional liability carrier could recoup a settlement payment where the policy and coverage letter provided for recoupment of uncovered payments.

Great Am. Ins. Co. v. Chang, No. 12-0833-SC, 2013 U.S. Dist. LEXIS 159197 (N.D. Cal. Nov. 6, 2013)

An insurer was entitled to reimbursement of uncovered defense costs even though the general liability policy did not contain a provision expressly providing for such reimbursement because an insurer's right to reimbursement is implied in law as quasi-contractual, whether or not it has one that is implied in fact in the policy as contractual.

Wallis v. Centennial Ins. Co., No. CIV 08-02558 WBS AC, 2013 U.S. Dist. LEXIS 161304 (E.D. Cal. Nov. 8, 2013)

A professional liability insurer was owed reimbursement for defense expenses related to its defense of a motion that resulted in sanctions for willful misconduct by the insured.

Century Sur. Co. v. Acer Hotel, No. C 13-00593 WHA, 2013 U.S. Dist. LEXIS 98620 (N.D. Cal. July 12, 2013)

A general liability insurer was allowed to recover defense costs advanced for uncovered claims when it defended the insured subject to a reservation of rights.

Certain Interested Underwriters at Lloyd's, London v. Halikoytakis, No. 8:09-CV-1081-T-17TGW, 2013 U.S. Dist. LEXIS 64412 (M.D. Fla. May 6, 2013)

The court held that the insurer was entitled to reimbursement of defense expenses when the insured impliedly consented to the insurer's defense subject to a reservation of such a right.

Farkas v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 518 Fed. App'x 178 (4th Cir. 2013)

Under either Florida or Illinois law, an insurer is entitled to recoup defense expenses for uncovered claims when the insurance policy expressly provides for such recoupment.

Facility Invs. LP v. Homeland Ins. Co. of N.Y., 741 S.E.2d 228 (Ga. Ct. App. 2013)

A professional liability insurer could not seek recoupment of a settlement payment when it unilaterally reserved the right to do so and failed to file a declaratory judgment action prior to making the payment.

Twin City Fire Ins. Co. v. Hartman, Simons & Wood, LLP, No. 1-13-CV-1608 (N.D. Ga. Nov. 25, 2013)

The insurer could not recoup a settlement payment under a professional liability policy, even though it had reserved its rights to do so and filed a declaratory judgment action in advance of making the payment.

Northstar Educ. Fin., Inc. v. St. Paul Mercury Ins. Co., No. A12-0959, 2013 Minn. App. Unpub. LEXIS 32 (Minn. Ct. App. Jan. 14, 2013)

The court concluded that the insured was not entitled to coverage, and that the insured was not entitled to retain the defense costs advanced by the insurer. The policy unambiguously provided that the defense costs were subject to recovery by the insurer.

Horace Mann Ins. Co. v. Hanke, 312 P.3d 429 (Mont. 2013)

An insurer was entitled to recoup a settlement payment under a homeowner's policy when it made such payment subject to a reservation of its rights to seek recoupment.

BX Third Ave. Partners, LLC v. Fid. Nat'l Title Ins. Co., No. 10577, 305864/10, 112 A.D.3d 430 (N.Y. App. Div. Dec. 5, 2013)

A title insurer was estopped from requesting recoupment of defense costs when it undertook the insured's defense without a reservation of rights.

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Fed. Ins. Co. v. Marlyn Nutraceuticals, Inc., No. 13-CV-0137(JS)(ARL), 2013 U.S. Dist. LEXIS 178565 (E.D.N.Y. Dec. 19, 2013)

The insurer was not entitled to recoup defense costs under a life sciences general liability policy because its coverage letter did not expressly reserve the right to do so.

Women's Integrated Network, Inc. v. U.S. Spec. Ins. Co., No. 12 CV 7072 (VB), 2013 U.S. Dist. LEXIS 130969 (S.D.N.Y. Aug. 9, 2013)

An insured must reimburse its insurer for uncovered defense expenses under an employment practices liability policy where the policy in question provides for such recoupment should noncoverage be finally determined.

Nat'l Sur. Corp. v. Immunex Corp., 297 P.3d 688 (Wash. 2013)

The court held that an insurer under an umbrella policy cannot seek to recoup defense costs incurred under a reservation of rights and will be held responsible for all costs until the date that a court determines there is no duty to defend.

Axis Surplus Ins. Co. v. St. Paul Fire & Marine Ins. Co., 947 F. Supp. 2d 1129 (W.D. Wash. May 24, 2013)

Under Washington law, an insurer was allowed to seek contribution from a co-insurer even though it could not seek recoupment from its mutual insured.

Consent

MarineMax, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., No. 8:10-CV-1059-T-33AEP, 2013 U.S. Dist. LEXIS 14641 (M.D. Fla. Feb. 4, 2013)

Amounts paid by an insured to settle a claim in contravention of a voluntary payment provision in a professional liability policy were deemed to be prohibited by the policy, and the insurer was therefore not required to reimburse the insured for these amounts.

McCollough v. Minn. Lawyers Mut. Ins. Co., No. CV 09-95-BLG-RFC-CSO, 2013 U.S. Dist. LEXIS 30995 (D. Mont. Mar. 6, 2013), adopted by 2013 U.S. Dist. LEXIS 60183 (D. Mont. Apr. 26, 2013)

A consent-to-settle provision in a professional liability policy providing that the insured could not negotiate or agree to a settlement of a claim without the insurer's consent was deemed to prevent the insurer from arguing that it did not have a duty to effectuate prompt, fair, and equitable settlement despite the policy also including a "hammer clause."

Paulus Sokolowski & Sartor, LLC v. Cont'l Cas. Co., No. 12-7172 (MAS)(TJB) (D.N.J. Aug. 30, 2013)

A provision in a professional liability policy requiring that an insured obtain written consent from its insurer prior to incurring expenses was deemed unambiguous and enforceable under New Jersey law.

Parvin v. CNA Fin. Corp., No. 6:10-CV-6332-TC, 2013 U.S. Dist. LEXIS 143654 (D. Or. Oct. 4, 2013)

An insurer was granted summary judgment on plaintiff insured's breach of contract claims under a professional liability policy provision requiring that the insurer obtain consent to settle a claim from the insured or a professional consultation committee, where it was determined that the insurer had obtained consent from the professional consultation committee to settle the claim against the insured.

Protectors Ins. & Fin. Servs., LLC v. Lexington Ins. Co., No. H-12-3469, 2013 U.S. Dist. LEXIS 130338 (S.D. Tex. Sept. 12, 2013)

An insurer was entitled to summary judgment on an insured's breach of contract claim under an errors and omissions policy based on the insured's failure to secure the insurer's written consent before incurring costs and expenses as mandated by the policy.

Contact

Charles A. Jones
Partner, Insurance
Washington, D.C. - 202.662.2074
tony.jones@troutmansanders.com

Editors

Brandon D. Almond
Associate, Insurance
Washington, D.C. - 202.274.2864
brandon.almond@troutmansanders.com

Binh Duong Pham
Associate, Insurance
Orange County - 949.622.2761
brinh.pham@troutmansanders.com

Insurance Members

Atlanta
Martin M. Wilson

Chicago
Eileen King Bower
Clinton E. Cameron
David F. Cutter
Seth M. Erickson*
Tyler S. Mertes*
Matthew M. Morrissey*
Milind Parekh
William P. Pipal*
Rebecca L. Ross
James J. Sanders*
Danielle N. Twait*

New York
Pamela L. Signorello

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

Raleigh
Gary S. Parsons

Richmond
Stacey E. Rufe*
Gary J. Spahn
Edward H. Starr

San Diego
Timothy P. Irving
Louise M. McCabe
Lou Segreti

Tysons Corner
Leslie S. Ahari
Sean M. Hanifin

Washington, D.C.
Brandon D. Almond*
Richard C. Ambrow*
Charles T. Blair
Daniel W. Cohen*
Jonathan A. Constine
Gary V. Dixon
John W. Duchelle
Darren W. Dwyer* **
John R. Gerstein
David M. Gische
Charles I. Hadden
Thomas S. Hay*
Merril Hirsh
Patrick F. Hofer
Elizabeth A. Jewell* **
Chares A. Jones
Prashant K. Khetan
Clarence Y. Lee
Stacey L. McGraw
Steven W. McNutt
Richard J. Pratt
Gabriela A. Richeimer
Jordan M. Rubinstein
Anna K. Schall*
Cathy A. Simon
Meredith E. Werner

*Contributors

**Not yet admitted to Washington, D.C. Bar

TROUTMAN SANDERS