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D&O and Professional Liability

2009 | A Year In Review

2009 was another dynamic year for courts confronted with issues relating to directors and officers and professional liability coverage, with no less than ten federal appellate courts, eight state supreme courts, and countless federal district courts issuing decisions of interest. Notice, particularly in the context of claims-made-and-reported policies, continues to be a heavily litigated topic, as does the applicability of "related claims" and similar provisions. Assessment of insureds' prior knowledge of potential claims, and whether claims resulted from an insured's "professional services," resulted in several significant decisions. Courts also continued to scrutinize the insurability of relief sought by third party claimants, and whether insurers may recoup defense and settlement payments made on behalf of insureds. Below we review some of the more notable rulings delivered in 2009. The issues discussed in these cases almost certainly will be significant to insurers, policyholders and courts analyzing coverage under directors and officers and professional liability policies in 2010 and beyond.

In This Issue

Notice

World Health & Educ. Found. v. Carolina Cas. Ins. Co., 612 F. Supp. 2d 1089 (N.D. Cal. 2009)

An insurer's motion to dismiss was granted without leave to amend where the insured alleged that it reported the underlying lawsuit to the insurer after the expiration of a claims-made-and-reported policy.

Charles Dunn Co. v. Tudor Ins. Co., 308 F. App'x 149 (9th Cir. 2009)

Under California law, an insurer properly denied coverage under a claims-made-and-reported policy for a claim that was made during one policy period, but was not reported to the insurer until a subsequent policy period.

OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co., 175 Cal. App. 4th 183 (App. Ct. 2009), *review denied*, 2009 Cal. LEXIS 10957 (Oct. 14, 2009)

An insurer's obligation to contribute to the defense of the insureds in an underlying lawsuit arose when the insurer learned of the claim from another defendant, regardless of whether the insureds tendered the claim for coverage.

Safeco Ins. Co. of Am. v. Parks, 170 Cal. App. 4th 992 (App. Ct. 2009), *review denied*, 2009 Cal. LEXIS 4191 (Apr. 29, 2009)
An insurer did not establish that it suffered prejudice due to an insured's delay in reporting a claim under a renters policy where the insurer would have relied on an exclusion in the policy, even in the absence of late notice, to deny coverage for the claim.

Am. Auto. Ins. Co. v. Marlow, No. 07-2180, 2009 U.S. Dist. LEXIS 90161 (D. Colo. Sept. 29, 2009)
An insurer's motion for summary judgment was granted where a claim was both made and reported after the expiration of a claims-made-and-reported policy.

Fleming, Ingram & Floyd, P.C. v. Clarendon Nat'l Ins. Co., No. 108-75, 2009 U.S. Dist. LEXIS 120784 (S.D. Ga. Nov. 29, 2009)
Under Georgia law, an insured's notice of a claim to its insurance agent was insufficient notice under a claims-made-and-reported professional liability policy where the policy required notice to the insurer and there was no evidence that the insurance agent to which the insured gave notice was an agent of the insurer.

U.S. Fid. & Guar. Co. v. VOA Assocs., No. 08-862, 2009 U.S. Dist. LEXIS 77205 (N.D. Ill. Aug. 27, 2009)
Under Illinois law, a question of fact existed as to whether a design firm insured under a claims-made-and-reported professional liability policy complied with the policy's notice requirement where the insured contended that it first learned and gave notice of circumstances of a potential "professional liability" claim during the policy period, even though the insured had been sued, prior to the policy period, based on "general liability" allegations in the same underlying suit.

AIG Domestic Claims, Inc. v. Tussey, No. 2008-CA-001248-MR, 2009 Ky. App. Unpub. LEXIS 727 (Ky. Ct. App. Aug. 28, 2009)
An insurer properly denied coverage under a claims-made-and-reported errors and omissions policy for a claim that was made during one policy period, but was not reported to the insurer until the subsequent policy period.

Vitto v. Davis, 23 So. 3d 1048 (La. Ct. App. 2009)
The reporting requirement in a claims-made-and-reported professional liability policy does not violate La. R.S. 22:629, which prohibits an insurance policy from limiting a right of action to one year or less from the date the cause of action accrues, because claims-made-and-reported policies do not limit the time in which an injured party may file suit against an insured, but only limit the time during which an insurer provides coverage for such actions.

Med. Mut. Ins. Co. v. Indian Harbor Ins. Co., 583 F.3d 57 (1st Cir. 2009)
Under Maine law, a suit filed against a company did not constitute a "claim" within the meaning of a directors and officers liability policy where the complaint did not name any insured person as a defendant, even though it did include allegations of wrongdoing by insured persons.

Gargano v. Liberty Int'l Underwriters, 572 F.3d 45 (1st Cir. 2009)
Under Massachusetts law, an insurer properly denied coverage for a claim under a professional liability policy where the insured failed to provide notice within the time period specified in the policy.

Title One, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., No. 08-11624, 2009 U.S. Dist. LEXIS 88800 (E.D. Mich. Sept. 1, 2009)
A forty-one month delay in reporting a claim under a claims-made policy does not constitute notice "as soon as practicable" under Mich. Comp. Law § 500.3008, which excuses late notice if an insured shows that notice could not be given within the time prescribed by a policy, but was given as soon as practicable.

Owatonna Clinic-Mayo Health Sys. v. Med. Protective Co. of Fort Wayne, No. 08-417, 2009 U.S. Dist. LEXIS 69839 (D. Minn. Aug. 10, 2009)
Predicting that the Minnesota Supreme Court would apply a substantial compliance standard to the notice requirement in a claims-made medical malpractice insurance policy, the court held that an insured substantially complied with the policy's notice requirement by providing notice of the time, place and circumstances of a deviation in the standard of care.

Landry v. Intermed Ins. Co., 292 S.W.3d 352 (Mo. Ct. App. 2009)
Under Missouri law, an insured under a claims-made medical malpractice policy provided sufficient notice of a claim where the insured sent an email to the insurer providing the name of the insured, the name of the claimant, and the date of service to the claimant, and identifying the allegations as "Missed acute MI."

Hermann Servs. Inc. v. Resurgens Specialty Underwriting Inc., No. 08-1213, 2009 U.S. Dist. LEXIS 66943 (D.N.J. Aug. 3, 2009)
Under a claims-made-and-reported directors and officers liability policy, an insurer need not establish prejudice in order to deny coverage for a claim based on insured's failure to provide timely notice of the claim.

Popovich & Popovitch LLC v. Evanston Ins. Co., No. 07-2225, 2009 U.S. Dist. LEXIS 72803 (D.N.J. Aug. 17, 2009)
An insured was not entitled to coverage under a claims-made-and-reported professional liability policy where the insured failed to forward a complaint to its insurer, thereby prejudicing the insurer, after the insured provided an earlier notice of circumstances.

S & L Oil, Inc. v. Zurich Am. Ins. Co., No. 07-1883, 2009 U.S. Dist. LEXIS 58748 (E.D. Cal. July 8, 2009)
Under New York law, an insured was not entitled to coverage for pollution cleanup costs under a claims-made-and-reported policy where the insured did not provide timely notice of the claim.

Bear Wagner Specialists, LLC v. Nat'l Union Fire Ins. Co., 24 Misc. 3d 1218A (N.Y. Sup. Ct. 2009)
An insurer waived the right to deny coverage based on late notice under an errors and omissions policy when it failed to reserve its right to do so in a denial letter.

J.P. Morgan Chase & Co. v. Travelers Indem. Co., 880 N.Y.S.2d 224 (Sup. Ct. 2009)
An insured's notice of a potential claim referencing potential causes of action that might be brought against the insured constituted sufficient notice of "wrongful acts" under a policy providing directors and officers, errors and omissions, and bankers liability coverage, regardless of whether the insured had actual knowledge of wrongdoing at the time of the relevant notice.

MBIA, Inc. v. Fed. Ins. Co., No. 08-4313, slip op. (S.D.N.Y. Dec. 30, 2009), *appeal docketed*, No. 10-386 (2d Cir. Jan. 28, 2010)
Under a directors and officers policy, a state subpoena constituted a "claim" because it was a "formal or informal investigative order."

Warren v. Fed. Ins. Co., No. 08-4448, 2009 U.S. App. LEXIS 28149 (6th Cir. Dec. 22, 2009)
Under Ohio law, a letter stating that a bank was evaluating its rights and remedies with regard to possible financial misrepresentations by the insureds was not equivalent to a demand for monetary damages or non-monetary relief and, thus, did not constitute a "claim" under a directors and officers liability policy.

Elkins v. Am. Int'l Specialty Lines Ins. Co., 611 F. Supp. 2d 752 (S.D. Ohio 2009)
Under Ohio law, notice of a claim given by a claimant's attorney to the insured's broker during the policy period, but not reported to the insurer by the insured until after the expiration of the extended reporting period, did not satisfy the reporting requirements under a claims-made-and-reported professional liability policy.

Leak v. Lexington Ins. Co., 641 F. Supp. 2d 671 (S.D. Ohio 2009)
Under Ohio law, knowledge of a claim by an insured's agent was imputed to the insured, and the failure to provide notice of that claim under a claims-made professional liability policy, or to disclose the claim when applying for a subsequent policy, precluded coverage under both policies.

Mt. Hood, LLC v. Travelers Cas. & Sur. Co. of Am., No. 08-1068, 2009 U.S. Dist. LEXIS 16775 (D. Or. Mar. 3, 2009)
Even though an underlying lawsuit was not filed during the insured's claims-made policy period, the insured was entitled to a defense in the lawsuit because he provided notice to the insurer, during the policy period, of a letter from the claimants demanding monetary relief. Not only was the letter a "claim," as defined in the policy, but, even if it was not, the insured's tender of the letter to the insurer would have constituted notice of a potential claim.

Post v. St. Paul Travelers Ins. Co., 593 F. Supp. 2d 766 (E.D. Pa. 2009)
A letter stating that a claimant would sue the insured for malpractice, but not explicitly referencing damages, was a claim under a professional liability policy defining "claim" to mean a "demand that seeks damages."

Fulton Bellows, LLC v. Fed. Ins. Co., 662 F. Supp. 2d 976 (E.D. Tenn. 2009)
Noting a lack of binding authority under Tennessee law, a federal district court predicted that the Tennessee Supreme Court might require an insurer to show prejudice in situations in which notice, although untimely, is made within the policy period of a claims-made policy.

Fin. Indus. Corp. v. XL Specialty Ins. Co., 285 S.W.3d 877 (Tex. 2009)
As long as an insured provides notice of a claim at some point during the policy period of a claims-made policy, the insurer may not deny coverage for that claim on the basis of late notice unless the insurer can demonstrate that it has suffered prejudice as a result of the insured's delay in reporting.

Prodigy Communications Corp. v. Agric. Excess & Surplus Ins. Co., 288 S.W.3d 374 (Tex. 2009)
An insurer could not deny coverage based on the insured's failure to provide notice as soon as practicable where the insurer had admitted that it was not prejudiced by the delay in reporting and notice had been given by the insured prior to expiration of the policy's reporting period.

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E. Tex. Med. Ctr. Reg'l Healthcare Sys. v. Lexington Ins. Co., 575 F.3d 520 (5th Cir. 2009)
Applying Texas law, although the insured provided notice of a claim to its insurer during the claims-made policy period, a fact issue existed regarding whether the insurer had been prejudiced by the insured's failure to provide notice of a subsequent lawsuit until seven months after it had been filed and the policy had expired.

Pennzoil-Quaker State Co. v. Am. Int'l Specialty Lines Ins. Co., 653 F. Supp. 2d 690 (S.D. Tex. 2009)
An insurer did not have to show prejudice in order to deny coverage for a claim under a claims-made-and-reported policy where notice of the claim was not provided until six years after a lawsuit had been filed and five years after expiration of the policy period.

Westport Ins. v. Ray Quinney & Nebeker, No. 07-236, 2009 U.S. Dist. LEXIS 69203 (D. Utah Aug. 7, 2009)
Where a claims-made-and-reported policy required written notice of a claim, an insured's oral notice was ineffective to trigger coverage. The insurer's motion for summary judgment was denied, however, in order to permit discovery regarding whether the insured should be equitably estopped from enforcing the policy's notice provisions.

Manufactured Hous. Cmtys. v. St. Paul Mercury Ins. Co., No. 09-5088, 2009 U.S. Dist. LEXIS 92081 (W.D. Wash. Oct. 2, 2009)
A reporting requirement in a claims-made policy that required notice as soon as practicable and during the policy period as a condition precedent to coverage was not ambiguous, and did not require a demonstration of prejudice by the insurer in order to deny coverage based on the insured's untimely notice of a claim.

Westport Ins. Corp. v. Markham Group, Inc., No. 08-221, 2009 U.S. Dist. LEXIS 76877 (E.D. Wash. Aug. 26, 2009)
Where the insured obtained successive claims-made-and-reported legal malpractice policies, the insurer was required to demonstrate that it was prejudiced by the insured's failure to provide notice of a potential claim during a prior policy period in order to deny coverage based on a prior knowledge exclusion.

Riverfront Landing Phase II Owners' Ass'n v. Assurance Co. of Am., Case No. 08-656, 2009 U.S. Dist. LEXIS 57143 (W.D. Wash. July 6, 2009)
The court found that a triable issue of fact existed as to whether an insurer was prejudiced by an insured's late notice, and suggested that a defense based on late notice would not bar a third-party claim by another insurer.

SNL Fin., LC v. Phila. Indem. Ins. Co., No. 09-10, 2009 U.S. Dist. LEXIS 93319 (W.D. Va. Sept. 30, 2009)
Under a claims-made employment practices liability policy, neither a letter stating that counsel for a former employee wanted to discuss certain discriminatory conduct by the insured, nor a subsequent oral settlement demand, constituted a "claim," which was defined as a written demand for monetary or non-monetary relief.

Related Claims

Peoplesupport Rapid Text Inc. v. Ill. Union Ins. Co., No. 08-00103-JVS, 2009 U.S. Dist. LEXIS 87732 (C.D. Cal. April 29, 2009)
A shareholder-director's arbitration demand, seeking relief against his co-directors and an insured entity for failure to pay contractual obligations and accounting fraud, was deemed a claim first made before the policy incepted because both the arbitration demand, and the claimant's pre-policy demand to be bought out of the company, asserted interrelated wrongful acts.

Berry & Murphy, P.C. v. Carolina Cas. Ins. Co., 586 F.3d 803 (10th Cir. 2009)
Under Colorado law, a claim under a lawyers professional liability policy by former clients alleging that an attorney's failure to opt out of certain disclosure rules resulted in dismissal of the clients' case was related to a prior letter from the same former clients advising the attorney to put his malpractice carrier on notice of a potential claim based on his alleged failure to submit required witness disclosures, because there was only one injury flowing from the multiple alleged acts of malpractice.

KB Home v. The Travelers Ins. Co., No. 09-10404, 2009 U.S. App. LEXIS 16883 (11th Cir. July 27, 2009)
Under Florida law, three of four claims submitted under an employment practices liability policy were not covered because they involved the same incident and, therefore, related back to the date of a claim made prior to the policy period. A fourth claim, however, was not related to the pre-policy claim because it was based on different incidents and time frames.

Vozzcom, Inc. v. Beazley Ins. Co., No. 08-62044-CIV-Altonaga/Brown (S.D. Fla. June 17, 2009)
Two separate actions brought by two former employees were related and, thus, constituted a single claim under an employment practices liability policy where both lawsuits accused the insured of failing to pay overtime and were asserted by employees who did the same job at approximately the same time.

Vozzcom, Inc. v. Great Am. Ins. Co., No. 09-60922-CIV-Altonaga/Brown, 2009 U.S. Dist. LEXIS 104866 (S.D. Fla. Sept. 18, 2009)
Under an employment practices liability policy, a lawsuit filed by an insured's former employee alleging failure to pay overtime was related to two previous actions by former employees making the same allegation, because all three employees did the same job at approximately the same time, even though the third employee's suit was filed one year later than the other two lawsuits.

ACI/Boland, Inc. v. U.S. Specialty Ins. Co., No. 07-378, 2009 U.S. Dist. LEXIS 2347 (E.D. Mo. Jan. 14, 2009)
An insured was not entitled to coverage under a claims-made professional liability policy for a lawsuit filed after the inception of the policy where a claim alleging the same wrongful acts had been asserted as a counterclaim against the insured before the inception of the policy.

G-I Holdings, Inc. v. Reliance Ins. Co., 586 F.3d 247 (3d Cir. 2009)
Under New Jersey law, coverage for two fraudulent conveyance actions was barred by an interrelated wrongful acts provision in a directors and officers liability policy because the actions were related to a different fraudulent conveyance suit filed during a prior policy period, where that suit was based on the same allegedly fraudulent transfer.

First Trenton Indem. Co. v. River Imaging, P.A., No. A-6191-06T3, 2009 N.J. Super. Unpub. LEXIS 2190 (N.J. Super. Ct. App. Div. Aug. 11, 2009)
A claim alleging that the insured fraudulently overcharged for medical services was not related to an earlier lawsuit accusing the insured of breach of contract and breach of fiduciary duties in connection with a medical partnership, because there was no "substantial overlap" among the parties involved, factual allegations, and causes of actions asserted in the two actions.

Quanta Lines Ins. Co. v. Investors Capital Corp., No. 06-4624, 2009 U.S. Dist. LEXIS 117689 (S.D.N.Y. Dec. 17, 2009)
Various arbitrations against an insured broker/dealer, alleging that the insured's employee sold unregistered securities and that the insured failed to supervise the employee, were deemed to be claims first made before the inception of the insured's professional liability policy because the arbitrations, and a pre-policy demand letter from another client based on the same employee's sale of the same unregistered securities, asserted interrelated wrongful acts.

Westport Ins. Corp. v. Coffman, No. 05-1152, 2009 U.S. Dist. LEXIS 6302 (S.D. Ohio Jan. 29, 2009)
A claim accusing an insured lawyer of failing to register various transfers of ownership and rights of use of a fictitious name on behalf of a collection agency client, and of failing to advise the client how to properly attach a debtors' assets, was related to a class action against the insured and his client alleging improper collection of consumer debts, because the alleged acts of malpractice created the basis for the class action allegations.

Alexander Mfg., Inc. Employee Stock Ownership & Trust v. Ill. Union Ins. Co., No. CV.06-735-PK, 2009 U.S. Dist. LEXIS 95897 (D. Or. Oct. 14, 2009)
An action by a creditor alleging reliance on false financial information in extending credit and a derivative action alleging that certain officers breached their fiduciary duties by shifting costs among projects such that the company's financial reports were deceptive were related claims as defined by both parts of a package directors and officers liability and fiduciary liability policy because the relevant acts and the pattern of conduct were the same in each lawsuit.

Oregon State Bar Prof'l Liab. Fund v. Benfit, 201 P.3d 936 (Or. Ct. App. 2009)
A single per claim limit of liability applied to claims against two attorneys where both claims arose out of work to establish and maintain the same business enterprise, involved clients that were connected to each other, and sought the same damages.

Liberty Ins. Underwriters, Inc. v. Camden Clark Mem'l Hosp. Corp., No. 08-01219, 2009 U.S. Dist. LEXIS 114278 (S.D. W.Va. Dec. 8, 2009)
Allegations that an insured lawyer improperly filed counterclaims on behalf of his client in two separate medical malpractice lawsuits brought by the same claimant arose out of "related wrongful acts." The lawsuits, therefore, would be treated as a single claim, subject to a single per claim limit of liability under the insured's professional liability policy, regardless of the number of underlying lawsuits on which the claim was based.

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Prior Knowledge, Known Loss and Rescission

Platte River Ins. Co. v. Baptist Health, No. 4:07-cv-0036, 2009 U.S. Dist. LEXIS 64197 (E.D. Ark. April 17, 2009)
Applying an objective standard, an insurer was entitled to rescind a directors and officers liability policy and to reimbursement of defense expenses paid where the insured failed to disclose, in its renewal application, information about its adoption of an economic credentialing policy that gave rise to several claims against it. At the time of the application, the insured was aware, but did not disclose, that other hospitals adopting similar economic credentialing policies had become involved in litigation as a result, and that serious concerns about the credentialing policy had been raised by physicians, including one of the insured's board members.

Flanigan v. Tudors Ins. Co., No. G040495, 2009 Cal. App. Unpub. LEXIS 4761 (Cal. Ct. App. June 16, 2009)
A prior knowledge exclusion in a professional liability policy precluded both defense and indemnity coverage where the insured real estate agent was aware, prior to the policy's inception, that a former client had threatened litigation against her.

Admiral Ins. Co. v. Sonicblue, Inc., No. 07-cv-04185, 2009 U.S. Dist. LEXIS 71935 (N.D. Cal. Aug. 14, 2009)
An insurer was entitled to rescind a consumer electronic maker's directors and officers liability policy based on the insured's failure to disclose its precarious financial situation and one or more potential or pending claims by the company's bondholders in its application for the policy.

Weddington v. United Nat'l Ins. Co., No. 08-15727, 2009 U.S. App. LEXIS 21095 (9th Cir. Sept. 23, 2009)
Under California law, a prior knowledge exclusion in a lawyers professional liability policy precluded coverage for a malpractice claim where the insured attorney knew, prior to the policy's inception, that her client's case had been dismissed based on a failure to prosecute.

Rivelli v. Twin City Fire Ins. Co., No. 08-5009, 2008 U.S. App. LEXIS 23559 (10th Cir. Oct. 26, 2009)
Under Colorado law, a warranty letter exclusion barred coverage under an excess directors and officers liability policy for defense costs incurred by the insured in defending a lawsuit filed by the SEC, where a prior SEC filing against the insured demonstrated the insured's knowledge, prior to submitting the warranty letter, of acts that could give rise to a claim under the policy.

Phila. Indem. Ins. Co. v. Atl. Risk Mgmt., Inc., No. CV-064018752, 2009 Conn. Super. LEXIS 2108 (Conn. Super. Ct. July 30, 2009)
In determining the applicability of a prior knowledge exclusion in a professional liability policy, a triable issue of fact existed as to whether the insured risk management company should have foreseen a claim arising out of the fact that, in handling a claim by one of its own clients, it denied coverage, failed to appoint counsel and allowed a default judgment to be entered against the client.

H.S.B. Group, Inc. v. S.V.B. Underwriting, Ltd., No. 3:04-cv-2127 (SRU), 2009 U.S. Dist. LEXIS 90723 (D. Conn. Sept. 30, 2009)
Applying a mixed subjective/objective standard to a prior knowledge exclusion in a professional liability policy, a triable issue of fact existed regarding whether the insured reasonably should have expected claims to be filed against it in connection with a nursing home explosion at a facility for which it provided boiler inspection services.

Dyncorp v. Certain Underwriters at Lloyd's, No. 08C-09-218 JRJ, 2009 Del. Super. LEXIS 412 (Del. Super. Ct. Nov. 9, 2009)
A known loss exclusion did not preclude coverage under an aviation liability policy for bodily injury or property damage resulting from the insured's aerial spraying activities. Despite the fact that a lawsuit previously had been filed against the insured alleging harm from those activities, no determination had been made that actually would link the spraying activities to the injuries alleged in the lawsuit.

Ross v. Cont'l Cas. Co., No. 07-1450 (RWR) (AK), 2009 U.S. Dist. LEXIS 112048 (D.D.C. Dec. 2, 2009)
In order to deny coverage based on a prior knowledge exclusion, a professional liability insurer was not obligated to demonstrate intent on the part of the insured. Although District of Columbia law requires an intent to deceive in order for an insurer to rescind a policy due to a false statement in the application, this law does not apply when the insurer is invoking a policy exclusion rather than attempting to rescind the policy.

Westport Ins. Co. v. Law Offices of Gerald J. Lindor, P.A., No. 08-61644-CIV-HUCK/O'SULLIVAN, 2009 U.S. Dist. LEXIS 22104 (S.D. Fla. March 18, 2009)
A known loss exclusion barring coverage for acts the insured knew or reasonably could foresee might give rise to a claim precluded defense and indemnity coverage under a lawyers professional liability policy for misappropriation and commingling of a client's loan closing funds where the insured lawyer acknowledged knowingly misappropriating client funds for at least ten years prior to the inception of the policy.

Keenan Hopkins Schmidt & Stowell Contractors, Inc. v. Cont'l Cas. Co., 653 F. Supp. 2d 1255 (M.D. Fla. 2009)
A known loss provision excluding coverage for any loss that manifested itself prior to the policy period barred defense coverage under a commercial general liability policy for loss resulting from damage discovered, but not attributed to the insured, before the policy incepted.

Employers Reinsurance Corp. v. Globe Newspaper Co., 560 F.3d 93 (1st Cir. 2009)
Under Massachusetts law, the known loss doctrine did not bar coverage for claims of libel and invasion of privacy against an insured newspaper where the insured was not yet a party to any litigation, but was aware, when applying for the policy, of a private letter requesting damages from the insured for alleged errors and mischaracterizations about the claimant in a published news story.

Chapman v. Minn. Lawyers Mut. Ins. Co., No. A08-1153, 2009 Minn. App. Unpub. LEXIS 698 (Minn. Ct. App. June 30, 2009)
An insurer was entitled to rescind a professional liability policy where, during a policy renewal, the insured attorney failed to disclose that it had received a demand for money by a disgruntled client.

Westport Ins. Corp. v. Jacobs & Barbone, P.A., No. 1:08-cv-0801 (NLH), 2009 U.S. Dist. LEXIS 23869 (D.N.J. Mar. 25, 2009)
A prior knowledge exclusion barred coverage for a legal malpractice claim where it was reasonably foreseeable, prior to the policy's inception, that a claim could result from the insured's failure to properly serve a summons.

United Nat'l Ins. Co. v. Granoff, Walker & Forlenza, P.C., No. 06 Civ. 3999 (DC), 2009 U.S. Dist. LEXIS 14839 (S.D.N.Y. Feb. 23, 2009)
An insurer could not rescind a professional liability policy where, at the time of the application, the insured law firm could not reasonably have foreseen a malpractice claim arising out of representation of a client in a property sale, in which the client's sales contract was cancelled due to the client's own conduct. The client had made no contrary allegations against the insured and continued an attorney-client relationship with the insured regarding other matters.

XL Specialty Ins. Co. v. Agoglia, Nos. 08 Civ. 3821 (GEL), 08 Civ. 4196 (GEL), 08 Civ. 5252 (GEL), 2009 U.S. Dist. LEXIS 36601 (S.D.N.Y. March 2, 2009)
Coverage by two excess directors and officers liability insurers was precluded due to prior knowledge endorsements in the respective policies, which superseded a contradictory severability clause in the primary policy. A triable question of fact existed, however, regarding whether a third excess insurer was obligated to provide coverage, because its policy included a prior knowledge exclusion and severability clause different from those in the primary policy, and the court could not find as a matter of law that this superseded the primary policy.

J.P. Morgan Chase & Co. v. Twin City Fire Ins. Co., No. 601904/06, 2009 N.Y. Misc. LEXIS 2714 (N.Y. Sup. Ct. March 25, 2009)
An insurer providing excess banker's professional liability coverage waived its right to assert rescission of the policy on the grounds of fraudulent concealment and inducement, where the insurer continued to retain premiums for four years after discovery of the insured's alleged misrepresentations.

S & L Oil, Inc. v. Zurich Am. Ins. Co., No. 2:07-cv-01883-MCE-KJM, 2009 U.S. Dist. LEXIS 58748 (E.D. Cal. July 10, 2009)
Under New York law, a known loss exclusion precluded coverage for a claim arising from the insured's petroleum contamination where the insured was aware of leaks in underground storage tanks and resulting contamination prior to the policy's inception.

Am. Auto. Ins. Co. v. Advest, Inc., No. 08 Civ. 6488 (LAK), 2009 U.S. Dist. LEXIS 101572 (S.D.N.Y. Oct. 28, 2009)
Notwithstanding its provision of a defense in the underlying action, an insurer could deny coverage for the claim pursuant to a prior knowledge carve-out in the insuring agreement of a professional liability policy where the insured knew of an employee's participation in an illegal kickback scheme on the effective date of the policy.

Quanta Lines Ins. Co. v. Investors Capital Corp., No. 06 Civ. 4624 (PKL), 2009 U.S. Dist. LEXIS 117689 (S.D.N.Y. Dec. 17, 2009)
Applying a mixed subjective/objective standard, a prior knowledge exclusion in a professional liability policy precluded coverage for various arbitrations against the insured broker/dealer where, prior to the policy's inception, the insured's general counsel knew of an investigation by the North Carolina Securities Division, a complaint letter from a former client, and a cease and desist order, all regarding the sale of fraudulent securities by a former registered representative of the insured.

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Chicago Ins. Co. v. Capwill, No. 3:01 CV 2588, 2009 U.S. Dist. LEXIS 87229 (N.D. Ohio Sept. 21, 2009)
Misstatements in an insured's application for a professional liability policy were found to be representations, rather than warranties, and thus rendered the policy voidable, rather than void *ab initio*.

Executive Risk Indem. Inc. v. Pepper Hamilton LLP, NY Slip Op 7453 (N.Y. Oct. 20, 2009)
Under Pennsylvania law, a prior knowledge exclusion in a professional liability policy does not require the insured to have knowledge of wrongful acts committed by the insured itself, but does require knowledge of acts which may form the basis of a claim against the insured. Applying this standard, the policy did not provide coverage for a claim against the insured where it knew, before the effective date of the policy, that its former client had been sued for securities fraud in connection with a loan securitization instrument the firm helped prepare.

Am. Guarantee & Liab. Ins. Co. v. Hoeffner, No. H-08-1181, 2009 U.S. Dist. LEXIS 31727 (S.D. Tex. Jan. 16, 2009)
A prior knowledge exclusion did not bar coverage under a professional liability policy for claims accusing the insured lawyers of involvement in a kickback scheme that caused their clients to settle lawsuits for arbitrary amounts, where the claimants did not allege that the insureds knew, prior to the policy's inception, that they were breaching any professional duties or that their conduct could result in a claim.

Westport Ins. Corp. v. Cotten Schmidt LLP, 609 F. Supp. 2d 796 (N.D. Tex. March 18, 2009)
Applying a mixed subjective/objective standard, a prior knowledge exclusion in a lawyers professional liability policy did not bar coverage for a legal malpractice claim where the underlying complaint did not allege that any insured knew that a claim was forthcoming prior to the inception of the policy, and a reasonable attorney would not necessarily have anticipated that a claim might be asserted.

Westport Ins. Co. v. RQN, No. 2:07-CV-236-TC, 2009 U.S. Dist. LEXIS 69203 (D. Utah Aug. 7, 2009)
Applying a mixed subjective/objective standard, a triable issue of fact existed as to whether a professional liability policy's prior knowledge exclusion precluded coverage for malpractice claims made against the insured law firm, despite the fact that, eighteen months before the policy's effective date, the insured received letters from a client suggesting, without elaboration, that the insured may have breached a professional duty and instructing the insured to notify its professional liability carrier of a potential claim.

The Doctor's Co. v. Drezga, No. 20080514, 2009 Utah LEXIS 187 (Utah Sept. 15, 2009)
An insurer could not rescind a medical malpractice policy that already had been cancelled because policy language indicated that the insurer either could rescind or cancel the policy, but could not do both.

Minn. Lawyers Mut. Ins. Co. v. Hancock, 600 F. Supp. 2d 702 (E.D. Va. March 3, 2009)
An insurer could rescind a lawyers professional liability policy by showing that statements on the insurance application, indicating that no insured was aware of any incident which could reasonably result in a claim, were false, regardless of whether the individual insured providing the information actually knew the statements were false.

Koger Mgmt. Group, Inc. v. Cont'l Cas. Co., No. 1:08-cv-301, 2009 U.S. Dist. LEXIS 18620 (E.D. Va. March 3, 2009)
An insurer was entitled to rescind a crime insurance policy based on the insured company's knowingly false statement, in its policy application, that its bank accounts were reconciled by someone who was not authorized to deposit or withdraw from the accounts. Because the application asked the applicant to "attest to the truth of the statement to the best of his knowledge," the insurer had to prove that the answer was knowingly false.

Prior Acts, Prior Notice, and Pending and Prior Litigation Exclusions

Vozzcom, Inc. v. Great Am. Ins. Co. of N.Y., No. 09-60922, 2009 U.S. Dist. LEXIS 104866 (S.D. Fla. Sept. 18, 2009)
Prior notice and prior litigation exclusions in an employment practices liability policy precluded coverage for a Fair Labor Standards Act claim that, along with another FLSA claim asserted by a different employee against the insured during a prior policy period, alleged closely related facts.

James River Ins. Co. v. Kemper Cas. Ins. Co., 585 F.3d 382 (7th Cir. 2009)
Under Illinois law, a lawyers professional liability insurer was not obligated to contribute toward a claim with the insured's prior professional liability insurer where the later policy excluded coverage for any claim arising from a common fact, circumstance, or decision that was reported as a claim under a prior policy, and the alleged wrongful acts in the later policy period arose from decisions made by insured lawyers during the earlier policy period.

ACI/Boland, Inc. v. U.S. Specialty Ins. Co., No. 07-0378, 2009 U.S. Dist. LEXIS 2347 (E.D. Mo. Jan. 14. 2009)
A prior acts exclusion in a professional liability policy precluded coverage for claims alleging errors and omissions by an architectural firm where facts underlying the claim made during the policy period were the same facts as those asserted against the insured in a counterclaim filed before the policy's inception.

Pereira v. Gulf Ins. Co., 330 F. App'x 5 (2d Cir. 2009)
Under New York law, a prior litigation exclusion in directors and officers liability policies barred coverage for various indemnity claims asserted by a bankruptcy trustee against individual insureds. The insurer was not estopped from denying coverage based on the prior litigation exclusion, and the court rejected the trustee's argument that the district court interpreted the prior litigation exclusion too broadly by considering losses that accrued during time periods other than those at issue in the prior litigation.

Quanta Lines Ins. Co. v. Investors Capital Corp., No. 06 Civ. 4624 (PKL), 2009 U.S. Dist. LEXIS 117689 (S.D.N.Y. Dec. 17, 2009)
A pending and prior claim exclusion barred coverage under a professional liability policy for multiple arbitrations commenced against an insured where the allegations made in those arbitrations were the same as those asserted in a prior demand letter from an investor, an investigation by the North Carolina Securities Division, and a cease and desist order, all of which occurred and were known to the insured prior to the policy's inception.

Med. Protective Co. of Fort Wayne, Ind. v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n, 648 F. Supp. 2d 753 (D.S.C. 2009)
In an action between two professional liability insurers seeking a declaration as to their respective obligations for the alleged malpractice of their mutual insureds, coverage for the portion of a settlement attributable to a claimant's injuries suffered before the retroactive date of the second insurer's professional liability policy was precluded by a prior acts exclusion in the second insurer's policy.

Fulton Bellows, LLC v. Fed. Ins. Co., No. 08-107, 2009 U.S. Dist. LEXIS 86205 (E.D. Tenn. Sept. 21, 2009)
A prior acts exclusion in the employment practices liability coverage section of a directors and officers liability policy did not preclude coverage for a discrimination claim against the insured because a question of fact existed as to whether the claim arose from wrongful acts that occurred prior to the policy's inception.

Dishonesty, Personal Profit and Intentional Acts Exclusions

Greenwich Ins. Co. v. Media Breakaway, LLC, No. 08-937, 2009 U.S. Dist. LEXIS 63454 (C.D. Cal. July 22, 2009)
A final arbitration award in an underlying action finding that the insureds permitted, encouraged, supported and benefited from illegal spamming served as collateral estoppel in a later coverage action and triggered application of the dishonesty and personal profit exclusions in both a directors and officers liability policy and an errors and omissions liability policy.

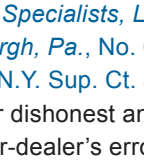
Westport Ins. Corp. v. Law Offices of Gerald J. Lindor, P.A., No. 08-616-44, 2009 U.S. Dist. LEXIS 22104 (S.D. Fla. Mar. 18, 2009)
An exclusion for "intentional, criminal, dishonest, malicious or fraudulent" acts precluded coverage under a lawyers professional liability policy for intentional misappropriation and commingling of client funds.

Miller v. Westport Ins. Corp., 200 P.3d 419 (Kan. 2009)
A dishonesty exclusion in an agent's errors and omissions insurance policy did not relieve the insurer of its obligation to defend the insured in underlying litigation where the allegedly dishonest acts had not been proven or admitted, and trial and appellate court rulings found that the dishonest conduct was not foreseeable.

Wintermute v. Kan. Bankers Sur. Co., No. 03-03285, 2009 U.S. Dist. LEXIS 56666 (W.D. Mo. July 2, 2009)
The allegations in a criminal indictment alleging bank fraud and fraudulent enrichment triggered application of dishonesty and "personal profit or advantage" exclusions under a directors and officers liability policy, despite the insured ultimately being acquitted of the counts alleging fraud and fraudulent enrichment.

Am. Auto. Ins. Co. v. Advest, Inc., No. 08-6488, 2009 U.S. Dist. LEXIS 101572 (S.D.N.Y. Oct. 28, 2009)
A professional liability policy did not provide coverage for claims arising out of the insured's alleged commission of bank fraud because the insured received "substantial profits" to which it was not legally entitled.

Bear Wagner Specialists, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., No. 650261/08, 2009 N.Y. Misc. LEXIS 1806 (N.Y. Sup. Ct. July 7, 2009)
Exclusions for dishonest and unlawful conduct in an insured broker-dealer's errors and omissions policy



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and directors and officers liability policy precluded coverage for various civil actions brought against the insured after it entered into a settlement with the SEC agreeing to disgorge profits and pay a civil penalty.

Alexander Mfg., Inc. Employee Stock Ownership & Trust v. Ill. Union Ins. Co., No. 06-735, 2009 U.S. Dist. Lexis 95897 (D. Or. Oct. 14, 2009)
A dishonesty exclusion in a directors and officers and fiduciary liability policy will not apply unless a "final judicial decision" establishing the specified conduct has been entered against the insured in the underlying action.

Pincus v. Chubb Group of Ins. Cos., No. 08-1483, 2009 U.S. Dist. LEXIS 26599 (E.D. Pa. Mar. 27, 2009)
An intentional acts exclusion precluded coverage for allegations of sexual abuse and rape regardless of whether the claimant also attempted to characterize those allegations as claims of negligence.

Nations First Mortgage, LLC v. Tudor Ins. Co., No. 05-2527, 2009 U.S. Dist. LEXIS 90343 (M.D. Pa. Sept. 30, 2009)
An errors and omissions liability policy did not provide coverage for the insured's alleged improper actions as a mortgage broker where the underlying lawsuit alleged deliberate and willful conduct, not negligent acts.

Transcore, LP v. Caliber One Indem. Co., 972 A.2d 1205 (Pa. Super. Ct. 2009)
In an action for declaratory judgment, the court found that the insured's professional liability policy did not provide coverage for a claim alleging that the insured induced a third party to infringe upon a patent because inducing one to infringe upon a patent is an intentional act.

Va. Mason Med. Ctr. v. Executive Risk Indem., Inc., 331 F. App'x 473 (9th Cir. 2009)
Under Washington law, a personal profit exclusion in a reimbursement policy did not bar coverage for an underlying claim, where the evidence did not establish that the insured was required to return something to which it was not "legally entitled."

Liberty Ins. Underwriters, Inc. v. Camden Clark Mem'l Hosp. Corp., No. 08-01219, 2009 U.S. Dist. LEXIS 114278 (S.D. W.Va. Dec. 8, 2009)
An intentional acts exclusion in a professional liability policy did not bar coverage for a claim alleging abuse of process and malicious prosecution because the policy's insuring agreement covered "personal injury," which expressly was defined to include abuse of process and malicious prosecution.

Restitution, Disgorgement and Damages

John Deere Ins. Co. v. Sanders Oldsmobile-Cadillac, Inc., No. 07-1110, 2009 U.S. Dist. LEXIS 49623 (E.D. Cal. May 28, 2009)
An insurer had no duty to defend or indemnify an insured car dealership under a policy providing various types of coverage because the claimants' lawsuit alleging a violation of California's Unfair Competition Law sought only uninsurable restitution.

Nardella Chong, P.A. v. Medmarc Cas. Ins. Co., No. 08-1239, 2009 U.S. Dist. LEXIS 115226 (M.D. Fla. Dec. 10, 2009)
An amount deposited by a law firm to replenish its clients' trust account after having been fraudulently induced to transfer funds out of the account to the perpetrator of a fraud was not covered by the law firm's professional liability policy because the loss represented only restitution and not compensatory damages resulting from a negligent act or omission.

Genzyme Corp. v. Fed. Ins. Co., 657 F. Supp. 2d 282 (D. Mass. 2009)
An insured corporation's settlement of a shareholder class action lawsuit alleging that directors and officers acted to benefit one group of shareholders at the expense of another group was not covered under a directors and officers liability policy because the settlement did not constitute "loss" under the policy, based both on public policy considerations and the commonly understood meaning of the term "loss."

Wintermute v. Kan. Bankers Sur. Co., No. 03-03285, 2009 U.S. Dist. LEXIS 56666 (W.D. Mo. July 2, 2009)
Costs incurred by an insured director to defend criminal charges did not constitute "loss" under a directors and officers liability policy that defined "loss" in part as amounts stemming from a "claim," which did not include criminal charges, against the insured.

Millennium Partners, L.P. v. Select Ins. Co., 882 N.Y.S.2d 849 (N.Y. Sup. Ct. 2009), *aff'd*, 889 N.Y.S.2d 575 (N.Y. App. Div. 2009)
Although an insured hedge fund, in its settlement with the SEC, did not admit the truth of the SEC's factual findings, and the settlement did not result in a final judgment against the insured, the costs incurred by the hedge fund to defend against the SEC's claim were not covered under a directors and officers liability policy because the settlement payments owed to the SEC, for which the insured did not seek coverage, consisted solely of uninsurable disgorgement of funds gained through improper market timing activities.

Alexander Mfg., Inc. Employee Stock Ownership & Trust v. Ill. Union Ins. Co., No. 06-735, 2009 U.S. Dist. LEXIS 95897 (D. Or. Oct. 14, 2009)
The general rule that an injured party's promise not to execute a judgment against the insured eliminates the insurer's obligation to indemnify the insured did not operate to bar coverage for a settlement between insured directors and a third-party claimant where the definition of "loss" in the relevant directors and officers liability policy included "settlements . . . incurred by the insureds" and the settlement agreement did not unconditionally eliminate the directors' liability.

Post v. St. Paul Travelers Ins. Co., 593 F. Supp. 2d 766 (E.D. Penn. 2009)
The definition of "damages" in a lawyers professional liability policy did not preclude coverage for a petition for sanctions joined by the insured lawyer's former client where the former client sought both sanctions and any other relief the court deemed just and equitable.

Huntingdon Ridge Townhouse Homeowners Ass'n, Inc. v. QBE Ins. Corp., No. 09-00071, 2009 U.S. Dist. LEXIS 108558 (M.D. Tenn. Nov. 20, 2009)
A directors and officers policy, which provided coverage for losses that the insured becomes "legally obligated to pay as damages," did not provide indemnity coverage for losses resulting from a lawsuit seeking a declaratory judgment that the insured homeowners association was obligated to repair property where the action did not result in an award of damages.

Am. Guarantee & Liab. Ins. Co. v. Hoeffner, No. 08-1181, 2009 U.S. LEXIS 3047 (S.D. Tex. Jan. 16, 2009)
An insurer had a duty to defend a law firm under a legal malpractice policy against class action lawsuits alleging that the lawyers engaged in a scheme to settle class action litigation in exchange for kickbacks where at least part of the requested relief included monetary damages, as defined in the policy, as opposed to excluded forfeiture, disgorgement and punitive damages.

Insured Capacity

S.J. Amoroso Constr. Co. v. Executive Risk Indem., Inc., 325 F. App'x 548 (9th Cir. 2009)
An insured organization was entitled to coverage under a directors and officers liability policy for claims stemming from an employee's individual actions because, under California law, an employee may be said to act within the scope of his employment, even when his actions are not authorized, so long as his actions are not so "unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."

Mt. Zion Baptist Church of L.A. v. State Farm Gen. Ins. Co., No. B206519, 2009 Cal. App. Unpub. LEXIS 5218 (Cal. Ct. App. June 25, 2009)
The directors and officers liability coverage part of a church liability policy did not provide coverage for a claim stemming from an officer's transfer of church property because the officer was not acting within the scope of his management responsibilities or his duties to the church.

Goerner v. Axis Reinsurance Co., No. 07-0166, 2009 U.S. Dist. LEXIS 14067 (C.D. Cal. Feb. 23, 2009)
A directors and officers liability insurer had no duty to defend the president of an insured corporation because no claims were asserted against him in his capacity as director or officer of the corporation.

Ill. State Bar Ass'n Mut. Ins. Co. v. Mondo, 911 N.E.2d 1144 (Ill. Ct. App. 2009), *appeal denied*, 234 Ill. 2d 521 (2009)
A lawyer acting as an insurance expert and fiduciary under ERISA, and not as an attorney, was not entitled to coverage under a lawyers professional liability policy for a claim alleging fraudulent concealment of information regarding the plaintiff's transition to a program of self-insurance.

Westport Ins. Corp. v. Adler, No. 07-5400, 2009 U.S. Dist. LEXIS 10341 (E.D. La. Jan. 29, 2009)
An attorney who was sued by a client in connection with the attorney's contract to purchase a part of the client's business was entitled to coverage for the claim under a lawyers professional liability policy where the complaint included allegations that the attorney breached professional duties to the client.

Carlson v. Twin City Fire Ins. Co., No. 09-608, 2009 U.S. Dist. LEXIS 54272 (D. Minn. June 23, 2009)
A director and officer sued in connection with his discharge of duties to several organizations, including the insured organization, was not entitled to coverage because the alleged wrongful conduct did not "arise solely" out of discharge of his duties on behalf of the insured organization.

Am. Guar. & Liab. Ins. Co. v. Moskowitz, 870 N.Y.S.2d 307 (App. Div. Jan. 6, 2009)
An exclusion in a lawyers professional liability policy barring coverage for claims based upon an insured's capacity as an officer, director, partner, manager or employee of a business enterprise did not bar coverage for claims asserted against an insured attorney alleging

that he was the *de facto* in-house counsel for certain entities in which he owned stock, where the insured was not, in fact, in-house counsel for the entities in question.

Westport Ins. Corp. v. Cotten Schmidt, LLP, 605 F. Supp. 2d 796 (N.D. Tex. 2009)
A lawyers professional liability insurer was obligated to defend an underlying lawsuit brought against multiple insured attorneys in their capacities as lawyers, regardless of whether the claimants were clients of the insureds.

Insured v. Insured Exclusions

Biltmore Assocs., LLC v. Twin City Fire Ins. Co., 572 F.3d 663 (9th Cir. 2009)
Under Arizona law, an "insured versus insured" exclusion in a directors and officers liability policy precluded coverage for a lawsuit filed by a bankrupt company against its directors and officers for mismanagement, even though the claim had been assigned to the creditors' trust. For purposes of applying the exclusion, the pre-bankruptcy company and the company as debtor-in-possession were the same entity and, because the creditors' trustee stood in the company's shoes with regard to the claim, there was no coverage under the policy.

Cal. Dairies Inc. v. RSUI Indem. Co., 617 F. Supp. 2d 1023 (E.D. Cal. 2009)
An "insured versus insured" exclusion in a directors and officers liability policy precluded coverage for a wage and hour class action by current and former employees of the insured entity where the class action did not trigger an exception for claims alleging "Employment Practices Wrongful Acts."

Peoplesupport Rapid Text Inc. v. Ill. Union Ins. Co., No. SACV 08-0003-JVS (MLGx), 2009 U.S. Dist. LEXIS 87732 (C.D. Cal. Apr. 29, 2009)
An "insured versus insured" exclusion in a directors and officers liability policy precluded coverage for an arbitration filed by a director of the named insured's subsidiary, regardless of whether the underlying action was collusive, and even though one claimant in the arbitration was not an insured under the policy.

Jeff Tracy, Inc. v. U.S. Specialty Ins. Co., 636 F. Supp. 2d 995 (C.D. Cal. 2009)
An "insured versus insured" exclusion in a directors and officers liability policy barred coverage for a wage and hour lawsuit brought by a former employee where an exception to the "insured versus insured" exclusion, for suits alleging "Employment Practices Wrongful Acts," was deleted by endorsement.

Cal. Dairies Inc. v. RSUI Indem. Co., No. 1:08-cv-00790 OWW GSA, 2009 U.S. Dist. LEXIS 72989 (E.D. Cal. Aug. 11, 2009)
Although initially holding that an "insured versus insured" exclusion barred coverage for a wage and hour class action, the court denied the insurer's motion to dismiss the insured's amended complaint, holding that the insured sufficiently alleged that the insurer might have waived its right to assert the "insured versus insured" exclusion as a coverage defense.

Chartrand v. Ill. Union Ins. Co., No. 08-05805 JSW, 2009 U.S. Dist LEXIS 77222 (N.D. Cal. Aug. 28, 2009)
An "insured versus insured" exclusion did not bar defense coverage under a directors and officers liability policy for a lawsuit brought by both insured and uninsured persons because, under California law, all insurance policies incorporate principles of allocation and, thus, indemnity coverage potentially existed for the allegations asserted by uninsured persons in the underlying lawsuits.

Ill. Union Ins. Co. v. Brookstreet Sec. Corp., No. SACV07-01095-CRC (RNBx), slip op. (C.D. Cal. Oct. 15, 2009)
An "insured versus insured" exclusion barring coverage for claims "alleging, arising out of, based upon or attributable to any dispute between Insureds" precluded coverage under a professional liability policy for a claim asserted against the insured entity by a former employee for failure to pay commissions.

Westchester Fire & Ins. Co. v. Wallerich, 563 F.3d 707 (8th Cir. 2009)
Under Minnesota law, an "insured versus insured" exclusion in a business and management indemnity policy barred coverage for a lawsuit brought against various individual insureds by a director and officer of the insured entity and his spouse because both of the plaintiffs were deemed to be insureds under the terms of the policy.

Maritz Holdings, Inc. v. Fed. Ins. Co., 298 S.W.3d 92 (Mo. Ct. App. 2009)
An "insured versus insured" exclusion in a directors and officers liability policy did not preclude coverage for claims by two former directors alleging that they were wrongfully removed from the company's board of directors, because the claims came within an exception for "wrongful termination" claims, even though the claimants were not employees of the company.

Carolina Cas. Ins. Co. v. Sowell, 603 F. Supp. 2d 914 (N.D. Tex. 2009)
An exception to an "insured versus insured" exclusion for shareholder derivative actions brought "totally

independent of" any insured did not apply to a derivative action in which one of the claimants was an insured.

Equine Assisted Growth & Learning Ass'n v. Carolina Cas. Co., 216 P.3d 971 (Utah Ct. App. 2009)
Under Utah law, extrinsic evidence is available to determine the applicability of an "insured versus insured" exclusion that bars coverage for claims brought "by, on behalf of, or in the right" of an insured.

Link Snacks, Inc. v. Fed. Ins. Co., 664 F. Supp. 2d 944 (W.D. Wis. 2009)
An "insured versus insured" exclusion in a directors and officers liability policy that contained an exception for wrongful termination claims by an executive did not preclude coverage for a counterclaim asserted against the insured entity by its former chief operating officer where the counterclaim was premised on the officer's contention that he was wrongfully terminated.

Coverage for Contractual Liability

S.J. Amoroso Constr. Co. v. Executive Risk Indem., Inc., 325 F. App'x 548 (9th Cir. 2009)
Under California law, a breach of contract exclusion in a directors and officers liability policy did not bar coverage for claims against the insured company where the underlying allegations were based on the fact that the claimant was not yet a party to the contract at the time of the alleged wrongdoing.

Am. Legacy Found. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 640 F. Supp. 2d 524 (D. Del. 2009)
A breach of contract exclusion in a not for profit individual and organization insurance policy barred coverage for a suit based on a contract entered into before the insured organization existed where the insured adopted the terms of the contract. The "escape clause" in the exclusion allowing coverage for liability that would have existed in the absence of the contract did not apply because, although the underlying claimant could have pursued claims of libel or slander, the allegations made against the insured were based solely on alleged breaches of contract.

HC Waterford Props., LLC v. Mt. Hawley Ins. Co., No. 08-22158, 2009 U.S. Dist. LEXIS 81355 (S.D. Fla. Aug. 21, 2009)
An exclusion in a general liability policy barring coverage for claims "arising out of" breach of contract applied to a negligence action against a condominium developer because the developer's duties stemmed solely from the contract to build the condominiums.

Benefit Sys. & Servs., Inc. v. Travelers Cas. & Sur. Co., No. 07-3922, 2009 U.S. Dist. LEXIS 34213 (N.D. Ill. Apr. 22, 2009)
A claim for breach of contract was not covered under a policy defining "Wrongful Act" as a "negligent act, misstatement, misleading statement, error or omission" because a breach of contract is not considered an act of negligence.

Aearo Corp. v. Am. Int'l Specialty Lines Ins. Co., No. 08-0604, 2009 U.S. Dist. LEXIS 117823 (S.D. Ind. Dec. 17, 2009)
A breach of contract exclusion in a commercial umbrella policy did not bar coverage for a trademark infringement lawsuit because, although the alleged infringement violated the terms of a contract, the insured faced liability independent of the contract.

Everett v. Philibert, 13 So. 3d 616 (La. Ct. App. 2009)
A breach of contract exclusion in a commercial general liability policy barred coverage for claims asserted by a homebuyer for personal injury and emotional distress where all of the allegations against the insured homebuilder were based on contractual duties to build the claimant's home competently.

Rodco Worldwide, Inc. v. Arch Specialty Ins. Co., 306 F. App'x 111 (5th Cir. 2009)
Under Louisiana law, a breach of contract exclusion in an insurance agent's professional liability policy barred coverage for a claim alleging negligence by the insured in issuing an insurance policy without authority to do so where the claim against the insured was based solely on his alleged breach of an agency agreement.

Carolina Cas. Ins. Co. v. Sowell, 603 F. Supp. 2d 914 (N.D. Tex. 2009)
A breach of contract exclusion in a management liability insurance policy applied to causes of action for negligence and statutory violations because all of the causes of action against the insureds were causally connected to, and would not exist without, a lease agreement between the claimants and insureds.

Century Sur. Co. v. Hardscape Constr. Specialties, Inc., 578 F.3d 262 (5th Cir. 2009)
Under Texas law, a breach of contract exclusion in a commercial general liability policy barred coverage for a lawsuit against a contractor for damage caused by faulty work where all the alleged damages related solely to the subject matter of the insured's construction contract.

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Professional Services

Great Am. Ins. Co. v. Baddley & Mauro, LLC, 330 F. App'x 174 (11th Cir. 2009)
Under Alabama law, a legal malpractice policy did not provide coverage for a dispute regarding attorneys' fees where the insured's alleged misconduct was self-serving, was not undertaken on behalf of or to protect the interest of the client, and, thus, did not relate to the provision of a professional service.

St. Paul Fire & Marine Ins. Co. v. ERA Oxford Realty Co. Greystone, LLC, 572 F.3d 893 (11th Cir. 2009)
Under Alabama law, a real estate agents or brokers professional liability policy did not provide coverage for claims alleging that the insureds induced the underlying plaintiffs to enter an agreement to merge real estate agencies, committed various torts related thereto, and breached the terms of the merger agreement, because such acts are not specific to the practice of the real estate profession.

Am. Cas. Co. of Reading, Pa. v. Kemper, No. 07-1149, 2009 U.S. Dist. LEXIS 50426 (D. Ariz. June 12, 2009)
Allegations that an insured rehabilitation counselor defamed her employer in correspondence with a state regulatory agency fell within the definition of professional services, where that definition was ambiguous and the acts in question were intertwined with the insured's role as counselor.

Am. Auto. Ins. Co. v. CBL Ins. Servs., Inc., No. G039051, 2009 Cal. App. Unpub. LEXIS 5375 (Cal. Ct. App. June 30, 2009)
A professional liability policy issued to a life insurance agency did not cover claims related to a program pursuant to which third parties loaned the agency money to assist people seeking to purchase large life insurance policies, because that program was not a professional service connected to the sale and service of specified insurance products.

Wellcare of Fla., Inc. v. Am. Int'l Specialty Lines Ins. Co., 16 So. 3d 904 (Fla. Dist. Ct. App. 2009)
A policy providing coverage for wrongful acts "in the performance of professional services for others for compensation" did not cover a lawsuit filed by a third party that the insured had authorized to sell HMO products on the insured's behalf because the wrongful conduct alleged in the third party's complaint did not constitute the performance of professional services.

Estate of Steven Adam Tinervin v. Nationwide Mut. Ins. Co., 23 So. 3d 1232 (Fla. Dist. Ct. App. 2009)
A professional services exclusion in a general liability policy issued to a doctor's medical office precluded coverage for a wrongful death action alleging negligence against the insured's employee for failing to make the doctor aware of lab reports in a timely manner where the employee was found to be a medical professional based on her assistance in all aspects of medical practice.

Nardella Chong, P.A. v. Medmarc. Cas. Ins. Co., No. 08 -1239, 2009 U.S. Dist. LEXIS 115226 (M.D. Fla. Dec. 10, 2009)
Where an insured association of lawyers accepted a counterfeit check from a prospective client and transferred money belonging to other clients out of its trust account and to the prospective client before the check had cleared, there was no coverage under the insured's professional liability policy because the insured did not commit a negligent act in the performance of professional services, but rather was the victim of fraud and misfortune.

Auto-Owners Ins. Co. v. State Farm Fire & Cas. Co., 678 S.E.2d 196 (Ga. Ct. App. 2009)
Professional services exclusions in various general liability policies barred coverage for supervisory and managerial work performed by insureds at a construction site in which a construction employee was injured when touching a live electrical wire.

Health Care Indus. Liab. Ins. Program v. Momence Meadows Nursing Ctr., Inc., 566 F.3d 689 (7th Cir. 2009)
Under Illinois law, allegations that a nursing center wrongfully retaliated against whistleblower employees did not trigger coverage under a professional liability policy because the alleged retaliation was not caused by a medical incident during the provision of professional services.

Ill. State Bar Ass'n Mut. Ins. Co. v. Mondo, 911 N.E.2d 1144 (Ill. App. Ct. 2009)
A lawyers professional liability policy did not provide coverage for a claim alleging that an insured attorney, while acting in his separate capacity as an insurance expert, fraudulently concealed information relating to the underlying plaintiff's transition to a program of self-insurance, because the claim was not one for professional services rendered by the insured as an attorney.

U.S. Fid. & Guar. Co. v. VOA Assocs., Inc., No. 08-862, 2009 U.S. Dist. LEXIS 77205 (N.D. Ill. Aug. 27, 2009)
A triable issue of fact precluded summary judgment regarding the applicability of a professional services exclusion to architectural and design work by the insured, even where the contract between the insured and the claimant's employer called only for professional services as defined in the policy, because the possibility

existed that the insured undertook other construction-related activities during the project in question.

ISMIE Mut. Ins. Co v. Michaelis Jackson & Assocs., LLC, No. 5-08-0426, 2009 Ill. App. LEXIS 1332 (Ill. App. Ct. Dec. 30, 2009)
A medical malpractice policy did not provide coverage for allegations by former employees that a doctor had defrauded Medicare through false billing because the false billing did not require or involve personal injuries caused by professional services.

Tri-Etch, Inc. v. Cincinnati Ins. Co., 909 N.E.2d 997 (Ind. 2009)
A professional services exclusion in a general liability policy precluded coverage for an alarm system company's failure to note that a customer had not armed the system at the regularly scheduled time, which resulted in harm to the customer's employee.

Miller v. Westport Ins. Corp., 200 P.3d 419 (Kan. 2009)
A professional errors and omissions insurer could not deny coverage for a claim alleging the failure of various insured insurance and financial planning agents to perform proper due diligence before recommending a particular investment to their clients, because the claim arose out of the rendering of services as licensed insurance agents.

First Specialty Ins. Corp. v. Arkel Sugar, Inc., No. 07-1813, 2009 U.S. Dist. LEXIS 21361 (W.D. La. Mar. 17, 2009)
A professional services exclusion in a general liability policy precluded coverage for a complaint seeking damages stemming from allegedly defective engineering services provided by a contractor of the insured, where the exclusion at issue applied to professional services by the insured, or any engineer, architect or surveyor who either is employed by the insured or is performing work on behalf of the insured in such capacity.

Brooks v. Tammany Hosp. Found., No. 2009 CA 0859, 2009 La. App. Unpub. LEXIS 759 (La. Ct. App. Dec. 23, 2009)
Under Louisiana law, a professional services exclusion in a general liability policy did not bar coverage for claims alleging that an insured's employee was negligent in performing a screening of a new employee that required physical tests, and which resulted in the new employee's injury, because performing the screening did not require any particular expertise or professional judgment.

Centennial Ins. Co. v. Patterson, 564 F.3d 46 (1st Cir. 2009)
Under Maine law, an insured veterinarian was entitled to coverage under a professional liability policy for claims of libel and slander arising out of his testimony at an animal repossession hearing because the insured's provision of testimony was a "professional veterinary service."

Mass. Insurers Insolvency Fund v. Mountzuris, 25 Mass. L. Rep. 469 (Mass. Super. Ct. 2009)
An exclusion in a general liability policy issued to a defendant medical center that barred coverage for injuries "arising solely out of acts or omissions in the rendering or failure to render professional services by individual physicians" precluded coverage for medical malpractice claims that arose out of the alleged acts or omissions of the co-defendant treating physician.

Citizens Ins. Co. of Am. v. Ladi, No. 283557, 2009 Mich. App. LEXIS 1560 (Mich. Ct. App. July 21, 2009)
A professional services exclusion in a homeowners policy precluded coverage for claims asserted by third parties who were injured by a fireworks display operated by a company owned by the insured because the insured was engaged in the professional service of fireworks displays at the time of the incident.

QBE Ins. Corp. v. Brown & Mitchell, Inc., 591 F.3d 439 (5th Cir. 2009)
Under Mississippi law, a professional services exclusion in a general liability policy precluded coverage for claims against the project engineer of a sewer installation job after an employee of the general contractor died when a trench collapsed, because the complaint clearly alleged breach of the insured's professional responsibility as the engineering firm on site and the conduct at issue required the "application of special skill, knowledge, and education."

Henslee v. Cameron Mut. Ins. Co., 292 S.W.3d 476 (Mo. Ct. App. 2009)
A professional services exclusion precluded coverage for liability resulting from a client's burnt scalp because an amendment to the insured salon's general liability policy adding coverage for professional services in the middle of the policy period did not create coverage for injuries sustained prior to the policy's amendment.

Feszchak v. Pawtucket Mut. Ins. Co., 316 F. App'x 181 (3d Cir. 2009)
Under New Jersey law, a professional services exclusion in a business owner's liability policy did not bar

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coverage for a claim for injuries sustained by the claimant while riding a stationary exercise bicycle at a medical center, because the failure of a stationary exercise bicycle was a manual or physical problem and did not require specialized knowledge, labor or skill that was predominantly mental or intellectual in nature.

Wimberly Allison Tong & Goo, Inc. v. Travelers Prop. Cas. Co. of Am., No. 08-2976, 2009 U.S. App. LEXIS 25294 (3d Cir. Nov. 18, 2009)
Under New Jersey law, a professional services exclusion in general liability and excess liability policies precluded coverage for claims against an insured architectural firm arising out of a parking garage collapse, because the claims were related to the insured's provision of professional architectural services.

Physicians' Reciprocal Insurers v. Brunswick Hosp. Ctr., Inc. (In re The Brunswick Hosp. Ctr., Inc.), 399 B.R. 582 (Bankr. E.D.N.Y. 2009)
A professional services exclusion barring coverage for "nursing service, treatment, advice or instruction" precluded coverage under a general liability policy for claims for injuries sustained when a nurse's aide allegedly instructed a patient to walk to the bathroom.

Lockwood Pension Servs., Inc. v. Steadfast Ins. Co., No. 08-8229, 2009 U.S. Dist. LEXIS 81178 (S.D.N.Y. Sept. 4, 2009)
Claims that the insured was engaged in the purchase or sale of, or the giving of advice relating to, life settlements were not outside the scope of professional services under a life insurance agent errors and omissions liability policy.

Hartford Fire Ins. Co. v. St. Paul Fire & Marine Ins. Co., 606 F. Supp. 2d 602 (E.D.N.C. 2009)
Injuries sustained by a patient in a car accident while traveling to a treatment appointment were not covered by the insured health care facility's professional liability policy because driving the patient to the appointment did not constitute a covered professional service.

Transcore, LP v. Caliber One Indem. Co., 972 A.2d 1205 (Pa. Super. Ct. 2009)
A patent infringement action brought against an insured supplier and installer of E-Z Pass systems was not covered under a professional liability policy because the insured and the plaintiff vendor had no professional relationship.

Nationwide Mut. Ins. Co. v. Garzone, No. 07-4767, 2009 U.S. Dist. LEXIS 85528 (E.D. Pa. Sept. 17, 2009)
A morticians' professional liability coverage endorsement within a general liability policy encompassed claims that the insured harvested organs of deceased individuals and negligently failed to obtain proper consent for organ donation, because these alleged actions arose from the exercise of the insureds' professional skills as cremators or undertakers.

Am. Guarantee & Liab. Ins. Co. v. Hoeffner, No. 08-1181, 2009 U.S. Dist. LEXIS 3047 (S.D. Tex. Jan. 16, 2009)
A lawyers professional liability insurer was obligated to defend claims alleging that insured lawyers participated in kickback schemes, causing lawsuits to be settled for arbitrary amounts and resulting in millions of dollars in attorneys' fees, because those claims were based on acts and/or omissions in the rendering of legal services.

Johnson v. Wood County, No. 2008AP424, 2009 Wisc. App. LEXIS 139 (Wis. Ct. App. Feb. 26, 2009)
A medical professional services exclusion in a general liability policy barring coverage for "liability arising out of any hospital, nursing home, mental health facility or other operation which provides medical professional services" precluded coverage for claims arising out of the drowning injury and subsequent death of a patient at a group home because the exclusion was "defined in terms of the nature of the *facility*, not the activity resulting in injury."

Independent Counsel

Sovereign Gen Ins. Servs., Inc. v. Nat'l Cas. Co., No. 08-16306, 2009 U.S. App. LEXIS 23686 (9th Cir. Oct. 27, 2009)
Under California law, an insured was not entitled to independent counsel where an underlying arbitration would not address issues that could implicate an exclusion on which the insurer had reserved its rights.

Nat'l Cas. Co. v. Forge Indus. Staffing Inc., 567 F.3d 871 (7th Cir. 2009)
Under Illinois law, the possibility that claimants might seek punitive damages against the insured following the filing of multiple EEOC charges, where the claimants had not indicated an intent to do so or made any allegations of intentional misconduct by the insured, did not create a conflict of interest that mandated the appointment of independent counsel to defend the insured in connection with the EEOC charges.

Liberty Mut. Ins. Co. v. Tedford, No. 3:07CV73-S-SAA, 2009 U.S. Dist. LEXIS 84521 (W.D. Miss. Sept. 15, 2009)
A question of fact existed as to whether the insured was prejudiced by an insurer's failure to notify the insured of its right to independent counsel and of the conflicts of interest that were created by the insurer's defense of an underlying claim under a reservation of rights.

Jaco Envtl. Inc. v. Am. Int'l Specialty Lines Ins. Co., No. 2:09-cv-0145 JLR, 2009 U.S. Dist. LEXIS 51785 (W.D. Wash. May 19, 2009)
Based on an insurer's breach of its duty to defend, the insured was entitled to recover the reasonable fees and costs it incurred in defending itself in an underlying lawsuit, rather than what the insurer actually would have paid pursuant to an endorsement to the policy, had the insured been entitled to independent counsel.

Advancement of Defense Costs

Jeff Tracy, Inc. v. U.S. Specialty Ins. Co., 636 F. Supp. 2d 995 (C.D. Cal. 2009)
The duty to defend standard, where a defense must be provided if there is any potential for coverage, does not apply to directors and officers liability policies that require the insurer to pay defense costs on an "as-incurred" basis. Because the insured did not establish that the underlying claims were within the basic scope of coverage, the insured could not sustain a claim for breach of contract against its insurer, which had declined to advance defense costs.

Executive Risk Indem., Inc. v. Jones, 171 Cal. App. 4th 319 (Ct. App. 2009), *review denied*, 2009 Cal. LEXIS 4761 (2009)
Where a professional liability policy required the insurer to reimburse defense costs but imposed no duty to defend, and the insurer declined to provide a defense although it was aware the insured was insolvent, the insurer could not later contest the validity or amount of the judgment against the insured regardless of the lack of a contractual duty to defend, because the insurer had notice and the opportunity to defend its insured.

Allocation

Am. Cas. Co. v. Health Care Indem., Inc., 613 F. Supp. 2d 1310 (M.D. Fla. 2009)
A speech language pathologist's professional liability insurer failed to establish the portion of an underlying judgment that should be allocated to another insurer where defense counsel appointed by the professional liability insurer did not demonstrate at trial what portions of the jury's verdict could be allocated to acts occurring solely at the hospital for which the insured might be liable.

First Trenton Indem. Co. v. River Imaging, P.A., No. A-6191-06T32009, 2009 N.J. Super. Unpub. LEXIS 2190 (N.J. Super. Ct. App. Div. Aug. 11, 2009)
Under a directors and officers liability policy requiring the parties to use their best efforts to properly allocate loss, the insurer was obligated to provide full defense coverage, subject to a right of reimbursement, to an insured in a lawsuit alleging both covered and uncovered claims where the insurer did not meet its burden of showing that defense costs could be allocated.

Fieldstone Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co., 61 A.D. 3d 185 (N.Y. App. Div. 2009)
A general liability insurer defending an insured property owners association in two actions alleging interference with property rights and publishing of injurious falsehoods sought reimbursement of defense costs from the association's directors and officers liability insurer, whose policy covered both the injurious falsehood and additional claims. The court held that the directors and officers liability insurer was obligated to contribute to the insured's defense because the "other insurance" clause contained in the directors and officers policy did not apply to losses insured only under that policy.

Camden-Clark Mem'l Hosp. Ass'n v. St. Paul Fire & Marine Ins. Co., 682 S.E.2d 566 (W.Va. 2009)
Where a professional liability insurance policy did not impose a duty to defend on the insurer, and the insured controlled the defense of underlying claims, the insured hospital had the burden of proving proper allocation between covered and uncovered claims after a jury verdict against the insured for fraud, concealment, negligence, and vicarious liability.

Recoupment of Defense Costs and Settlement Payments

Zurich Global Corporate U.K. v. Bickerstaff, Whatley, Ryan & Burkhalter, Inc., 650 F. Supp. 2d 1064 (C.D. Cal. 2009)
A professional liability insurer was entitled to recoup costs expended in defending the insured in an underlying action where coverage for the claim was found to be excluded under the policy.

Valley Forge Ins. Co. v. Health Care Mgmt. Partners Ltd., Nos. 05-cv-00374-RPM and 05-cv-00835-RPM, 2009 U.S. Dist. LEXIS 49167 (D. Colo. May 28, 2009)
Multiple insurers were entitled to recoup defense costs paid on the insured's behalf in the underlying litigation because, according to the court, to hold otherwise would provide the insured with the very coverage that it was not entitled to receive under the relevant policies.

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Nationwide Mut. Ins. Co. v. Mortensen, No. 3:00-CV-1180 (CFD), 2009 U.S. Dist. LEXIS 74870 (D. Conn. Aug. 24, 2009)
An insurer's reservation of rights letter did not impose a burden on the insured to reimburse defense costs advanced by the insurer under a commercial liability policy where there was no policy provision requiring reimbursement and no active assent to the reservation of rights by the insured.

Royal Indem. Co. v. C. H. Robinson Worldwide, Inc., No. A08-0996, 2009 Minn. App. Unpub. LEXIS 772 (Minn. Ct. App. July 21, 2009)
An excess insurer had the right to challenge the payment of defense costs that were unreasonable or that did not fall within the policy definition of "loss," and had the right to recoup any overage it paid into a settlement as a result of the underlying carriers' payment of unreasonable defense costs under an employment practices liability policy.

Westchester Fire Ins. Co. v. Wallerich, 563 F.3d 707 (8th Cir. 2009)
Under Minnesota law, an insurer that was not obligated to defend the insured under the directors and officers coverage part of a business and management indemnity insurance policy could not recoup defense costs. In reaching its conclusion, the court took note of the split in authority around the country and concluded that it was persuaded by the more recent state and federal court opinions that have adopted the "minority" position barring reimbursement for defense costs.

Liberty Mut. Ins. Co. v. Tedford, No. 3:07-CV-73-SA-SAA, 2009 U.S. Dist. LEXIS 84521 (N.D. Miss. Sept. 15, 2009)
Even though intentional acts exclusions barred coverage for the underlying action, the insured's workers' compensation and employment practices liability insurer could not recoup defense costs paid in the underlying action because it had a duty to defend.

Certain Underwriters at Lloyds v. Magnolia Mgmt. Co., No. 04-CV-540TSL-JCS, 2009 U.S. Dist. LEXIS 60083 (S.D. Miss. June 26, 2009)
An insurer was not entitled to reimbursement of costs paid to defend the insured in the underlying litigation where the policy did not provide a right to reimbursement, and the insurer's reservation of rights letter was not specific or clear enough to afford the insureds with notice of the insurer's intent to seek reimbursement of defense costs.

Herley Indus. v. Fed. Ins. Cos., No. 08-5377, 2009 U.S. Dist. LEXIS 74871 (E.D. Pa. Aug. 21, 2009)
An insured was required to repay amounts advanced by the insurer under a policy providing directors and officers, entity securities and fiduciary liability coverage, where the policy expressly required the insured to repay defense costs upon a determination that the costs were not covered.

InterDigital Communications Corp. v. Fed. Ins. Co., 607 F. Supp. 2d 718 (E.D. Pa. 2009)
An insurer was entitled to post-arbitration interest on defense expenses awarded to it in an arbitration regarding its right to reimbursement of such expenses from the insured.

Consent

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. NVIDIA Corp., No. 09-02046, 2009 U.S. Dist. LEXIS 79759 (N.D. Cal. Aug. 18, 2009)
An insurer seeking a declaration that its insured must comply with a no voluntary payments provision and a cooperation clause need not allege that the insurer has suffered prejudice as a result of the insured's alleged noncompliance.

Enodis Corp. v. Cont'l Cas. Co., No. 04-4357, 2009 U.S. Dist. LEXIS 23498 (C.D. Cal. Mar. 26, 2009)
A no voluntary payments provision precluded coverage for an insured's defense costs where the insured admitted that it engaged counsel to defend the claim prior to tendering the claim to its insurer, and that it intended to proceed with that counsel regardless of whether the insurer accepted coverage for the claim.

Hilco Capital, LP v. Fed. Ins. Co., 978 A.2d 174 (Del. 2009)
An excess insurer had no duty to consent to or fund a settlement of litigation where the insureds and other insurers effectively cut the objecting insurer out of the settlement process.

Rolyn Cos. v. R & J Sales of Tex., Inc., No. 08-61618, 2009 U.S. Dist. LEXIS 106881 (S.D. Fla. Nov. 16, 2009)
A no voluntary payments provision precluded coverage for costs incurred by an insured, without the insurer's consent, in repairing hurricane damage to the insured's building.

Trinity Outdoor, LLC v. Cent. Mut. Ins. Co., 285 Ga. 583 (2009)
A no voluntary payments provision precluded coverage for a settlement entered into by the insured without the insurer's consent.

Ace Am. Ins. Co. v. RC2 Corp., No. 07-5037, 2009 U.S. Dist. LEXIS 35343 (N.D. Ill. Apr. 23, 2009)
Neither an insurer's refusal to defend an insured in underlying litigation, nor the insurer's filing of a declaratory judgment action, relieved the insured of its obligation to comply with a no voluntary payments provision.

Myoda Computer Ctr., Inc. v. Am. Family Mut. Ins. Co., 389 Ill. App. 3d 419 (App. Ct. 2009)
An insured did not breach a no voluntary payments provision by settling an underlying action where, at the time of the settlement, the insurer already had received notice of the settlement and had agreed to the insured's retention of independent counsel.

Nat'l Cas. Co. v. Forge Indus. Staffing, Inc., 567 F.3d 871 (7th Cir. 2009)
Under Illinois law, an insured was not entitled to coverage for costs incurred in connection with its retention of independent counsel, where the insured was not entitled to independent counsel and the insurer did not consent to that counsel's retention.

Demolition Contractors, Inc. v. Westchester Surplus Lines Ins. Co., No. 07-112, 2009 U.S. Dist. LEXIS 29760 (W.D. Mich. Apr. 3, 2009)
Where a road's damaged condition did not pose "an imminent environmental threat," repair of that road without the insurer's consent was a violation of the policy's no voluntary payments provision and no action clause.

Spann v. Allstate Prop. & Cas. Ins. Co., No. 08-95, 2009 U.S. Dist. LEXIS 102994 (S.D. Miss. Oct. 28, 2009)
Although a default judgment is not binding on an insurer where the insured fails to comply with a policy's consent provision, the failure to obtain consent does not void coverage altogether.

Cont'l Cas. Co. v. Ace Am. Ins. Co., No. 07-958, 2009 U.S. Dist. LEXIS 29018 (S.D.N.Y. Mar. 31, 2009)
The insured was not entitled to coverage for a settlement executed without the insurer's consent where the policy at issue contained a provision requiring the insurer's consent.

Alexander Mfg., Inc. v. Ill. Union Ins. Co., No. 06-735, 2009 U.S. Dist. LEXIS 95897 (D. Or. Oct. 14, 2009)
An insurer must prove prejudice in order to deny coverage on the basis of the insured's breach of a consent provision. If the insurer does establish prejudice, coverage only will be precluded if an insured did not act reasonably in breaching the consent provision.

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Puget Plastics Corp., 649 F. Supp. 2d 613 (S.D. Tex. 2009)
A settlement and waiver of appeal by an insured without its insurer's consent did not materially prejudice the insurer because Texas law allows an insurer to intervene and appeal a decision against its insured. Accordingly, neither the settlement payment nor the waiver of appeal precluded coverage under the policy.

Md. Cas. Co. v. Am. Home Assurance Co., 277 S.W.3d 107 (Tex. App. 2009), *appeal docketed*, No. 09-0226 (Tex. 2009)
A no voluntary payment provision will preclude coverage for any amounts incurred by an insured without notice to and the consent of the applicable insurer.

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