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CaseWatch: Insurance

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CaseWatch: Insurance provides timely summaries of and access to insurance law decisions and legislation. It is distributed bi-weekly via e-mail. For ease of reference, we have organized cases by topic. Jurisdictional information and links to full text decisions are found in individual case titles. *CaseWatch* is the collaborative effort of Goldberg Segalla's [Global Insurance Services](#) Practice Group. Your interest is appreciated and feedback welcome. Please share this publication with your colleagues. If others in your organization are interested in receiving *CaseWatch*, or if you do not wish to receive future issues, please contact [Sarah J. Delaney](#).

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Actions and Proceedings

[Century Indemnity Co. v. The Marine Group, LLC](#)

(D.Or., October 6, 2010)

District Court Grants Insurer Right To Intervene In Coverage Dispute

The court granted the insurer's motion to intervene by right concluding that its proposed counterclaim would not significantly expand the number of policies involved, as there were almost thirty other named insurance companies involved in the suit. Also, the requested relief was identical, and thus the additional party would not expand the court's inquiry. Consequently, as it was determined that the insurer had a clear interest in the litigation, its intervention would not seriously expand or complicate the pending litigation.

[Chaucer Corporate Capital No. 2 Ltd. v. Azad](#)

(S.D.Tex., September 20, 2010)

Coverage Suit Relating to Hurricane Ike Survives Motion to Dismiss

Plaintiff sued six businesses seeking a declaration on the disputed scope of coverage for Hurricane Ike damages. The court denied defendants' motion to dismiss, rejecting their argument that the case should be dismissed for lack of subject matter jurisdiction because

plaintiff failed to join all of the underwriters as plaintiffs. The court held that only plaintiff's citizenship is relevant to diversity even though a nondiverse party is contractually bound to indemnify the diverse parties.

Bad Faith

Bradley v. Allstate Insurance Company

(5th Cir. (La.), September 20, 2010)

A Plaintiff Attempting to Base Her Theory of Recovery Against an Insurer on LA. Rev. Stat. Ann. §§22:658 and 22:1220 Must First Have a Valid Underlying Substantive Claim Upon Which Insurance Coverage is Based

This insurance dispute arose from total destruction of the policyholders' home as a result of flood and wind damage suffered during Hurricane Katrina and the interplay between the homeowners and flood insurance policy. The policyholders alleged they were entitled to full limits under their homeowners policy and additional amounts for personal property, living expense and mental and physical distress, and the insurer's bad faith. The district court determined the insurers were fully entitled to actual cash value of their home and granted summary judgment on the LA. Rev. Stat. Ann. §§22:658 and 22:1220. The appellate court vacated the district court's grant of summary judgment and remanded for consideration consistent with its opinion as to the breach of contract and related bad faith claim for uncompensated construction damage to the policyholders' home. The appellate court determined that the grant of summary judgment under the Louisiana Statutes was in error as it was based on the premature determination that there was no underlying breach of contract.

Cancellation/Rescission

Medical Protective Co. v. Fragatos

(Oh. Ct. of App., September 23, 2010)

Whether Or Not A Policy Is Voidable Or Void Ab Initio Depends On The Type Of Misrepresentation

Ohio law distinguishes among material misrepresentations depending on whether they are mere representations or warranties: a false warranty will render an insurance policy void ab initio, while a misstatement, which is fraudulently made and the fact is material to the risk, that does not rise to the level of a warranty will render the policy voidable. A representation is a statement made prior to the issuance of the policy which tends to cause the insurer to assume the risk. A warranty is a statement, description or undertaking by the insured of a material fact either appearing on the face of the policy or in another instrument specifically incorporated in the policy. The insurer's decision to incorporate the statement in or to omit it from the policy generally controls whether the statement is a warranty or a representation.

Archway Ins. Services, Inc. v. James River Ins. Co.

(E.D.Pa., September 21, 2010)

Material Issue Of Fact Whether Or Not Policy Cancelled Where Policyholder's Action Is Not Unequivocal Evidence Of Waiver

Waiver of cancellation is not evidenced by payment of premium after cancellation where such payments would be required even if policy was cancelled. The fact that the policy was

renewed is not unequivocal evidence of waiver. The submission of a claim is also not unequivocal evidence of waiver because the claims were submitted under the renewed policy.

Duty to Defend

[Amerisure Mut. Ins. Co. v. Microplastics, Inc.](#)

(7th Cir. (Ill.), September 20, 2010).

A Duty to Defend Not Triggered By Theoretical Possibility

A CGL insurer sought a declaration that it owed no duty to defend or indemnify its policyholder because the suit only sought damages for the cost to repair the defective products themselves and did not allege the defects caused damage to any other property. The policyholder argued that, construing the complaint liberally, there was a duty to defend because the allegations of the complaint did not foreclose the theoretical possibility that the security system manufacturer's customers charged back costs resulting from potentially covered damage to property beyond the defective products. The court determined that, although there was a theoretical possibility that the complaint included potentially covered damages, taking the allegations of the complaint as they were, there was no allegation or indication of potentially covered damages.

[United States Fidelity and Guaranty Co. v. Continental Ins. Co.](#)

(D.Mon., September 10, 2010)

Umbrella Insurer Required to Defend

The district court held that umbrella policies are designed to fill both vertical and horizontal gaps in coverage; the vertical coverage provides additional coverage above the limits of the primary coverage and the horizontal coverage provides primary coverage for losses outside the scope of the primary coverage. The umbrella policy was determined to contain two separate provisions within the "Conditions" section of the policy which imposed a duty to defend once the underlying primary policies were exhausted.

[Zurich American Ins. Co. v. Public Storage](#)

(E.D.Va., September 16, 2010)

Under Washington, D.C. Law, Insurer Only Obligated to Defend Covered Causes of Action

Unlike most jurisdictions, in Washington, D.C., where some claims are covered by an insurance policy and others are not, the insurer has a duty to defend only the covered claims. The court found the insurer had a duty to defend against one of four claims. Under Washington law, the insurer was allowed to turn the defense over to the policyholder and reimburse it for the cost of defending the one covered claim.

Environmental

[Essex Ins. Co. v. Dixon](#)

(S.D.Fla., September 21, 2010)

Pollution Exclusion Bars Coverage for Settlement

A developer settled with homeowners who alleged that their property was damaged by pollutants released during construction on the site of a former chemical and medical waste dump. The court held that the complaint does not allege a single claim unrelated to pollution that would preclude the application of the policy's pollution exclusion clause.

[Ash Grove Cement Co. v. Liberty Mutual Ins. Co.](#)

(D.Or., September 30, 2010)

District Court Granted Partial Summary Judgment To Insured On Duty To Defend Against CERCLA Section 104(e) Suit

The insurer asserted that a §104(e) letter does not constitute a "suit" because the statute required either an "action" by the EPA "against" the policyholder or an "agreement" between the EPA and the policyholder in which the EPA requests that the insured "take action." The insurers argued that the §104(e) letter was not an "action" and "does not require [the policyholder] to take action" Rather, the §104(e) letter simply asked the policyholder to voluntarily provide information. The district court ruled in favor of the policyholder holding that, while the letter sought "voluntary cooperation," compliance with the request was "required by law," and failure to respond could result in immediate civil penalties, thereby containing the threat of legal action. Based on the foregoing, the court held that the EPA letter to the insured was equivalent to a "suit seeking damages" under the liability policy, and therefore, the insurer had a duty to defend Ash Grove.

Exclusions

[Gov't Employees Ins. Co. v. Brown](#)

(D.Co., September 22, 2010)

No Coverage for Co-Insureds Where Policy Excluded Bodily Injury Caused By or At the Direction of "An Insured."

People injured when the policyholder's son fired a shotgun into their vehicle sued the son's parents alleging negligent entrustment of a vehicle to their son. The insurer sought a declaration that it was not required to defend or indemnify the parents, relying upon a policy exclusion for bodily injury caused by or at the direction of "an insured." The court determined that the exclusion clearly and unambiguously excluded coverage for all insureds where injury was intentionally caused by any insured.

[Peace College of Raleigh Inc. v. Amer. Int'l Spec. Lines Ins. Co.](#)

(E.D.N.C., September 16, 2010)

Insurers Owe a Duty to Defend CERCLA Suit

Plaintiff was sought to contribute to cleanup costs associated with PCB contamination resulting from transformer repair. The court held that exclusions barring coverage for loss arising from the plaintiff's products after it relinquished possession and for loss arising out of waste disposal activities that took place prior to July 1, 1998 did not apply. There was no indication in the complaint when the disposal occurred, and plaintiff did not sell transformers as a regular part of its business.

[Gen'l Star Indemn. Co. v. Mid-Atlantic Youth Services Corp.](#)

(M.D.Pa., September 27, 2010)

Criminal Conspiracy Masterminded by One Insured Triggered Criminal Acts Exclusion as to All Insureds

A criminal acts exclusion and an exclusion for the knowing violation of the rights of another precluded coverage under CGL policy for claims against operators of juvenile detention facility who took part in conspiracy to violate civil rights of juvenile offenders by incarcerating them for inordinately long sentences without due process of law. Where underlying complaints by victims of conspiracy alleged the insureds committed intentional acts in violating their constitutional rights, the allegations fell within the knowing violation and criminal acts exclusions. One insured masterminded the criminal “judicial kickback scheme” thereby triggering the criminal acts exclusion as to all insureds, relieving the insurer of any obligation to defend the insureds.

[Mid-Continent Cas. Co. v. Global Enercom Mgmt.](#)

(Tex. Sup. Ct., October 1, 2010)

Failure of Parties to Sign a Subcontract Before Commencing Work Did Not Bar Coverage Under CGL Policy’s “Subsequent to Execution” Exclusion

A company contracted with a subcontractor for repair work on a cell tower. Although the contract had not yet been signed by both parties, the subcontractor commenced work. After being hoisted upon a rope, three of the subcontractor’s workers fell and died. The subcontractor had a CGL policy that contained a “subsequent to execution” exclusion that barred coverage for a claim under an “insured contract” unless the underlying incident “occurs subsequent to the execution of the [insured] contract or agreement.” In the coverage dispute which followed, the Texas Supreme Court held that, although not signed by the company until after the accident, the subcontract was nonetheless executed before the accident. Since there was no policy language explicitly requiring both parties to sign the insured contract, the exclusion did not bar coverage.

[American Western Home Ins. Co. v. Israel](#)

(S.D.Tex., October 1, 2010)

Exclusion for Bodily Injury “Arising Out of Assault or Battery” Excluded Coverage for Suit Against Landlord by Tenant who was Assaulted by Intruders

The policyholder landlord was not entitled to a defense under a CGL policy against a tenant’s suit for damages stemming from a break-in and assault in the tenant’s apartment by unknown intruders. The tenant alleged the landlord was negligent with respect to security measures at the apartment complex. The landlord’s policy included an “assault and battery” exclusion which excluded bodily injury and property damage “arising out of assault or battery.” The court determined the tenant’s claims “would not exist but for” the assault and battery in his apartment, triggering the exclusion. The insurer had no duty to defend the landlord against the suit.

[Essex Ins. Co. v. Clark](#)

(N.D.Tex., October 5, 2010)

No Duty to Defend Employer under CGL Policy which Excluded Bodily Injury to Employees

The insurer had no duty to defend a policyholder under a CGL policy for injury to policyholder’s employee that arose while employee was performing duties for policyholder.

The employee cut his hand on a table saw on the job and sued his employer for negligent supervision, failure to provide safe equipment and warnings, and failure to timely seek medical assistance. Multiple exclusions excluded coverage for bodily injury to employees arising during course of employment.

Fraud

Maloof v. John Hancock Life Ins. Co.

(Ala. Sup. Ct., September 30, 2010)

Agent's Representation About Life Insurance Policy Does Not Constitute Fraudulent Misrepresentation

The policyholders claimed that an agent misrepresented to them that the universal-life policies they purchased were in their best interests and that they would provide funds which would be available to pay the estate taxes due upon their deaths. It was further claimed that the agent suppressed the fact that the policies would not perform as promised. The court found that the policyholders could not have reasonably relied upon the alleged misrepresentations due to the clear language of the insurance policies. Moreover, with regard to that alleged misrepresentation that the purchase of the life policies was in the policyholders' best financial interests, the court agreed with the trial court this was a statement of an opinion, not of a material fact.

Call v Czaplicki

(D.N.J., September 16, 2010)

New Jersey's Consumer Fraud Act Applies to Variable Insurance Policies

The plaintiff, who had purchased a variable life insurance policy for the protection of his business, alleged a violation of the Consumer Fraud Act. The defendants responded that the CFA did not apply to variable life insurance policies as they included investments. The issue has not been decided by New Jersey courts, so the District Court in applying New Jersey law found that although CFA does not apply to securities generally, there is nothing in the CFA which excludes an instrument consisting of both life insurance component and an investment component.

Selective Ins. Co. of Am. v Hudson E. Pain Management

(N.J. App. Div., October 7, 2010)

The Cooperation Clause Of The Policy And The PIP Statute Do Not Allow Discovery Of Medical Provider Corporate Records

The policyholders had received treatment payable under PIP and assigned the payment rights to their medical providers. The insurer challenged bills from medical providers as it observed a systematic and common treatment of patients. It demanded broad range of corporate information before payment could be made. The court held that the duties under the cooperation clause of a policy are not assigned to health care providers. It also held the PIP statute does not include the production of information about the provider. There are other avenues for fraud investigation available.

Rosario v Eckman

(E.D.Pa., September 14, 2010)

Plaintiff's Claims Of Fraud Are A Matter For Workers Compensation Court

The plaintiff sustained an injury during employment and entered into a settlement with Workers Compensation carrier. Thereafter, the plaintiff was terminated and filed suit alleging fraud, as he was misled and deceived in the settlement. His complaint alleged violation of Age Discrimination Act, breach of contract and negligent misrepresentation. The Court found that although the plaintiff attempted to characterize his fraud claims as otherwise, the claims were related to the settlement and thus was a matter for the workers compensation court.

Standiford v Rodriquez-Hernandez

(N.D.W.V., September 15, 2010)

Insurers' Interest In Combating Fraud Supersedes Injunctive Relief

The plaintiff, who was injured in an automobile accident, sought an injunction to prevent insurance companies from distributing medical information into indexing databases. The plaintiff alleged embarrassment and undue burden of expense. The insurers stated the reason for the databases is to prevent fraud. While the court held that the plaintiff did not meet the burden to obtain an injunction, it also held there is a public interest in combating fraud and thus the injunction is not in the public interest.

Notice/Policy Conditions

Rockland Exposition, Inc. v. Great American Assurance Co.

(S.D.N.Y., September 29, 2010)

Notice to an Insurance Agent Does Not Satisfy Policyholder's Obligation

The policyholder received copy of a complaint against it on June 27, 2008. In August 2008, the policyholder discussed with its insurance agent whether or not the CGL policy provided coverage for the suit, but did not give a copy of the complaint to the agent until September 30, 2008. The insurer received a copy of the complaint from the agent on October 1, 2008. The Court held the policyholder did not provide notice to the insurer until October 1, without justification, which notice was untimely. The policyholder's mistaken belief that notice to its insurance agent fulfilled its obligation to notify the insurer did not excuse the late notice.

Occurrence/Trigger of Coverage

Landers Auto Group Number One, Inc. v. Continental Western Ins. Co.

(8th Cir.(Ark.), September 17, 2010)

Repossession Due to Accounting Error accounting Error is Not Covered Where No Physical Damage to Vehicle Alleged

A customer filed a lawsuit against the policyholder auto dealership alleging that in spite of the fact that she timely made all payments, her car was repossessed and sold for allegedly failing to make timely payments. The court determined that the dealership's intentional repossession of the vehicle was not an "occurrence", was excluded because it resulted in an expected loss, and that there was no covered property damage alleged by the customer.

Other Insurance/Allocation

Arrowood Indemnity Co. v. Travelers Indemnity Co. of Connecticut

(Cal. App., October 6, 2010)

Non-Participating Co-Insurer Required to Share Defense and Indemnity Costs with Participating Insurer Where the Scope of What the Jury Decided in the Underlying Trial Was Not Clear

In an action for equitable contribution brought by a participating CGL insurer (that has defended and indemnified a policyholder) against a CGL coinsurer (that has not defended or indemnified the policyholder) which covered the same general contractor in different years, the first insurer asserted that it was not required to indemnify the contractor for negligence in repairing dry rot because a jury found negligence against the contractor only during the second policy period. In reversing a bench trial verdict in favor of the first insurer and remanding the matter to the trial court to equitably allocate the defense and indemnity costs, the California appellate court held that the first insurer failed to meet its burden of proving the absence of coverage and the scope of what the jury decided was not entirely clear.

Pennsylvania Lumbermens Mut. Ins. Co. v. Indiana Lumbermens Mut. Ins. Co.

(Fla. Ct. of App., September 15, 2010)

Primary Insurer Has No Right to Reimbursement of Defense Costs

Two insurers issued separate policies to the same policyholder covering consecutive policy periods. A suit was filed against the policy holder, alleging damages that began in one policy period but extended into the other. One insurer defended and indemnified the policyholder, but the other did not. The first insurer sought a reimbursement of defense costs and indemnity from the second insurer. The court determined that the second insurer was not required to reimburse any of the defense costs because the first insurer had an independent duty to defend. The first insurer was entitled to contribution for indemnity, however.

Peabody Essex Museum, Inc. v. United States Fire Ins. Co.

(D.Mass., September 30, 2010)

Court Determines Start Date for Allocation, But Orders a Second Trial

The court addressed allocation of indemnity between the policyholder and its insurance company for damage caused by an oil spill discovered in 2003, but having originated at some point over the previous decades. The court held that the start date for the allocation period is the first day of the policy but a second trial is required to determine the end date of allocation, based on the date when the spreading of oil no longer caused new injury.

Builders Mutual Ins. Co. v. Wingard Properties, Inc.

(D.S.C., September 28, 2010)

Court Allocates Settlement Percentages to Insurers

The underlying action involved water damage resulting from construction defects was settled by defendants' two insurers. Addressing the amount of the pro rata share between the insurers, the court held that the most equitable manner to distribute the amount attributed to time the defendant was uninsured was to divide it evenly between the two insurance carriers.

Professional Liability

McCarthy v. State Farm Fire and Cas. Co.

(D.Or., October 5, 2010)

Veterinarian's Violation of Employment and Purchase Agreements Not "Professional Liability"

A veterinarian who sold his practice and became employee of the purchaser was sued by the purchaser for allegedly making disparaging remarks about other employees and the purchaser to customers. The insured was not entitled to coverage under veterinary professional liability policy. The doctor's allegedly disparaging remarks were not considered professional services but rather business aspects of the veterinary practice. Further, complaint was not filed by pet owner but by the doctor's employer and purchaser of his veterinary practice. The doctor's alleged conduct related to the performance of purchase and employment agreements, not the provision of professional services. Therefore, there was no coverage under the policy. The insurer had no duty to defend.

Sheinbaum v. American Cas. Co. of Reading, Pennsylvania

(DC D., October 1, 2010)

Nurse Licensed in Denmark Not Covered by Professional Liability Policy for Practicing In Virginia Without a License

An insurer who issued a nurse's professional liability to a registered nurse ("RN") had no duty to defend the nurse in a suit alleging negligent performance of professional services. The nurse received certification as an RN in Denmark, but not in Virginia where she resided and worked. The application which indicated she was an RN was not misleading, as a matter of law, because application did not restrict meaning of RN to persons licensed to practice in Virginia. Nonetheless, exclusion for liability resulting from professional services rendered while insured's license to practice is "no longer valid" excluded coverage because the "no longer valid" language is jurisdiction-specific. Because the nurse did not have a valid RN license in Virginia where she was practicing, the exclusion applied even though her RN license was valid in Denmark.

Legislation

2009 California Senate Bill 1406

(Intro: Feb. 19, 2010; Last Action: Sept. 25, 2010)

Amends existing law that states a policy of residential property insurance may not be issued or delivered or, under certain circumstances, initially renewed by an insurer unless the named insured is offered coverage for loss or damage caused by an earthquake. Authorizes an insurer to focus claims and its resources on services to existing policyholders in the event of an earthquake and to temporarily defer the mandatory offer and its associated workload, including inspections or underwriting activity.

New York Senate Bill 7773

(Intro: May 7, 2010; Last Action: Sept. 20, 2010)

Relates to property damage and personal injury liability insurance; provides that employer sponsored group personal excess insurance policies must comply with certain requirements, including requirements relating to premiums, advertising, and termination of coverage; defines the term group policy to mean a group insurance policy providing personal excess

insurance, personal property floater insurance, renters' insurance, and vintage vehicle insurance.

Pennsylvania Senate Bill 1181

(Intro: Jan. 8, 2010; Last Action: Sept. 22, 2010)

Amends The Insurance Company Act of 1921. Provides that the Insurance commissioner and employees of the Insurance Department when acting without malice and in the absence of fraud or bad faith are not subject to civil liability for libel, slander or any other relevant tort. Relates to insurance fraud.

Pennsylvania Senate Bill 1774

(Intro: June 23, 2010; Oct. 7, 2010)

Amends The Insurance Company Act of 1921. Provides that a service contract for service, repair, replacement or maintenance of property or indemnification for failure due to a defect in materials, workmanship or normal wear and tear is not insurance. Provides that insurer towing, rental, breakdown and emergency road service is not a service contract. Provides for service, repair, replacement or maintenance of property for damage resulting from power surges or accidental damage from handling.

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