

## ACTIONS AND PROCEEDINGS

### **Self-Serving Affidavit Raises Triable Issue of Fact**

*C.R. Pittman Constr. Co., Inc. v. Nat'l Fire Insurance Co.*  
(5th Cir. (La.), Sept. 30, 2011)

The policyholder sought appeal of an order of summary judgment entered in favor of the insurer on the policyholder's claim that the insurer breached the insurance contract by failing to reimburse the policyholder for damage to equipment caused by Hurricane Katrina. The policyholder argued that the district court had erred by failing to consider its affidavit to be competent evidence. The appeals court determined that the district court had erred by failing to consider the policyholder's affidavit, despite the fact that the affidavit was entirely self-serving, since the affidavit was not wholly conclusory; was based on personal knowledge; and did create a fact issue as to the cause of the damage to the equipment.

### **District Court Abstained From Ruling Where Issues Were Not Resolved in State Court**

*Liberty Ins. Underwriters Inc. v. Pacia*  
(D.R.I., Sept. 29, 2011)

The plaintiff law firm had a professional liability policy with the insurer. The plaintiff provided notice to the insurer of multiple claims. After information came to light that the plaintiff owned a quarter share in one of the companies making a claim against itself, the plaintiff waived coverage for that claim. The other claims totaled more than the policy limit and the insurer was accordingly required to engage in meaningful settlement negotiations in order to bring about settlement of as many claims as possible. The insurer was attempting to preclude coverage for certain claims and not others that were still ongoing in state court. This court held that the question before it was a novel, unsettled, difficult, complex, or otherwise problematic issue that would weigh in favor of abstention. Therefore the court held that it was appropriate to abstain.

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## ADDITIONAL INSURED

### **Offer and Performance by Named Insured Constitute “Executed Contract” Within Meaning of AI Endorsement**

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*Evanston Ins. Co. v. American Guar. & Liab. Ins. Co.*  
(9th Cir. (Wash.), Oct. 3, 2011)

The issue in this declaratory judgment action was whether a general contractor and subcontractor executed a contract triggering the additional insured endorsement in the subcontractor’s policy. The court held that a fax from the general contractor to the subcontractor was an offer insofar as it noted that the subcontractor would be able to continue working only if it complied with the general contractor’s insurance requirement. A contract was formed, the court found, when the subcontractor contacted its insurance broker and requested that the broker issue a certificate of insurance to the general contractor. The court ruled that the unilateral offer by the general contractor and performance by the subcontractor constituted an “executed contract” that triggered additional insured coverage for the general contractor.

### **Nebraska Supreme Court Holds That AI Endorsement Provides Coverage for Additional Insured’s Own Negligence**

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*Federated Serv. Ins. Co. v. Alliance Constr., LLC*  
(Neb., Oct. 28, 2011)

An insurer filed a declaratory judgment action against a contractor with whom its named insured contracted to perform construction work. The insurer sought a declaration that it was not obligated to provide additional insured coverage

to the contractor for a personal injury action filed by an employee of its named insured. The insurer argued that the contractor was not entitled to additional insured coverage for its own negligence. The Supreme Court of Nebraska disagreed, stating that the additional insured endorsement provides “direct primary coverage for [the contractor’s] own negligence, not just its vicarious liability.”

### **Insurer’s Duty to Defend Triggered by Personal Injury Complaint**

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*Lafayette College v. Selective Ins. Co.*  
(3rd Cir. (Penn.), Nov. 10, 2011)

A college filed a declaratory judgment action against its general contractor’s insurer after it was sued by a subcontractor’s employee for injuries he sustained during a fall on a campus construction site. The general contractor’s policy contained an additional insured endorsement that provided coverage for “liability caused by [the general contractor’s] acts or omissions.” The court held that the insurer was obligated to defend the college because the underlying complaint alleged facts sufficient to support a claim based on the “peculiar risk” doctrine, which imposes vicarious liability on the employer of an independent contractor.

## AGENTS AND BROKERS

### **Brokers Not Necessary Party in Declaratory Action Regarding Insurer Obligations**

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*Principal Life Ins. Co. v. DeRose*  
(M.D.Pa., Oct. 3, 2011)

The insurer brought a declaratory action seeking an order that the policies were procured through fraudulent misrepresentations or not for legitimate purposes. The court allowed the bank that financed the premiums to intervene, which in turn sought dismissal for failure to join a necessary party, the agents/brokers of the policies. The court held that the policies at issue govern the rights and responsibilities between the insurer and the insured beneficiary trust, and because both were parties to the action, complete relief can be afforded with respect to the rights and obligations owed under the policies. The court stated that the brokers are not parties to the policies and are therefore not “necessary” under Rule 19(a)(1)(A).

## DUTY TO DEFEND

### **Motion to Dismiss Denied Where Policyholder May Not Have Been Aware of Claim Until Coverage Period Began**

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*All-Star Settlements Inc. v. Zurich Am. Ins. Co.*  
(D.Md., Sept. 28, 2011)

In this case the plaintiff was served with a lawsuit a day before its insurance policy began. The insurer moved to dismiss the claim prior to any discovery. The plaintiff claimed that although it was served the day before the policy coverage period began, it did not “become aware” of

the underlying action until the day that the policy coverage period began. Because there was no discovery to prove otherwise, the court must accept the plaintiff's contentions as true and therefore the insurer's motion to dismiss was denied.

### **No Duty to Defend in Coverage B Action Where There Was No Publication**

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*Creative Hospitality Ventures v. United States Liab. Ins. Co.*  
(11th Cir. (Fla.), Sept. 30, 2011)

The policyholder was subject to a class action suit under FACTA (Fair and Accurate Credit Card Transaction Act) for printing receipts with more than five digits of the consumer's credit card on them. The policyholder sought a defense from the insurer under its policy for personal and advertising injury. In order to be covered under the policy, the injury must be suffered as a result of a publication. The court held that the receipts were not publications. The policyholder provided the receipts only to the customer (who already knew their own credit card numbers) and thus the receipts were not publications. Therefore the court held that the insurer was not obligated to defend the policyholder for the printing of receipts in violation of FACTA.

### **No Duty to Defend Where the Policy Was Unambiguous**

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*Evanston Ins. Co. v. Douglas Heeder*  
(M.D. Fla., Oct. 7, 2011)

A hotel commissioned the policyholder to work on its hotel roof. The policyholder exposed a large area of the existing roof and failed to cover it, which resulted in water damage to the hotel. The hotel sued the policyholder, who then sought

defense from his insurer. The insurer made a motion for declaratory judgment to disclaim its duty to defend because the policy covered only "roofing-residential." The policyholder argued that the policy was ambiguous as to whether the use of the word "and" may be construed to mean "or." The court held that in this policy "and" was unambiguous and was used in the ordinary sense, which could not be read disjunctively. The information in the insurance application also compelled the result as the policyholder had described his business as "residential roofing contractor," and quantified his roofing operations as 100 percent residential.

### **Insurer Obligated to Defend Policyholder in Quantum Meruit Action**

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*Indian Harbor Ins. Co. v. Satterfield & Pontikes Construction, Inc.*  
(S.D. Tex., Oct. 6, 2011)

The policyholder obtained a subcontractor to perform services. The subcontractor sued the policyholder for breach of contract and quantum meruit for additional work allegedly necessitated by the policyholder's insufficient plans. The policyholder made a claim for defense and indemnity from its insurer. The court found that the subcontractor's claim against the policyholder for quantum meruit existed independent of the contract and could thus fit within an exception to the breach of contract exclusion in the policy.

## **ENVIRONMENTAL**

### **Vermont Affirms Use of Time-on-the-Risk Approach in Petroleum Contamination Case**

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*Bradford Oil Company, Inc. v. Stonington Ins. Co., et. al.*  
(Ver., Sept. 11, 2011)

The policyholder brought this environmental coverage suit seeking a declaration on coverage for its cleanup liabilities involving petroleum contamination from a gas station. The coverage periods of the policies issued by the insurer covered only a portion of the total time that contamination allegedly occurred. The Vermont Supreme Court affirmed the time-on-the-risk allocation established in *Towns v. Northern Specialties Ins. Co.*, 2008 Vt. 98 (2008), controlled under the circumstances, and that the court was unconvinced by the state's reasonable expectations, equity, and policy arguments to distinguish the recent decision.

### **Citing Ambiguity, Illinois Appellate Court Denies Reversed Trial Court on Applicability of Pollution Exclusion**

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*Erie Ins. Exchange v. Imperial Marble Corp.*  
(Ill. App. Ct., Sept. 15, 2011)

The plaintiff insurer filed this action seeking a declaration that it did not have a duty to defend or indemnify its policyholder under a commercial general liability (CGL) policy in an underlying class action suit for personal injuries due to permitted emissions from the policyholder's manufacturing operations. The policyholder used volatile chemicals creating odorous emissions that were dispersed into the atmosphere, but which were authorized.

The policyholder raised two issues on appeal: whether the trial court erred in granting summary judgment for the insurer on coverage and whether it erred in denying the policyholder's estoppel defense. The appellate court concluded that the underlying complaint alleged an occurrence under the policy as the intended release of contaminants under the permit resulted in unintended harm. Also, the court held that the policy's pollution exclusion was arguably ambiguous as to whether the emission of hazardous materials in levels permitted by the Illinois Environmental Protection Agency (IEPA) permit constituted traditional environmental pollution excluded under the policy.

### **Pollution Exclusion Held to Encompass Carbon Monoxide Releases In Residential Homes**

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*Midwest Family Mutual Ins. Co. v. Wolters, et. al.*  
(Minn., Ct. of App., Aug. 22, 2011)

This environmental coverage matter involved a homeowner's exposure to carbon monoxide. The appellate court held that the insurer did not have a duty to defend the defendant contractor because the policy's pollution exclusion was not limited to purely environmental pollutants.

### **Pollution Exclusion Deemed Ambiguous as a Matter of Law**

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*Tyson Foods Inc. v. Allstate Ins. Co., et. al.*  
(Del., Aug. 31, 2011)

In this environmental coverage dispute, plaintiff chicken house owners (CHOs) sought a declaratory judgment against its insurers seeking a determination that they owed a duty to defend and indemnify the CHOs in underlying lawsuits. The

underlying actions alleged the CHOs' improper disposal of poultry waste contaminated water resources, causing property damage and bodily injury. The insurers asserted that there was no such duty due to the application of the policy's pollution exclusion. However, the court held that the underlying complaints triggered the policies and they alleged property damage or bodily injury within the policy periods. Moreover, the court held that under Arkansas law, pollution exclusions were ambiguous, as a matter of law, such that there was a possibility that they did not preclude coverage.

### **Insurer Required to Defend and Indemnify Hotel in Legionnaires' Case Due to Non-Applicability of Pollution and Bacterial Exclusions**

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*Westport Ins. Corp. v. VN Hotel Group LLC, et. al.*  
(D. Fla., Oct. 11, 2011)

The issue was whether the policy's pollution exclusion or fungi or bacteria exclusion applied to bar coverage for a Legionnaires' disease claim. In holding against the insurer and against the application of the exclusions, the court concluded that while bacteria may be considered a contaminant, the Legionella bacteria that caused the injury was not a "pollutant" under the policy as it was not a solid, liquid, gaseous, or thermal substance. Likewise, the court held that the fungi or bacterial exclusion did not apply to the facts as the spa tub did not constitute a "structure" within the meaning of the policy.

## **EXCLUSIONS/ CONDITIONS**

### **"Your Work" Exclusion Under CGL Policy Precludes Coverage Solely for Damage to Property Upon Which the Policyholder Performed Repair Services**

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*American Home Assurance Co. v. CAT Tech LLC*  
(5th Cir. (Tex.), Oct. 5, 2011)

In the course of servicing a hydrotreating reactor, the policyholder damaged several of the reactor's components. In the subsequent arbitration between the policyholder and the reactor owner, the arbitrators found the insured responsible for the damage to the reactor and entered an award against it. The policyholder sought indemnification from its insurers under a CGL policy and a commercial umbrella policy and the insurers moved for summary judgment, contending that the "your work" exclusion found in both policies precluded coverage. The federal appellate court held that summary judgment was inappropriate because the "your work" exclusion only precluded coverage for damage to that portion of the property upon which the insured performed repair services but it did not preclude coverage for any damage to the property that the insured did not repair or service.

### **Defects Caused by Contractor's Faulty Workmanship Do Not Constitute an "Occurrence"**

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*Town & Country Property LLC v. Amerisure Ins. Co.*  
(Ala. App., Oct. 21, 2011)

The owner of an automobile dealership sought coverage directly from the insurer of the general contractor that

constructed the dealership after finding defects in the building and being awarded a judgment against the general contractor. The insurer moved for summary judgment, claiming that there had been no occurrence or accident. The Alabama Supreme Court held that summary judgment in the insurer's favor is appropriate to the extent that the damages represent the costs of repairing the faulty work itself. However, the court remanded the case to the trial court to determine if any of the damages were compensation for personal property or otherwise non-defective portions of the building as such would result from an occurrence and fall under the subcontractor exception to the "your work" exclusion.

### **Policyholder Cannot Recover Pre-Notice Expenditures**

*The Travelers Ins. Co. v. Maplehurst Farms Inc.*  
(Ind. Ct. of App., Aug. 24, 2011)

This environmental coverage matter involved an attempt by the policyholder to recover costs and expenses from various insurers that were incurred in remediating an environmental cleanup prior to notifying the insurers of an underground storage tank leak. The court held that the policyholder could not recover the costs of expenditures incurred prior to notifying their insurers of the tank leak. Further, because the policyholder entered into a settlement agreement without the insurers' consent in violation of the policy provisions, recovery was precluded as well.

## **NO-FAULT**

### **PIP Coverage Language Arguably Deceptive Despite DOI Approval**

*Dominick Servedio v. State Farm Insurance Company*  
(E.D.N.Y., Sept. 19, 2011)

The policyholder claimed that the manner in which his insurer offered PIP coverage amounted to a deceptive trade practice and false advertising in violation of the New York General Business Law, sections 349 and 350, as well as common law fraud. The insurer moved to dismiss the policyholder's complaint, arguing that the policy language for its additional PIP coverage was mandated by the New York Department of Insurance (DOI) and therefore the policyholder could not state a claim upon which relief could be granted. The court concluded that DOI's approval of the policy language did not, as a matter of law, preclude the policyholder from pursuing his claim.

### **Insurer That Did Not Approve or Reject Proof of Loss Still Relied on for Purposes of Fraud Claim**

*Felman Production, Inc. v. Industrial Risk Insurers*  
(S.D.Va., Sept. 29, 2011)

The plaintiff policyholder moved for summary judgment on the defendant insurer's common-law fraud counterclaim. In its counterclaim, the insurer alleged that the policyholder misrepresented facts in its proof of loss and concealed the truth about its business in its responses to the insurer's investigation of the alleged loss. The policyholder argued, in part, that to prove fraud or misrepresentation the insurer needed to show reliance on the proof of loss, and since the insurer neither approved nor denied the claim,

even after suit was filed, the insurer did not rely on the proof of loss. In denying the policyholder's motion, the court concluded that it was sufficient that the insurer relied on the proof of loss to investigate the claim.

### **Summary Judgment for Insurer Where Investigation Failed to Turn Up Remains of Personal Property Allegedly Destroyed by Fire**

*John Roach, Jr. v. Allstate Indemnity Co.*  
(M.D.La., Sept. 20, 2011)

This insurance coverage dispute pertaining to personal property coverage payments following a fire was resolved in favor of the insurer. The court determined that the policyholder made material misrepresentations in his property loss claim and therefore the insurer was entitled to summary judgment. An investigation by the insurer's fire examiner failed to turn up the metallic remains of \$19,174.98 in personal property that the policyholder claimed was lost in the fire. This evidence demonstrated that the policyholder's statements were false, and because those false statements would have resulted in the insurer paying more than was owed under the policy, the misrepresentations were material and therefore the entire policy was void.

### **No Duty to Defend Action for Fraud Despite Claims of Negligence**

*National Union Fire Ins. Co. v. Absolute Title Services, Inc.*  
(N.D.Ill., Oct. 13, 2011)

The insurer sought a declaration that it did not have a duty to defend and indemnify its policyholders with respect

to a mortgage fraud lawsuit where the policy between the parties provided coverage for negligent acts or errors and omissions only. The court held that the insurer had no duty to defend, despite the fact that the complaint contained three counts of negligence, because the complaint was clearly focused on a fraudulent scheme and the negligence actions contained therein were conclusory and inconsistent with the larger complaint and the detailed allegations of fraud.

## **LHD & ERISA**

### **State Law Tort Claims Preempted by ERISA**

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*Cacoperdo v. Hartford Life Ins. Co.*  
(S.D.N.Y., Oct. 5, 2011)

The plaintiff, as policyholder, brought suit against two medical evaluation service providers for tortious interference. The policyholder claimed that the two providers knew or should have known that a valid contract existed between the policyholder and the insurer and that they induced the insurer to breach the contract by creating medical findings and opinions that led to the insurer's failure to discharge its duties and obligations with respect to the policyholder's LTD benefits. The court stated that a benefits determination under ERISA supersedes any and all state laws insofar as they relate to any employee benefit plan. The court found that the policyholder would not have a state law claim to bring if the insurer did not deny his LTD benefits, because neither of the providers owed the plaintiff an independent legal duty. Therefore, the plaintiff's state law claims are preempted as they directly relate to the insurer's administration of the plan benefits.

### **Deferential Review for Plan Administrator's Beneficiary Determination Under ERISA**

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*Caples v. US Foodservice, Inc.*  
(5th Cir.(La.), Oct. 6, 2011)

The plaintiff, ex-wife of the deceased policyholder, appealed summary judgment claiming the defendant insurer undermined her life insurance claim in violation of ERISA. This court affirmed on the ground that the plaintiff lacked standing to sue under ERISA. ERISA defines a beneficiary as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." The court stated that if a plan gives discretionary authority to a plan administrator to determine beneficiaries, that factual determination is reviewed for abuse of discretion. At the summary judgment stage, ERISA's substantial evidence standard of review means that the plaintiff carries a heavy burden. The plaintiff must show that there is not substantial evidence in the administrative record supporting the beneficiary determination such that the determination was an abuse of discretion. The court affirmed the lower court finding that the defendants have shown evidence substantial enough to make the ultimate decision reasonable.

### **Failure to Discuss 12.04(C) Criteria Results in Misapplication of Treating Physician Rule**

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*Jennings v. Astrue-Comm'r of Social Security*  
(S.D.N.Y., Oct. 3, 2011)

The plaintiff, as policyholder, was denied disability insurance benefits on a finding by the Social Security Administration that he was not disabled. A hearing was granted and the administrative law

judge (ALJ) also found that the plaintiff was not disabled. The issue before this court was whether the Commissioner's decision was supported by substantial evidence. Under the treating physician's rule a claimant is entitled to an express recognition of a favorable treating physician's report by the ALJ and if the ALJ does not credit the findings of the report than an explanation of why it does not. Here the ALJ did not mention the 12.04(C) criteria that define "affective disorder" and under which the treating physician had made a favorable finding. The court remanded the case for further consideration due to the lack of sufficient evidence supporting the decision not to credit the treating physician's testimony.

### **ERISA Disclosures Required by Duty of Loyalty**

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*Kujanek v. Houston Poly Bag I, Ltd.*  
(5th Cir. (Tex.), Sept. 27, 2011)

The court found that, as a fiduciary under ERISA, the defendant was required to act "solely" in the interest of the plaintiff, and to refrain from conduct that would have involved or created a conflict between its fiduciary duties and personal interests. The defendant, by withholding plan documents and rollover information, failed to act in the plaintiff's best interest and for the exclusive purpose of providing benefits to participants. The court stated that ERISA's duty of loyalty was the highest known to the law. It was clear that the defendant breached that duty and had made misleading and false statements to the court in its pleadings. The court remanded to the district court for additional findings on whether the defendant failed to furnish the plaintiff with the requisite documents, and if so, whether that omission served as a basis for statutory penalties.

## TRIGGER OF COVERAGE

### **Supreme Court of South Carolina Adopts Time-on-the-Risk Approach for Progressive Property Damages**

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*Crossmann Comm. Of North Carolina v. Harleysville Mut. Ins. Co.*  
(S.C., Aug. 22, 2011)

In this environmental coverage matter the policyholder developer sued its insurer seeking a judgment declaring that its CGL policies provided coverage for progressive property damages sustained by homeowners due to water penetration to the condominium units. The Supreme Court affirmed the trial court's finding of coverage based on an "occurrence," but reversed the trial court's finding of the insurers' joint and several liability. Specifically, the Supreme Court adopted the "time on the risk" framework for determining an insurer's responsibility under a CGL policy, thereby overruling *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 561 SE 2d 355 (2002), which mandated a joint and several approach.

## OTHER INSURANCE/ PRIORITY OF COVERAGE

### **General Liability Policy Must Be Exhausted before Personal Policy Kicks In**

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*Great Am. Assur. Co. v. Am. Cas. Co. of Reading*  
(E.D.Ky., Oct. 4, 2011)

The plaintiff insurer issued a general liability insurance policy to a licensed daycare center that provides services for medically fragile children. Several of the caretakers also had individual policies

for "Healthcare Providers Professional Liability." The daycare center and several workers, including those with personal policies, were sued when a special needs child died while in the custody or care of the policyholders. In considering priority, the court applied Kentucky law and held that priority depends on whether the escape clause in the policy was a standard or non-standard escape clause. In this case, there was no question that the one policy contained an escape clause that created a general disclaimer of coverage due solely to the presence of any other insurance. It was therefore a standard escape clause which must yield to the excess clause in the personal policies.

### **Priority of Coverage Agreement Extended Only to Third Parties, Not the Claimant**

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*Harco Nat'l Ins. Co. v. Zurich Am. Ins. Co.*  
(M.D.Fla., Sept. 26, 2011)

The claimant rented a vehicle from the policyholder. In the rental agreement, the policyholder and claimant agreed to the priority of insurance coverage in the event of personal injuries and property damage to third parties. The claimant was not a third party, but instead was the driver himself, and the factual scenario does not include any negligent act by the claimant-driver. Inasmuch, the priority of liability coverage was not involved where the operator/renter sought compensation for personal injuries from the owner of the motor vehicle on the basis of primary liability, not vicarious liability.

## PERSONAL AND ADVERTISING

### **Content of Facsimile, Not Act of Sending Fax, Is Key to Determining Privacy Violation**

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*Md. Cas. Co. v. Express Prods.*  
(E.D.Pa., Sept. 22, 2011)

The insurer asserted that there was no duty to defend or indemnify under the personal and advertising injury coverage provision the alleged harm arises solely from the improper transmittal of a facsimile rather than the content of the faxes themselves. The policyholder asserted that the policy should cover "blast fax" claims. The court found that the allegations focused on the unsolicited faxes, which imposed costs without authorization, and the underlying action complained of the monetary costs caused by the depletion of resources, not the content of any of the faxes. Accordingly, the court concluded that the defendant did not fall within the advertising injury coverage provisions.

### **Intentional Discrimination Does Not Equal Wrongful Eviction**

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*Essex Ins. Co. v. Harris*  
(E.D.Mo., Sept. 30, 2011)

After a policyholder was sued for violations of the Fair Housing Act due to alleged discrimination by their property manager, the insurer moved for summary judgment arguing that coverage did not exist under the policy. The policyholder argued that that the factual allegations in the complaint were covered by the policy because the policy partly defined a personal or advertising injury as "the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy...." The district court disagreed, finding that the complaint

was devoid of any allegations of forced entry, trespassing, or unauthorized entry such that the alleged conduct could be considered an invasion of the right of private occupancy. Therefore, the insurer had no duty to defend against the discrimination allegations.

## **REINSURANCE**

### **Judgment Creditor Not Allowed to Collect Proceeds Due From Reinsurer**

*Callon Petroleum Co. v. National Indem. Co.*  
(E.D.N.Y., Oct. 11, 2011)

Callon Petroleum obtained a judgment against Frontier Insurance Company and commenced suit against NICO, Frontier's reinsurer, in an attempt to enforce its judgment against proceeds due to Frontier from NICO. Callon argued that the reinsurance agreement had an implied cut-through rights provision, allowing it to collect from NICO. The court previously held against Callon on this claim and denied Callon's motion for reconsideration. The court refused to reconsider its prior ruling, finding Callon had no cut-through rights, regardless of whether its judgment was an "ultimate net loss" under the reinsurance agreement.

### **Court Refuses to Appoint Arbitrator or Consolidate Reinsurance Arbitrations**

*IRB-Brasil Resseguros S.A. v. National Indem. Co.*  
(S.D.N.Y., Oct. 5, 2011)

The parties were involved in two separate but related reinsurance arbitrations in New York. IRB filed a petition to stay both arbitrations and disqualify one

arbitrator appointed by NICO and permit IRB to appoint NICO's arbitrator. NICO filed a cross-petition to consolidate the two consolidations, which were filed two years apart but which related to the same claim. The court denied both petitions in their entirety. As to IRB's petition to disqualify NICO's arbitrator, the court ruled that it had no authority to disqualify a party-chosen arbitrator, and even if it did, the complained - of conduct that the - arbitrator had previously agreed to serve as a neutral in the parties' other arbitration - hardly afforded cause for concern. The court also denied the motion to consolidate the arbitrations ruling that the issue of potential consolidation was for the arbitration panel to rule on once it was empaneled.

## **UM/SUM**

### **Self-Insureds Not Required to File Form Rejecting Underinsured Coverage**

*Tidwell v. BellSouth Telecommunications, Inc.*  
(D.S.C., Oct. 17, 2011)

The case involved whether the defendant, a self-insured company, violated South Carolina's rule requiring the filing of a mandatory form rejecting an underinsured. The court held that South Carolina law requires that "automobile insurance carriers" make a meaningful offer of underinsured motorist coverage to their insureds and since self-insureds are not automobile insurance carriers they law does not apply. In addition, requiring a self-insured to make a meaningful offer of underinsured motorist coverage to itself would produce an absurd result.

### **Colorado Supreme Court Refuses to Reform Umbrella Policy to Include UM/UIM Coverage**

*Apodaca v. Allstate Ins. Co.*  
(Col., June 20, 2011)

The Colorado Uninsured Motorist Act requires insurers to offer uninsured/underinsured motorist (UM/UIM) coverage with every "automobile liability or motor vehicle liability" policy sold in Colorado. Allstate did not separately offer UM/UIM coverage in connection with the umbrella policy it sold to the insureds. The insureds brought suit against Allstate seeking judicial reformation of the umbrella policy to include UM/UIM coverage on the basis that the policy included automobile liability coverage. The trial court granted Allstate's motion to dismiss, reasoning that only liability policies expressly linked to a specific, licensed Colorado motor vehicle are required to include the mandatory offer of UM/UIM insurance. The Supreme Court affirmed, holding that an umbrella policy is not an "automobile liability or motor vehicle liability policy" as specified in the statute and, therefore, Allstate did not have an obligation to offer UM/UIM coverage.

### **Court Holds Insurance Policy With Two-Year Limit Violates Illinois Public Policy**

*Country Preferred Ins. Co. v. Whitehead*  
(Ill. App. Ct. 3d Dist., Aug. 30, 2011)

The policyholder, an Illinois resident, was involved in a motor vehicle accident with an underinsured driver in Wisconsin. The subject Illinois policy provided that uninsured motorist coverage claims were to be decided by arbitration and that the arbitration must be demanded within two years from the date of the accident.

The policyholder retained counsel, who communicated his representation of the policyholder on her underinsured claim before the two-year limitations period lapsed but failed to demand arbitration within that timeframe. After the limitations period expired, the insurer commenced a declaratory judgment action, arguing that the policyholder was barred from making her UM claim because she failed to make a written demand for arbitration within two years of the accident date. The majority observed that the public policy behind the Illinois UM statute was to place the injured party in substantially the same position he would have been in if the uninsured driver had been insured. Thus, an insurance policy violates Illinois public policy when it places an injured party in a substantially different position than if the tortfeasor had carried insurance. Because the two-year limitations period effectively shortened the applicable three-year Wisconsin statute of limitations from three years to two years, placing the policyholder in a “substantially different” position than if the other driver had been insured (i.e., if the driver of the other vehicle had been insured, the Country Preferred insured could have brought her personal injury action against him in Wisconsin, and a three-year statute of limitations would apply), it violated public policy.

### **Pennsylvania Supreme Court Upholds Regular-Use Exclusion as Applied to State Trooper**

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*Williams v. GEICO*  
(Penn., Oct. 19, 2011)

In a majority opinion (with three concurring opinions), the Pennsylvania Supreme Court affirmed a regular-use exclusion contained in a Pennsylvania state trooper’s personal auto policy. A

Pennsylvania state trooper was injured in the course and scope of his employment in an accident caused by an underinsured tortfeasor. Since state police vehicles do not provide UIM coverage, he sought UIM coverage under his personal auto policy with GEICO. The GEICO policy contained a regular-use exclusion, which provided that coverage did not apply when using a motor vehicle furnished for the regular use of the insured, his/her spouse, or a relative who resides in the insured’s household, “which is not insured under this policy. The Court addressed whether the exclusion was valid in light of its prior decision in *Burstein v. Prudential Property & Cas. Ins. Co.*, 809 A.2d 204 (Pa. 2002), where it had held that the regular-use exclusion was not void as against public policy under similar facts. The court affirmed *Burstein*, constrained by its prior decision, holding that a contrary decision would have been untenable as it would require insurers to compensate for risks they have not agreed to insure, and for which premiums have not been collected. However, because of the unique factual circumstances and challenges a Pennsylvania state trooper is required to face, and due to the fact that the plaintiff would have been entitled to UIM coverage under the GEICO policy but for this valid exclusion, the court recommended that the Pennsylvania legislature create a special public policy exception for first responders.

### **Excess Policy Means Vehicle is Not Underinsured in North Dakota**

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*Jung v. Gen. Cas. Co.*  
(8th Cir. (N.D.), Aug. 9, 2011)

In a case interpreting the North Dakota UIM statute, the 8th Circuit Court of Appeals refused to adopt the general

rule that personal-excess-liability policies are not relevant to determining whether a vehicle is underinsured for purposes of UIM coverage.

Goldberg Segalla LLP is a Best Practices law firm with offices in Philadelphia, New York, Princeton, Hartford, Buffalo, Rochester, Syracuse, Albany, White Plains and on Long Island. The Global Insurance Services Practice Group routinely handles matters of national and international importance for both domestic and foreign insurers, cedents and reinsurers. This includes: comprehensive audits,

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