

# CaseWatch: Insurance

The latest court decisions and developments | Vol.19, No. 2

## CGL EXCLUSIONS

### **Professional Services Exclusion Bars Coverage for Architectural Services**

*Orchard, Hiltz & McCliment, Inc. v. Phoenix Insurance Co.*  
(6th Cir., January 20, 2017)

An architecture firm was retained to upgrade a wastewater treatment plant's sludge-handling system. Specifically, the firm was tasked with drafting contracts and design documents for the architectural, structural, HVAC, electrical, and other phases of the ensuing construction. The firm was also responsible for creating the schedule for construction and quality assurance. During construction, the firm handled contract administration, daily observation, and staking. The firm was eventually sued in two separate suits for personal injuries sustained while the work was underway. The firm had two general liability policies that contained professional services exclusions. The insurers denied coverage and the firm sued. The court found that the professional services exclusions applied and barred coverage under the policies.

### **Used Tire Exclusion Bars Coverage for Tire Sale Company**

*Praetorian Insurance Co. v. A R Business Group, Inc.*  
(E.D. Cal., January 13, 2017)

The policy in issue contained an exclusion for used and recapped tires. The insured attempted to argue that it did not know about the exclusion and that it was not clear. The court found that the exclusion was sufficiently clear and that the insurer had no duty to notify the insured of the exclusion contained in the policy. Accordingly, the court found the exclusion was enforceable and applied to bar coverage in the underlying case in which the insured was sued for injuries caused during a motor vehicle accident.

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*CaseWatch: Insurance*, a collaborative effort of Goldberg Segalla's Global Insurance Services Practice Group, provides summaries of and access to important insurance law decisions and legislation.

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## Assault and Battery Exclusion Precludes Coverage Despite Uncertainty

*Burlington Insurance Co. v. Blind Squirrel, LLC*  
(E.D. Wash., January 10, 2017)

The underlying complaint alleged injuries suffered by the plaintiff when he was assaulted or battered at the insured establishment. The testimony showed it to be unclear whether the underlying plaintiff was physically hit during the altercation outside of the establishment. The court found that, regardless of whether the underlying plaintiff was physically hit, the undisputed testimony demonstrated that he suffered injuries in connection with the altercation and that the limited assault and battery exclusions applied.

## DUTY TO DEFEND

### Coverage Scratched Due to Exclusion

*James McHugh Construction Co. v. Travelers Property Casualty Co. of America*  
(D. Md., December 20, 2016)

An insured contractor hired a subcontractor to clean the windows of a skyscraper. The subcontractor's policy contained an exclusion for "faulty, inadequate, or defective ... materials, workmanship, or maintenance." The subcontractor severely scratched the windows while cleaning, and the building owner sued the contractor.

The insured-contractor's insurer denied coverage, so the insured brought a declaratory judgment action seeking a declaration that there was coverage under the policy. The court held that the subcontractor's work was "faulty workmanship" under the policy exclusion, so there was no coverage under the policy. The court rejected the insured's argument that the exclusion was ambiguous, holding that the exclusion referred to the quality or skill of the work performed in creating the product, which unambiguously included the quality of both the work in progress (cleaning the glass) and the final product (the scratched windows).

The court also rejected the insured's position that the damage was covered under the policy's "ensuing loss" clause, which provided coverage for "resulting loss or damage" from a covered loss. The court stated that scratched windows were a direct result of the subcontractor's faulty workmanship and that no other property was damaged other than the windows themselves, so the damage was not a "resulting loss" under that provision. In making this determination, the court reinforced the premise that an insurance policy is not a performance bond for contractual work.

## Scope of Damages Sought Precludes Coverage

*Westport Insurance Corp. v. M.L. Sullivan Insurance Agency, Inc.*  
(N.D. Ill., January 5, 2017)

An insured insurance broker and its employee (the insureds) were sued by a trucking insurance company that prepared policies and calculated premiums for the insureds' customers. The trucking insurance company alleged that the insureds provided it false information, resulting in the insureds withholding and pocketing premium payments owed to the trucking insurance company. The only damages sought by the trucking insurance company were the recovery of the withheld premiums, but the policy excluded "the reimbursement or return of premiums" from its definition of covered damages.

The court held that despite claims of both intentional and negligent acts, there was no coverage because there was no evidence that the trucking insurance company sought damages other than those excluded by the policy. The court further stated that the underlying action's request for "all such further and other relief as the Court deems just and appropriate" was merely boilerplate language that could not support the proposition that the complaint requested damages other than the withheld premiums.

## EMPLOYMENT PRACTICES/ PROFESSIONAL LINES

### **Under Claims-Made Policy, Insurer's Actual Notice of Claim Does Not Excuse Insureds' Obligation to Provide Notice**

*Wright State Physicians, Inc. v. Doctors Co.*  
(Ohio Ct. App., December 23, 2016)

An interinsurance exchange program issued two separate policies to a medical practice group and a hospital. A doctor who was named as a defendant in a lawsuit alleging negligent treatment of a child was a neurologist with the group and provided medical services at the hospital. Upon receipt of a letter from the claimants' attorney regarding the claim, the hospital timely filed a claims form with the interinsurance exchange. The litigation specialist at the interinsurance exchange noted that the doctor was employed by the group.

When suit was filed against the doctor, both the group and the hospital tendered their defense to the interexchange program. The carrier provided coverage to the hospital, but denied coverage to the group and the doctor, citing late notice. The group and the doctor filed a breach of contract action against the interinsurance exchange, but the court dismissed the suit. The court found that because the hospital was separately insured from the group and the doctor, the hospital's notice did not satisfy the strict reporting requirements imposed by the policy issued to the group and the doctor.

## ENVIRONMENTAL

### **Court Avoids Determining Whether Pollutants Definition Was Ambiguous, Validates Alternative Basis to Deny Coverage**

*Atlantic Casualty Insurance Co. v. Garcia*  
(N.D. Ind., January 5, 2017)

The policyholders purchased property where a dry cleaning facility was previously located, and a site assessment performed prior to the purchase showed that the property was contaminated. After the purchase, the policyholders received notice from the state environmental agency to remediate the property, and the policyholders sought coverage for the remediation costs from their insurer. However, the insurer denied coverage due to a pollution exclusion and claims-in process exclusion and instituted a declaratory judgment lawsuit.

The policyholder argued that the pollution exclusion, which defined "pollutants" in accordance with federal law, was ambiguous, while the insurer claimed that this definition was permissible. Presented with conflicting authorities, the federal court declined to determine whether a pollution exclusion may define "pollutants" in accordance with federal or state law. Instead, the court found that the policy did not provide coverage for the remediation costs based upon the claims-in-process exclusion, which precludes coverage for losses arising from property damage that began to occur prior to the inception of the policy, because it was undisputed that the property was contaminated before the policy was issued.

## LIFE, HEALTH, DISABILITY AND ERISA/EMPLOYEE BENEFIT LIABILITY

### **New York Governor Reminds Insurers of Contraception Requirement Under State Law**

Governor Andrew Cuomo of New York and the New York Department of Financial Services (NYDFS) recently announced several actions New York was taking with respect to coverage for contraception. The NYDFS reminds those entities providing health coverage for contraceptive services that coverage under New York law is independent of federal law and tracks the guidelines adopted by the Health Resources and Services Administration and mandates the provision for: "coverage for all contraceptive drugs and devices"; "coverage at no cost-sharing for at least one form of contraception within each of the methods of contraception that the FDA has identified for women"; "coverage with no cost-sharing of contraceptive services related to follow-up and management of side effects, counseling for continued adherence, and device removal"; "an exceptions process for a woman to use to gain access to a contraceptive service at no cost-sharing that is easily accessible, transparent, and sufficiently expedient and that is not unduly burdensome for a woman"; and "complete and accurate information regarding contraceptive coverage to insureds and prospective insureds." NYDFS also proposed the 47th and 48th Amendments to 11 NYCRR 52 (Insurance Regulation 62).

## PERSONAL AND ADVERTISING INJURY

### **No “Personal Advertising Injury” Where Infringing Copyrights Not Found in Advertisement**

*Educational Impact v. Travelers Property  
Casualty Co.*

(N.D. Cal., December 21, 2016)

In a spat between companies providing educational programs, the issue was whether the policyholder infringed on the exclusive license and copyrights of the underlying plaintiff. Notably, the plaintiff filed suit alleging breach of contract, violation of the Lanham Act, and unfair competition, among others. The insurer denied coverage, which led to a resolution of the underlying lawsuit wherein the policyholder assigned its rights to the plaintiff. The plaintiff then brought suit against two insurers for coverage, one of which settled.

On cross-motions for summary judgment, the California federal district court granted judgment in favor of the insurer. In so holding, the court stressed the alleged copyright infringements must have occurred in the policyholder’s advertisement since general copyright infringement was not covered. Furthermore, there was no causal connection between the plaintiff’s injury and the advertising injury since the sale of the policyholder’s products, not its advertisements, potentially infringed the plaintiff’s copyrights.

## **“Unsolicited Communications” Endorsement Barred Coverage in TCPA Coverage Case**

*Travelers Indemnity Co. v. Margulis*  
(E.D. Mo., Dec. 15, 2016)

While coverage lawsuits involving the Telephone Consumer Protection Act (TCPA) generally involve fax-blasting, a Missouri federal district court analyzed whether there was coverage for an automated phone call. Specifically, the policyholder, a hotel resort, was alleged to have called the underlying plaintiff’s cell phone without prior consent. After choosing to defend the policyholder under a reservation of rights, the insurer later initiated a declaratory judgment action asserting there was no coverage under four policies. The court agreed. First, there was no coverage under three of the four policies since the alleged phone call did not occur during their respective policy periods. Second, an “unsolicited communications” endorsement barred coverage for any communication that was not specifically requested, which included the unsolicited phone call in question.

## PRIORITY OF COVERAGE/ ALLOCATION

### **Predicting North Carolina State Law, Federal Court Looks to Underlying Indemnity Agreement to Determine Coverage Priority**

*Continental Casualty Co. v.  
Amerisure Insurance Co.*  
(W.D.N.C., January 3, 2017)

A North Carolina federal court resolved a dispute between liability insurers as to which of their policies responds first to a bodily injury claim. Underlying the insurance coverage dispute is an accident involving a construction project. The general contractor retained subcontractor #1, which, in turn, retained subcontractor #2 to erect structural steel. An employee of subcontractor #2 was allegedly injured very seriously when he fell from steel decking during work on the project.

The employee commenced an action against all three contractors, among others. Subcontractor #1 had a commercial general liability policy from insurer #1, which included the general contractor as an additional insured. Subcontractor #2 had commercial general liability and umbrella policies from insurer #2, on which the general contractor and subcontractor #1 were additional insureds. When the employee sued the general contractor and subcontractor #1, insurer #1 tendered the defense and indemnity of each to insurer #2. In response, insurer #2 acknowledged the general contractor’s and subcontractor #1’s status as additional insureds, but rejected the tender based on a policy exclusion.

The underlying case settled pending indemnification from insurer #1. Insurer #1 argued that even if its primary policy must respond first, its umbrella policy is excess to insurer #2’s primary policy based on the respective “other insurance” provisions of the policies. The court agreed that the “other insurance” provisions supported this argument,

but ruled that the underlying indemnity agreement's terms override the "other insurance" provisions. But the court stated that the U.S. Court of Appeals for the Fourth Circuit has held that the indemnity provisions of a written agreement between insureds override the "other insurance" provisions to govern which policy responds first to a loss.

## REGULATORY

### **NYDFS Issues Updated Cybersecurity Regulation**

*December 28, 2016*

The New York Department of Financial Services (NYDFS) recently issued an updated version of its proposed cybersecurity regulation, "Cybersecurity Requirements For Financial Services Companies" (23 NYCRR 500). The updated proposed regulation reflects several of the comments offered during the initial public notice and comment period that concluded on November 14, 2016. A comprehensive overview of the changes is contained in the "[Assessment of Public Comments for New Part 500 to 23 NYCRR](#)." The public was invited to comment on the updated proposed regulation until January 27, 2017. The new regulation is expected to become effective March 1, 2017.

### **NAIC and NIPR to Host the 2017 Insurance Summit**

The National Association of Insurance Commissioners ("NAIC") and National Insurance Producer Registry are hosting the 2nd Annual Insurance Summit in Kansas City, MO from May 22-26, 2017. The summit is expected to bring together various insurance and regulatory disciplines including, but not limited to, technology, financial and market regulation, and producer licensing and "focus on disruptive innovations and InsurTech topics throughout the week."

### **U.S and EU Reach Covered Agreement**

*January 13, 2017*

On January 13, 2017, former U.S. Treasury Secretary Jacob Lew and former U.S Trade Representative Michael Froman notified Congressional leaders that U.S. negotiators reached a covered agreement with EU officials entitled Bilateral Agreement Between the European Union and the United States of America on Prudential Measures Regarding Insurance and Reinsurance. The covered agreement covers three main areas of prudential insurance supervision: 1) group supervision; 2) reinsurance; and 3) exchange of information between supervisory authorities. The U.S. Treasury Department released a [fact sheet](#) explaining the key provisions of the covered agreement. The [NAIC](#) is currently reviewing the deal.

### **NAIC Releases Insurance Reports**

*January 19, 2017*

The NAIC recently released several reports that will provide "validated data on market distribution and average cost by policy form and amount of insurance." These reports include [The Homeowners Insurance Report for 2014](#), [The 2013-2014 Auto Insurance Database Report](#), and [The Report on Profitability by Line by State in 2015](#). NAIC President Ted Nickel stated in a press release, "Robust data collection, validation, and dissemination are core services provided by the NAIC to state insurance departments, companies, and the public. As the world's largest centralized repository of insurance data and analysis, reports such as these demonstrate the NAIC's commitment to insurance research and produce insight in the insurance marketplace."

### **Court Blocks Aetna-Humana Merger**

*January 23, 2017*

The Honorable John D. Bates of the U.S. District Court for the District of Columbia has blocked a proposed merger between Aetna and Humana on antitrust grounds. The court noted that "the merger would likely substantially lessen competition in the market for individual Medicare Advantage [plans]" in over 350 counties. Furthermore, the "merger would also be likely to substantially lessen competition on the public exchanges in three Florida counties." The court also noted that Aetna withdrew from the public exchanges in 17 counties "to avoid antitrust scrutiny."

## UM/UIM/NO-FAULT

### **Limiting Underinsured Motorist Coverage to Insureds Upheld**

*Bono v. State Farm Mutual Automobile Insurance Co.*  
(D. Ariz., December 22, 2016)

The policyholder's son was killed when struck by a vehicle while he was walking across the street. The tortfeasor's insurer tendered its \$50,000 policy limit. The policyholder sought underinsured motorist coverage from her insurer. The insurer denied the claim because the policyholder's son was not an insured since he did not live with the policyholder and was not a named insured on the policy. The court held that the underinsured motorist provision did not provide coverage for the son's death because the policy unambiguously stated that bodily injury must be sustained by an insured and the son was not an insured. It also held that this limitation was not contrary to the statutes mandating underinsured motorist coverage.

### **Non-Work Related ATV Accident Not Covered Under Business Auto Policy**

*Farris v. Ohio Security Insurance Co.*,  
(D. Colo., December 19, 2016)

The decedent died in a single-vehicle ATV accident. The decedent's widow sought UM/UIM coverage from the insurer that had issued a business auto policy to a company owned and controlled by the decedent. The court held that there was no coverage because the decedent's use of the vehicle and the accident generally were not work-related and was solely recreational. It also stated that the vehicle involved was not listed on the policy. The court also refused to reform the policy to provide coverage to the decedent since there was no work connection to the accident.

### **Affidavit Is Insufficient Evidence to Establish UIM Limit Lower Than Liability Limit**

*Lacrosse v. Owners Insurance Co.*  
(Ky. Ct. App., December 22, 2016)

The plaintiff was involved in an accident while driving a truck for his employer. The tortfeasor's policy paid its limit of \$50,000. The plaintiff then sought underinsured motorist benefits from his employer's insurer and his personal auto insurer. First, the court held that the employer's insurer's UIM limit may be \$1 million rather than the \$100,000 listed on the declarations page. The court stated that while the insurer had the employer's affidavit stating that it rejected the \$1 million UIM limit, the insurer did not have evidence that any written request for lower UIM limits ever existed or was ever provided to the insurer. Second, the court held that UIM benefits from both insurers could be set off by the plaintiff's receipt of workers' compensation benefits, the tortfeasor's settlement payment, and relevant no-fault coverage.

### **Issue of Fact Regarding Policyholder's Electronically Signed UIM Waiver**

*Johnson v. First Acceptance Insurance Co.*  
(Ala. Civ. App., January 6, 2017)

The policyholder was involved in a motor vehicle accident caused by an underinsured driver. The policyholder sought to recover UIM benefits under his policy with the insurer. The insurer denied the policyholder's claim, asserting that the policyholder had declined UIM coverage. The insurer claimed that the policyholder rejected UIM coverage via his electronic signature. The court stated that for purposes of resolving the appeal, it was not addressing the trial court's determination that an electronic signature may suffice to waive UIM coverage. Ultimately, the court held that there was an issue of fact regarding whether the policyholder actually electronically signed the UIM waiver.



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