Simpson Thacher
# Insurance Law Alert
October 2012

This Alert addresses decisions relating to a first-party bad faith claim, advertising injury coverage for fax blasting claims and the scope of coverage for employee theft under a fidelity policy. In addition, we highlight three recent decisions regarding a policyholder's right to excess coverage following a below limits settlement with a primary insurer. This Alert also discusses the South Carolina Supreme Court's calculation of a policyholder's loss under title insurance and the U.S. Supreme Court's upcoming review of whether a plaintiff can avoid removal under the Class Action Fairness Act by stipulating to damages of less than $5 million, the minimum amount in controversy required under the Act. Finally, we address a Ninth Circuit ruling regarding the scope of attorney-client privilege for communications between an insurer acting as an ERISA fiduciary and its counsel. Please "click through" to view articles of interest.

- ***Appraisal Award in Favor of Policyholder May Be Basis for Bad Faith Claim Against Insurer, Says Florida Court***

  A Florida appellate court held that an appraisal award issued in favor of a policyholder in connection with first-party property damage constitutes a "favorable resolution" sufficient to form the basis of a bad faith claim against an insurer. *Trafalgar at Greenacres, Ltd. v. Zurich Am. Ins. Co.*, 2012 WL 3822215 (Fla. Dist. Ct. App. Sept. 5, 2012).
  *Click here for full article*

- ***Three Courts Rule That a Below Limits Settlement With a Primary Insurer Precludes Coverage Under Excess Policy***

  Three courts ruled that applicable policy language unambiguously required the actual payment of full policy limits by a primary (or lower-level) insurer in order for the policyholder to access benefits under an excess policy. *Goodyear Tire & Rubber Co. v. Nat'l Union Fire Ins. Co.*, 2012 WL 4054122 (6th Cir. Sept. 17, 2012); *Intel Corp. v. Am. Guarantee & Liab. Ins. Co.*, 2012 WL 3889138 (Del. Sept. 7, 2012); *Forest Labs., Inc. v. Arch Ins. Co.*, No. 600219/10 (N.Y. Sup. Ct. N.Y. Cnty. Sept. 12, 2012). *Click here for full article*

- ***Fax Blasting Claims Are Covered Under Advertising Injury Provision, Says Eighth Circuit***

  The Eighth Circuit ruled that damages sustained as a result of unwanted fax blasting were within the scope of coverage provided by an advertising injury provision. *Owners Ins. Co. v. European Auto Works, Inc.*, 2012 WL 4052406 (8th Cir. Sept. 17, 2012). *Click here for full article*

- ***Sixth Circuit Adopts a "Direct is Direct" Approach to Direct Loss Under Fidelity Policy***

  The Sixth Circuit ruled that a fidelity policy covering loss resulting "directly" from employee theft required an immediate and/or uninterrupted causal connection between the theft and the insured's loss, and thus that an insured company was not entitled to fidelity coverage for theft-related losses sustained by a limited liability corporation controlled by the insured. *Tooling, Mfg. & Techs. Ass'n v. Hartford Fire Ins. Co.*, 2012 WL 3931802 (6th Cir. Sept. 11, 2012). *Click here for full article*

- ***South Carolina Supreme Court Rules That Calculation of "Actual Loss" Under Title Insurance Policy is Based on Property's Purchase Price, Not Current Property Value***

  The South Carolina Supreme Court held that "actual loss" under a title insurance policy must be measured by a decrease in property value from the purchase price of the property rather than from the value of the property at the time the title defect is found. *Whitlock v. Steward Title Guar. Co.*, 2012 WL 4013558 (S.C. Sept. 12, 2012). *Click here for full article*

- ***Supreme Court to Determine Whether Plaintiffs Can Avoid Removal Under CAFA by Stipulating to Damages of Less Than $5 Million***

  The U.S. Supreme Court granted certiorari to determine whether a named plaintiff can defeat a defendant's right to removal under the Class Action Fairness Act by filing a stipulation that attempts to limit class damages to less than $5 million. *Standard Fire Ins. Co. v. Knowles*, 2012 WL 1966025 (Aug. 31, 2012). *Click here for full article*

- ***Attorney-Client Privilege Does Not Protect Communications Between an Insurer Acting as ERISA Fiduciary and its Counsel, Says Ninth Circuit***

  The Ninth Circuit ruled that the attorney-client privilege does not protect communications between an insurer acting as an ERISA fiduciary and its counsel relating to the payment of benefits to a policyholder, where those communications occurred prior to a final determination on the policyholder's claim. *Stephan v. Unum Life Ins. Co. of Am.*, 2012 WL 3983767 (9th Cir. Sept. 12, 2012). *Click here for full article*

- ***STB News Alerts***

  Click here for information on Simpson Thacher's involvement in insurance-related events and honors.

## Bad Faith Alert:

### *Appraisal Award in Favor of Policyholder May Be Basis for Bad Faith Claim Against Insurer, Says Florida Court*

A Florida appellate court held that an appraisal award issued in favor of a policyholder in connection with first-party property damage constitutes a "favorable resolution" sufficient to form the basis of a bad faith claim against an insurer. *Trafalgar at Greenacres, Ltd. v. Zurich Am. Ins. Co.*, 2012 WL 3822215 (Fla. Dist. Ct. App. Sept. 5, 2012).

Florida law requires a policyholder to obtain a "favorable resolution" of an action for insurance benefits before it can assert a first-party bad faith claim against its insurer. In many cases, the "favorable resolution" requirement is satisfied by a ruling in favor of the policyholder on a breach of contract claim against its insurer. In *Trafalgar*, the court held that the "favorable resolution" precondition is also met where a policyholder obtains an appraisal award, even absent a breach of the insurance contract.

Here, Zurich agreed to pay insurance benefits to Trafalgar under a property policy in connection with hurricane-related property damage. However, the parties disputed the dollar amount of damage and Zurich paid only part of the amount requested in Trafalgar's statement of loss. Trafalgar filed suit, alleging that Zurich breached the policy by failing to pay all proceeds due. While that action was pending, the parties appointed a panel of appraisers who ultimately entered an award in favor of Trafalgar. Following the award, Zurich moved for summary judgment on the breach of contract claim, arguing that there was no breach because it had paid the appraisal award. The trial court agreed, entering judgment in favor of Zurich, but also allowed Trafalgar to amend its complaint to add a statutory bad faith claim. Later, the trial court dismissed the bad faith claim, finding that because Trafalgar had failed to obtain a favorable resolution of the breach of contract claim, the bad faith claim could not proceed. The appellate court reversed the bad faith ruling. The appellate court reasoned that the appraisal award was tantamount to a favorable resolution regardless of the dismissal of the breach of contract claim. In so ruling, the court analogized the appraisal award to an arbitration award, which has also been held to satisfy the "favorable resolution" requirement of a bad faith claim. *See Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216 (Fla. 2006).

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# Excess Alert:

## *Three Courts Rule That a Below Limits Settlement With a Primary Insurer Precludes Coverage Under Excess Policy*

Previous Alerts have discussed the frequently-litigated issue of whether a policyholder can access excess coverage when it has entered into a settlement with its primary insurer for an amount that is less than primary policy limits. *See* September, October 2011 Alerts. In deciding this issue, courts consider a number of factors, including applicable jurisdictional law, the language of exhaustion provisions in the relevant policies and settlement agreements, and whether the policyholder's total loss exceeded the limits of the primary policy. Last month, three additional courts weighed in on the issue, all ruling that applicable policy language unambiguously required the actual payment of full policy limits by a primary (or lower-level) insurer in order for the policyholder to access benefits under an excess policy.

In *Goodyear Tire & Rubber Co. v. Nat'l Union Fire Ins. Co.*, 2012 WL 4054122 (6th Cir. Sept. 17, 2012), the Sixth Circuit affirmed an Ohio district court ruling that an excess insurer had no indemnity obligation where the policyholder had settled with the primary carrier for less than policy limits. The court reasoned that applicable policy language—requiring the primary insurer to "have paid in legal currency the full amount of the Underlying Limit"—unambiguously required actual payment of full policy limits in order to access excess coverage. In so ruling, the court rejected Goodyear's reliance on underinsured-motorist coverage cases, in which Ohio courts have declined to strictly enforce exhaustion provisions that conditioned a driver's coverage under his own policy on payment of the other driver's policy limits. The court reasoned that public policy concerns at issue in the underinsured-motorist cases were inapplicable to the commercial general liability policies at issue in *Goodyear*. The court also rejected the argument that the exhaustion requirement should be disregarded because the below limits policy settlement did not prejudice the excess carrier. The court stated that unlike a notice provision or cooperation clause, the exhaustion requirement can preclude coverage regardless of prejudice to the insurer.

Similarly, in *Intel Corp. v. Am. Guarantee & Liab. Ins. Co.*, 2012 WL 3889138 (Del. Sept. 7, 2012), the Delaware Supreme Court held that a fourth-level excess insurer had no duty to contribute to the policyholder's defense costs where the policyholder had entered into a below limits settlement with a lower-level carrier. The fourth-level excess policy contained an endorsement creating a duty to defend that was conditioned upon exhaustion of the underlying limits "by payment of judgments or settlements." The policyholder argued that the exhaustion provision was satisfied because the below limits settlement, in combination with its own out-of-pocket defense costs, exceeded the limits of the third-tier excess policy. The court rejected this argument, holding that the exhaustion clause required full payment of underlying limits by judgment or settlement alone, and could not be construed "to encompass an insured's own payment of defense costs." In so ruling, the court relied on California precedent holding that an exhaustion requirement is not satisfied by a below limits settlement by virtue of the insured

"crediting" the underlying insurer with the remaining policy limits. *See Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London,* 161 Cal. App. 4th 184 (2008).

Finally, in *Forest Labs., Inc. v. Arch Ins. Co.*, No. 600219/10 (N.Y. Sup. Ct. N.Y. Cnty. Sept. 12, 2012), a New York court held that the highest-level excess insurer in a $70 million tower of insurance had no defense or indemnity obligations where the policyholder had settled with lower-level excess insurers for amounts below each insurer's respective policy limits. The applicable policy language required exhaustion of underlying limits "solely as a result of actual payment of a Covered Claim." The policyholder argued that this language was ambiguous as to who was to "actually pay" the limits of the underlying policy and thus could encompass a "combination of payments made by the insurers [in settlement] and by [the policyholder itself]." The court rejected this argument, reasoning that the provision required the underlying insurers to pay their full policy limits. In so ruling, the court distinguished *Zeig v. Mass. Bonding & Ins. Co.*, 23 F.2d 665 (2d Cir. 1928), in which the Second Circuit found a different exhaustion provision to be ambiguous.

## Advertising Injury Alert:

### *Fax Blasting Claims Are Covered Under Advertising Injury Provision, Says Eighth Circuit*

As discussed in our March 2010 and October 2011 Alerts, courts are split as to whether claims brought pursuant to the Telephone Consumer Protection Act (commonly known as "fax blasting" claims) constitute advertising injury under a general liability policy. In a recent decision, the Eighth Circuit ruled that damages sustained as a result of unwanted fax blasting were within the scope of coverage provided by an advertising injury provision. *Owners Ins. Co. v. European Auto Works, Inc.*, 2012 WL 4052406 (8th Cir. Sept. 17, 2012).

A class action lawsuit against Autopia, an auto repair company, alleged that unsolicited faxes sent by the company violated the class members' right to privacy. Autopia's general liability and umbrella insurers agreed to defend the action under a reservation of rights, but filed a declaratory judgment action seeking a ruling that the TCPA claims were not covered under the relevant policies. The policies covered damages arising from "advertising injury," defined as injury arising out of, among other things, "oral or written publication of material that violates a person's right of privacy." A Minnesota district court granted summary judgment in favor of Autopia, finding that the claims were covered under the plain meaning of the advertising injury provision. The Eighth Circuit affirmed.

Courts have acknowledged that the right to privacy can refer to either the right to secrecy (*i.e.*, to keep certain information private), or the right to solitude (*i.e.*, to be free of unwanted intrusions). Courts that have declined to find coverage for TCPA claims have generally interpreted the phrase "right to privacy" in the advertising injury provision to mean only the right to secrecy. In contrast, in *Owners Insurance*, the Eighth Circuit held that the phrase "right to privacy" also includes the right to solitude and thus encompasses the

receipt of unsolicited fax advertisements. In so ruling, the court rejected the insurers' argument that "the provision's placement in the policy next to other types of advertising injuries which require an evaluation of the content of the advertisement" justifies a finding that the advertising injury provision was intended to cover only content-based violations of privacy. The court noted, "[h]ad the insurers wanted to exclude TCPA violations from the advertising injury provision, they 'could have specifically [so] defined the term.'"

Outcomes in this context have been largely fact-dependent, based primarily on the particular language used in the advertising injury provision at issue. Interpreting policies with varying advertising injury language, the Fifth, Tenth and Eleventh Circuits have found advertising injury coverage for TCPA claims whereas the First, Third and Seventh Circuits have rejected such arguments.

## Fidelity Insurance Alert:

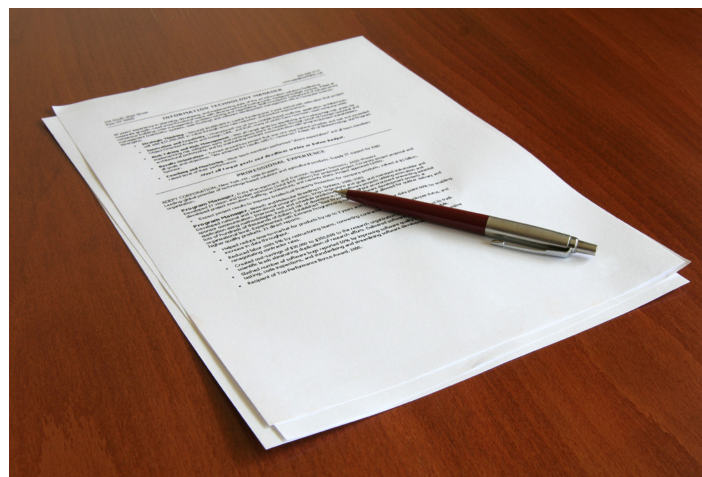
### *Sixth Circuit Adopts a "Direct is Direct" Approach to Direct Loss Under Fidelity Policy*

Affirming a Michigan district court decision, the Sixth Circuit ruled that a fidelity policy covering loss resulting "directly" from employee theft required an immediate and/or uninterrupted causal connection between the theft and the insured's loss, rather than proximate causation. Applying this so-called "direct is direct" approach, the court concluded that an insured company was not entitled to fidelity coverage for theft-related losses sustained by a limited liability corporation controlled by the insured, and from which the insured received a significant portion of its income. *Tooling, Mfg. & Techs. Ass'n v. Hartford Fire Ins. Co.*, 2012 WL 3931802 (6th Cir. Sept. 11, 2012).

TMTA, the insured company, controlled and derived a sizable portion of its income from a separate limited liability corporation ("LLC"). Although TMTA procured employee theft coverage from Hartford, the LLC was not listed as a named or additional insured under the policy. Therefore, following an incident of theft from the LLC, Hartford denied coverage on the grounds that its policy did not cover the LLC's losses. At the center of the ensuing coverage dispute was interpretation of the term "directly" in the provision that required the insured's loss to result "directly" from theft. TMTA argued that its injury was direct because it was a natural and unavoidable consequence of the theft from the LLC. In contrast, Hartford argued that the injury was indirect, because the losses were sustained by the LLC, rather than TMTA. The district court granted summary judgment in favor of Hartford and the Sixth Circuit affirmed.

The Sixth Circuit concluded that the employee's theft of funds from the LLC did not "directly" result in loss to TMTA, no matter how closely aligned the two entities were. In so ruling, the court applied a "direct is direct" approach, rejecting a more lenient proximate cause standard. Noting a split across jurisdictions on this issue, the court joined the "weight of the authorities" in defining "direct" as "immediate" under Michigan law.

This ruling contrasts with two other recent Sixth Circuit decisions, both decided under Ohio law. In *Retail Ventures, Inc. v. National Union Fire Ins. Co.*, 2012 WL 3608432 (6th Cir. Aug. 23, 2012), the Sixth



Circuit rejected a "direct means direct" approach and instead held that the phrase "resulting directly from" in a commercial crime insurance policy imposed a traditional proximate cause standard. And in *First Defiance Financial Corp. v. Progressive Cas. Ins. Co.*, 688 F.3d 265 (6th Cir. 2012) (discussed in our September 2012 Alert), the Sixth Circuit held that fidelity policies issued to financial institutions provided coverage for the theft of funds from client brokerage accounts by an employee.

## Title Insurance Alert:

### *South Carolina Supreme Court Rules That Calculation of "Actual Loss" Under Title Insurance Policy is Based on Property's Purchase Price, Not Current Property Value*

Adopting what appears to be a minority position, the South Carolina Supreme Court held that "actual loss" under a title insurance policy must be measured by a decrease in property value from the purchase price of the property rather than from the value of the property at the time the title defect is found. *Whitlock v. Steward Title Guar. Co.*, 2012 WL 4013558 (S.C. Sept. 12, 2012).

A property owner brought suit against her title insurer after learning that she could not build a residence on her property due to an easement that was missed in the title search. The property owner argued that her damages should be measured by the diminution in property value from the purchase price of the property, which was $410,000. In contrast, the title company contended that the value of the loss should be measured as of the date of discovery of the title defect, an amount significantly lower than the purchase price given the downturn in the real estate market.

Answering a certified question, the South Carolina Supreme Court held that as a general matter, the method of valuation of a title defect is determined by the language in the title policy. Because the term "actual loss" was not defined in the title policy at issue, the court concluded that the term was ambiguous and must be construed in favor of the insured. As such, the court held that the property owner's damages should be measured by reference to the purchase price of the property.

*Whitlock* highlights the importance of clear policy language in this context. Although the *Whitlock* court noted the inequity of requiring a title insurer, rather than a property owner, to bear the risk of fluctuating property values, the court stated that its ruling was driven by policy language construction, not principles of equity.

## Jurisdiction Alert:

### *Supreme Court to Determine Whether Plaintiffs Can Avoid Removal Under CAFA by Stipulating to Damages of Less Than $5 Million*

With insurance-related class actions on the rise, the requirements pertaining to federal diversity under the Class Action Fairness Act ("CAFA") are

important and may be the subject of dispute in such class action litigation. Previous Alerts have discussed interpretation of jurisdictional requirements under CAFA. *See* November 2010 Alert (Eleventh Circuit rules that CAFA does not require any one individual plaintiff to meet the minimum amount in controversy set forth in the federal diversity statue); June 2011 Alert (Ninth Circuit rules that CAFA does not allow a party joined to an action as a counterclaim defendant to remove the case to federal court).

The U.S. Supreme Court is poised to rule on another CAFA jurisdictional question. On August 31, 2012, the Supreme Court granted certiorari to determine whether "a named plaintiff [can] defeat a defendant's right to removal under [CAFA] by filing … a 'stipulation' that attempts to limit the damages he 'seeks' for the absent putative class members to less than the $5 million threshold for federal jurisdiction" under CAFA. *Standard Fire Ins. Co. v. Knowles*, 2012 WL 1966025 (Aug. 31, 2012). This marks the first time that the Supreme Court has agreed to review a question arising under CAFA.

Plaintiff filed a class action complaint in Arkansas state court against Standard Fire Insurance Company. The complaint included an affidavit stating that plaintiff would not seek damages for the class in excess of $5 million in the aggregate. Defendant Standard Fire removed the case to an Arkansas federal district court, and plaintiff moved to remand. The district court remanded the case, relying in part on a state statute that allows a plaintiff to file a binding stipulation with respect to the amount in controversy in order to establish subject matter jurisdiction. Standard Fire petitioned the Eighth Circuit for permission to appeal the district court ruling, which was denied. Standard Fire then petitioned the Supreme Court for certiorari, arguing that putative class members are not bound by actions taken by a named plaintiff before class certification. Standard Fire also argued that allowing a named plaintiff to bind absent putative class members to a limitation on damages for jurisdictional purposes not only contravenes the text of the CAFA but also

violates the due process rights of those members. In contrast, plaintiff argued that the decision to limit damages to a certain amount is "no different from innumerable other decisions that class representatives inevitably make as masters of their complaints." The Supreme Court granted certiorari, and will review the *Standard Fire* case this coming term.

## Discovery Alert:

### *Attorney-Client Privilege Does Not Protect Communications Between an Insurer Acting as ERISA Fiduciary and its Counsel, Says Ninth Circuit*

The Ninth Circuit ruled that the attorney-client privilege does not protect communications between an insurer acting as an ERISA fiduciary and its counsel relating to the payment of benefits to a policyholder, where those communications occurred prior to a final determination on the policyholder's claim. *Stephan v. Unum Life Ins. Co. of Am.*, 2012 WL 3983767 (9th Cir. Sept. 12, 2012).

An employee covered by a long-term disability plan sought benefits after sustaining permanent injury. Unum Life Insurance Company, the underwriter and administrator of the plan, calculated benefits based only on the employee's monthly salary without consideration of his annual bonus payments. In the coverage dispute that ensued, the employee sought to compel discovery of a series of internal memoranda created by Unum's in-house counsel regarding the employee's claim. A central issue before the court was whether those documents were protected by attorney-client privilege, or whether they fell within the "fiduciary exception" to the privilege, which is based on a fiduciary's duty to disclose all information about plan administration to plan beneficiaries.

Finding the fiduciary exception applicable here, the Ninth Circuit reasoned that the "justifications for excepting ERISA fiduciaries from attorney-client privilege apply equally to insurance companies." In so ruling, the court rejected Unum's argument—which the district court had accepted—that the fiduciary exception did not apply in this case because Unum and the employee had already become adversaries at the time the memoranda were created. Noting the lack of Ninth Circuit precedent regarding "when the interests of a Plan fiduciary and its beneficiary become sufficiently adverse that the fiduciary exception no longer applies," the court adopted the position endorsed by courts in other jurisdictions that it is not until after final determination (including final administrative appeal) that the interests of a Plan fiduciary and the beneficiary diverge for purposes of the fiduciary exception.

The Ninth Circuit's ruling in *Stephan* runs counter to *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007), in which the Third Circuit held that the fiduciary exception did not apply to insurance companies.

## STB News Alerts

On October 18, partner Mary Kay Vyskocil will speak at The Inaugural Women in Insurance Network CLE Workshop sponsored by the Insurance Coverage Litigation Committee of the Section of Litigation of the American Bar Association in Washington, D.C. The conference will feature panels on various substantive insurance issues and practical skills.

Simpson Thacher received three Global Insurance Elite Awards in the categories of U.S. Market-Litigation, U.S. Market-Claims, and U.S. Market-Reinsurance from *Intelligent Insurer* in its Summer 2012 list of "The Legal Elite."

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