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Reversing an Alabama federal district court decision, the Eleventh Circuit ruled that faulty workmanship constitutes a covered "occurrence" and that a contractual liability exclusion does not bar coverage for breach of warranty claims. *Penn. Nat'l Mut. Cas. Ins. Co. v. St. Catherine of Siena Parish*, 2015 WL 3609353 (11th Cir. June 10, 2015). (click here for full article)

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Missouri Court Rules That Ensuing Loss Provision Does Not Restore Coverage for Losses Caused by Design Defect

A Missouri federal district court ruled that an ensuing loss provision does not restore coverage because the construction-related property damage was caused entirely by an excluded event. *Performing Arts Community Improvement District v. Ace American Ins. Co.*, 2015 WL 3491292 (W.D. Mo. June 3, 2015). (click here for full article)

Statutory Pre-Suit Procedures for Construction Defect Claims Do Not Trigger Duty to Defend, Says Florida Court

A Florida federal district court ruled that invoking a "notice and repair" statute does not constitute a "suit" for purposes of triggering an insurer's duty to defend. *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 2015 WL 3539755 (S.D. Fla. June 4, 2015). (click here for full article)

Fourth Circuit Rules That Additional Insured Coverage is Not Limited to Vicarious Liability for Named Insured's Actions

The Fourth Circuit ruled that an insurer is required to defend a real estate developer under an additional insured endorsement even though no claims were asserted against the named insured contractor. *Capital City Real Estate, LLC v. Certain Underwriters at Lloyd's London*, 2015 WL 3606861 (4th Cir. June 10, 2015). (click here for full article)

Supreme Court of New Jersey Broadly Defines "Successful Claimant" under Fee-Shifting Statute

The Supreme Court of New Jersey ordered an insurer to pay statutory attorneys' fees as a "successful claimant" to a factory owner even though a jury found that the factory owner was not entitled to recover damages in the underlying construction defect litigation. *Occhifinto v. Olivio Construction Co., LLC*, 2015 WL 2095767 (N.J. May 7, 2015). (click here for full article)

New York Court Finds Reinsurance Certificates Ambiguous as to Whether Limits Apply to Expenses

A New York federal district court ruled that a reinsurance certificate is ambiguous as to whether expenses are excluded from the reinsurance limits of liability. *Utica Mutual Ins. Co. v. R&Q Reinsurance Co.*, No. 6:13-CV-1332 (N.D.N.Y. June 4, 2015). (click here for full article)

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Newly-Enacted Texas Law Imposes Strict Requirements on Asbestos Claimants

This month, Texas passed legislation requiring claimants in asbestos and silica personal injury lawsuits to provide notice of any trust claims and to disclose trust claim material. H.B. 1492. (click here for full article)

Construction Defect Coverage Alerts:

Eleventh Circuit Rules in Policyholder's Favor on "Occurrence" Issue and Contractual Liability Exclusion

Reversing an Alabama federal district court decision, the Eleventh Circuit ruled that faulty workmanship constituted a covered "occurrence" and that a contractual liability exclusion did not bar coverage for breach of warranty claims. *Penn. Nat'l Mut. Cas. Ins. Co. v. St. Catherine of Siena Parish*, 2015 WL 3609353 (11th Cir. June 10, 2015).

The coverage dispute arose out of the faulty installation of a new roof for a parish. The contractor's insurer defended a suit about the faulty workmanship under a reservation of rights. After a jury entered a verdict against the contractor, the insurer filed suit, seeking a declaration that it had no duty to indemnify the judgment. An Alabama district court ruled in the insurer's favor, finding that a contractual liability exclusion barred coverage. The Eleventh Circuit reversed.

The Eleventh Circuit ruled that the negligent construction claims alleged an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The court explained that although faulty work itself is not an accident or occurrence, there is an occurrence when the faulty work results in damage to other property. On this basis and because the faulty roof work at issue damaged the building's ceilings and decks, the court found an "occurrence." Although some courts have endorsed a similar damage-to-other-property approach to construction defect coverage, others have refused to do so, emphasizing that the presence or absence of consequential damage is irrelevant to the occurrence question. *See* May, October and December 2013 Alerts; April 2010 Alert; February 2011 Alert.

The Eleventh Circuit also ruled that a contractual liability exclusion that precluded coverage for damages "by reason of the assumption of liability in a contract or agreement" did not bar coverage. The district court had held that the exclusion applied to breach of implied warranty claims that arose out of the parties' contractual relationship. The Eleventh Circuit reversed, finding that under Alabama precedent, contractual liability exclusions apply "only where the insured agree[s] to indemnify another party" and do not extend to breach of express or implied warranty claims, even when they arise out of contract. The Fifth Circuit, applying Louisiana law, has likewise interpreted a contractual liability exclusion to apply only where the alleged injury would not have occurred "but for" a breach of contract. *See* May 2012 Alert.

Missouri Court Rules That Ensuing Loss Provision Does Not Restore Coverage for Losses Caused by Design Defect

An ensuing loss provision provides coverage for a loss that occurs when an event that is excluded from coverage causes a subsequent and distinct event that is covered. When seeking coverage pursuant to an ensuing loss provision, policyholders frequently argue that an intervening (and non-excluded) event contributed to a loss that originated from an excluded event. In a recent decision, a Missouri federal district court rejected this argument and ruled that that construction-related property damage was caused entirely by an excluded event. *Performing Arts Community Improvement District v. Ace American Ins. Co.*, 2015 WL 3491292 (W.D. Mo. June 3, 2015).

The coverage dispute arose out of losses related to defects in the design and construction of a parking garage. The original design plan called for a maximum of 18 inches of fluid fill against a retaining wall, but the contractor subsequently increased the amount to 36 inches. During construction, the wall cracked. A structural engineer determined that the failure of the wall was caused by the increase in fill amount. On this basis, the contractor's insurer denied coverage, citing a design defect exclusion. Plaintiff filed suit, alleging breach of contract. Plaintiff argued that the ensuing loss provision restored coverage because excessive pressure caused by the additional fill was an ensuing event that caused the loss. The court disagreed and granted the insurer's summary judgment motion.

The court rejected plaintiff's attempt to "divorce the defective design from the losses it caused." The court explained that an ensuing loss must be "distinct and subsequent" to the excluded loss, which was not the case here. The court stated: "[t]his case presents no subsequent event. A defective wall was created (because it was built in accordance with defective plans), and the defective wall failed. There was no ensuing event that caused the wall to fail. Plaintiff[ ] submits [that] the build-up of lateral pressures was an ensuing event, but this is simply another way of saying the wall was defectively designed." As the court noted, numerous other jurisdictions have rejected policyholder efforts to separate losses from excluded causes in order to obtain coverage under ensuing loss provisions.

Statutory Pre-Suit Procedures for Construction Defect Claims Do Not Trigger Duty to Defend, Says Florida Court

Addressing an issue of first impression under Florida law, a Florida federal district court ruled that invoking a "notice and repair" statute does not constitute a "suit" for purposes of triggering an insurer's duty to defend. *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 2015 WL 3539755 (S.D. Fla. June 4, 2015).

A condominium served a contractor with a Notice of Claim pursuant to a Florida statute that sets forth pre-suit procedures for a property owner to assert construction defect claims against a contractor. The contractor sought defense and indemnity from its insurer. The insurer refused to defend on the basis that there was no "suit" as required by the policy. The court agreed and granted the insurer's motion for summary judgment.

The policy defined "suit" as a "civil proceeding." The contractor argued that the notice at issue constitutes a civil proceeding because it is "an act or step that is part of a larger action or step taken in the prosecution of an action." The court disagreed, explaining that the statute provides only "a mechanism to guide the parties to enter into discussions with one another. No part of [the statute] provides for a setting where the parties would appear before anyone to assist with this process. There is no procedure contained therein that results in a decision or delineation of private rights and remedies."

Other courts have concluded that pre-suit procedures are not "suits" for purposes of an insurer's duty to defend. Outside of the construction defect context, courts have issued mixed decisions as to whether administrative procedural requirements and actions, including the issuance of a PRP letter in environmental contamination suits, constitute a "suit" triggering an insurer's defense obligation. *See* January and May 2013 Alerts; February 2011 Alert.

Fourth Circuit Rules That Additional Insured Coverage is Not Limited to Vicarious Liability for Named Insured's Actions

The Fourth Circuit ruled that an additional insured endorsement does not limit coverage to instances in which an additional insured is alleged to be vicariously liable for the acts of the named insured. The court therefore held that an insurer was required to defend a real estate developer in a negligence action even though no claims were asserted against the named insured contractor. *Capital City Real Estate, LLC v. Certain Underwriters at Lloyd's London*, 2015 WL 3606861 (4th Cir. June 10, 2015).

Capital City, a real estate developer, contracted with Marquez Brick Work, Inc. to perform foundation work. In connection with the contract, Marquez Brick secured general liability insurance from the Underwriters. The policy's additional insured endorsement provided coverage to Capital City "but only with respect to liability for … 'property damage' … caused in whole or in party by: 1. [Marquez's] acts or omissions; or 2. The acts or omissions of those acting on [Marquez's] behalf; in the performance of [Marquez's] ongoing operations for [Capital City]." During the course of Marquez's construction work, a wall collapsed. A suit was filed against Capital City and several other parties, but not Marquez. Capital City filed a third-party complaint against Marquez and sought coverage from the Underwriters based on the additional insured endorsement. A Maryland federal district court granted the Underwriters' summary judgment motion, finding that the Underwriters had a duty to defend Capital City "only if the underlying complaint had alleged that Capital City was vicarious liable for the actions of its subcontractor." The Fourth Circuit reversed.

The Fourth Circuit ruled that the endorsement provides coverage for property damage caused by Marquez, "either in whole or in part, regardless of whether the underlying complaint seeks to hold Capital City vicariously liable for Marquez's acts or omissions." Here, although the underlying complaint did not mention Marquez, it alleged negligence in the excavation and renovation in which Marquez was undisputedly involved. Therefore, the court concluded that "it cannot be said that the complaint does not seek to hold [Capital City] liable for property damage 'caused in whole or in part' by Marquez." The court distinguished a scenario in which a complaint alleged negligence solely on the part of the additional insured, noting that "perhaps [that] would be a different case."

Courts disagree as to whether additional insured coverage is limited to circumstances in which the additional insured is held vicariously liable for the named insured's negligence, or whether it extends to acts of the additional insured's own negligence, so long as the injury has some connection to the operations of the named insured. As reported in our March 2013 Alert, the Minnesota Supreme Court, addressing policy language similar to that at issue in *Capital City*, limited additional insured coverage to instances of vicarious liability and ruled that an insurer was not required to provide additional insured coverage to a contractor where the named insured sub-contractor had not committed negligence. *Engineering & Construction Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695 (Minn. 2013).

Attorneys' Fees Alert:

Supreme Court of New Jersey Broadly Defines "Successful Claimant" under Fee-Shifting Statute

The Supreme Court of New Jersey ruled that a factory owner was entitled to statutory attorneys' fees as a "successful claimant" in litigation against a contractor's insurer even though a jury found that the factory owner was not entitled to recover damages. *Occhifinto v. Olivio Construction Co., LLC*, 2015 WL 2095767 (N.J. May 7, 2015).

A factory owner sued a contractor alleging negligent construction. The contractor's insurer sought a declaration that it had no duty to defend or indemnify the claims. The factory owner defended that action as a third-party beneficiary of the contractor's liability policy. A trial court ruled that the policy provided coverage for the claims. Thereafter, the negligent construction suit proceeded to trial, and a jury found that the contractor breached its duty of care, but did not proximately cause the property damage. Therefore, no damages were awarded. After trial, the factory owner moved to collect attorneys' fees from the insurer pursuant to N.J. Rule 4:42-9(a)(6), which authorizes fee shifting in "an action upon a liability or indemnity policy of insurance in favor of a successful claimant." The trial court denied the motion, ruling that the factory owner was not a "successful claimant" because no damages were awarded in the negligent construction trial. The appellate division affirmed.

The Supreme Court of New Jersey reversed, ruling that the factory owner was a "successful claimant" because in the coverage action, the trial court had ruled that the insurer was required to defend and, if necessary, indemnify the negligent construction claims. The court held that a party does not need to prevail on all issues in the underlying litigation in order to be a "successful claimant." Rather, under New Jersey precedent, a "successful claimant" is a party that "succeed[s] on any significant issue in litigation which achieves some benefit the parties sought in bringing suit." Applying this standard, the court deemed the factory owner a successful claimant because he secured a successful coverage ruling as a "third-party beneficiary of a liability policy," notwithstanding the absence of an underlying damage award requiring indemnification.

The impact of *Occhifinto* may be limited. First, attorneys' fee awards under N.J. Rule 4:42-9(a)(6) are not mandatory and are within the sound discretion of a trial court. Second, because Rule 4:42-9(a)(6) is procedural, its application is generally limited to actions filed in New Jersey state court and should not extend to federal cases or out-of-state cases applying New Jersey substantive law.

Reinsurance Alert:

New York Court Finds Reinsurance Certificates Ambiguous as to Whether Limits Apply to Expenses

Our December 2014 Alert reported on a Second Circuit decision holding that a reinsurance certificate was ambiguous as to whether expenses were excluded from the reinsurance limits of liability. *Utica*

Mutual Ins. Co. v. Munich Reins. Am., Inc., 2014 WL 6804553 (Dec. 4, 2014). The decision was significant in its analysis of New York precedent. In particular, *Munich* distinguished a trio of cases that are widely cited for the proposition that facultative reinsurance limits presumptively include expenses. *See Unigard Sec. Ins. Co. v. North River Ins. Co.*, 4 F.3d 1049 (2d Cir. 1993); *Bellefonte Reins. Co. v. Aetna Cas. & Sur. Co.*, 903 F.2d 910 (2d Cir. 1990); *Excess Ins. Co. v. Factory Mutual Ins. Co.*, 822 N.E.2d 768 (N.Y. 2004). This month, a New York federal district court followed suit and ruled that a reinsurance certificate with nearly identical language was ambiguous as to whether it was expense inclusive. *Utica Mutual Ins. Co. v. R&Q Reinsurance Co.*, No. 6:13-CV-1332 (N.D.N.Y. June 4, 2015).

Utica issued primary and umbrella policies to an underlying insured. INA Reinsurance reinsured a portion of Utica's liability pursuant to a facultative certificate that was later assumed by R&Q. The certificate included a $1 million per occurrence limit and provided reinsurance "subject to the terms hereon and the general conditions set forth on the reverse side hereof." The parties disputed whether expenses were included in the $1 million limit. Citing to *Unigard, Bellefonte* and *Excess*, R&Q argued that its liability was capped at $1 million, inclusive of expenses. The court disagreed. Employing the same reasoning as *Munich*, the court found that the certificate did not include the language at issue in *Unigard* and *Bellefonte* that expressly made all of the reinsurer's obligations subject to the limit of liability. Rather, the language was nearly identical to the language at issue in *Munich* – providing indemnification against "loss or damage which [Utica] is legally obligated to pay … subject to the Reinsurance Accepted limits shown in the Declarations … ." Adhering to *Munich*'s rationale, the court reasoned that "the fact that 'losses or damages' [were] 'subject to' the limit of liability reasonably implie[d] that expenses [were] not." Although the certificate at issue did include an overarching "subject to" clause in its preamble (unlike the one at issue in *Munich*), the court found that this language did not expressly refer to the liability limit. The court ruled that extrinsic evidence must be considered in deciding whether the reinsurance limit of liability includes expenses.

Choice of Law Alert:

Choice of Law Governed by Texas Insurance Statute Rather Than Policy's Choice-of-Law Provision, Says Texas Court

A federal bankruptcy court ruled that a Texas statute requires application of Texas law to an insurance coverage dispute even though the parties expressly agreed to application of New York law. *In re: ATP Oil & Gas Corp.*, No. 12-36187 (S.D. Tex. Bankr. June 5, 2015).

ATP Oil & Gas sought coverage under a maritime insurance policy for certain pollution-related losses. ATP did not dispute that it failed to provide "immediate notice" of an occurrence that gave rise to a claim, as required by the policy. However, ATP argued that it was still entitled to coverage because the insurer did not suffer prejudice. The insurance policy expressly stated that New York law would govern matters of contract interpretation. Although New York statutory law requires a showing of prejudice in certain late notice cases, *see* N.Y. Ins. Law § 3420, it does not apply to insurance "in connection with ocean going vessels," as was the case here.

Notwithstanding the policy's New York choice of law provision, the court held that the policy was ambiguous as to choice of law. The court explained that "a policy of insurance, by necessity, incorporates applicable state law insurance requirements into the terms of the policy." Texas statutory law provides that any

insurance contract issued to a Texas citizen is held to be a contract "made and entered into" and "governed [by]" Texas law. Tex. Ins. Code § 21.42. Under Texas Supreme Court precedent, an insurer must demonstrate prejudice in order to deny coverage based on late notice. Addressing the conflict between "statutorily mandated Texas law" and "contract-mandated New York law," the court held that the conflict must be resolved in favor of the insured such that Texas law applies.

Late Notice Alert:

Montana Supreme Court Endorses Notice-Prejudice Rule

Answering a question certified by the Ninth Circuit, the Montana Supreme Court ruled that a liability insurer must establish prejudice in order to avoid defense and indemnity based on late notice. *Atlantic Cas. Ins. Co. v. Greytak*, 2015 WL 3444507 (Mont. May 29, 2015).

The insurance policy at issue required the policyholder to provide notice "as soon as practicable of an 'occurrence' of an offense which may result in a claim." The insurer sought a declaration that it had no duty to provide coverage based on non-compliance with the notice provision. A Montana federal district court agreed, ruling that the policyholder's untimely notice excused the insurer from providing coverage regardless of prejudice. On appeal, the Ninth Circuit certified to the Montana Supreme Court the question of whether Montana follows the "notice-prejudice" rule such that an insurer must establish prejudice in order to deny coverage for late notice. The Montana Supreme Court ruled that prejudice is required, explaining that "a condition that results in a forfeiture is to be strictly interpreted against the party for whose benefit it was created." A majority of jurisdictions have adopted the notice-prejudice rule for occurrence-based policies. However, most courts strictly enforce time-specific notice requirements and notice requirements in claims-made policies as condition precedents to coverage, regardless of prejudice.

Asbestos Alert:

Newly-Enacted Texas Law Imposes Strict Requirements on Asbestos Claimants

On June 16, Texas passed legislation requiring claimants in asbestos or silica personal injury lawsuits to provide notice of a trust claim. H.B. 1492. More specifically, the new law requires a claimant to identify all pending trust claims and to disclose trust claim material, including documentation filed with any asbestos trust. Under the statute, a defendant can seek sanctions for non-compliance. The statute also gives courts discretion to stay asbestos trials until a claimant gives notice of all trust claims, and/or to modify a judgment based on, among other things, the filing of a trust claim following trial. H.B. 1492. The law, which takes effect on September 1, 2015, is designed to foster transparency and fairness in asbestos injury lawsuits and to restrict claimants' ability to "double-dip" by receiving compensation via trust claims and litigation judgments/settlements.

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Simpson Thacher has been an international leader in the practice of insurance and reinsurance law for more than a quarter of a century. Our insurance litigation team practices worldwide.

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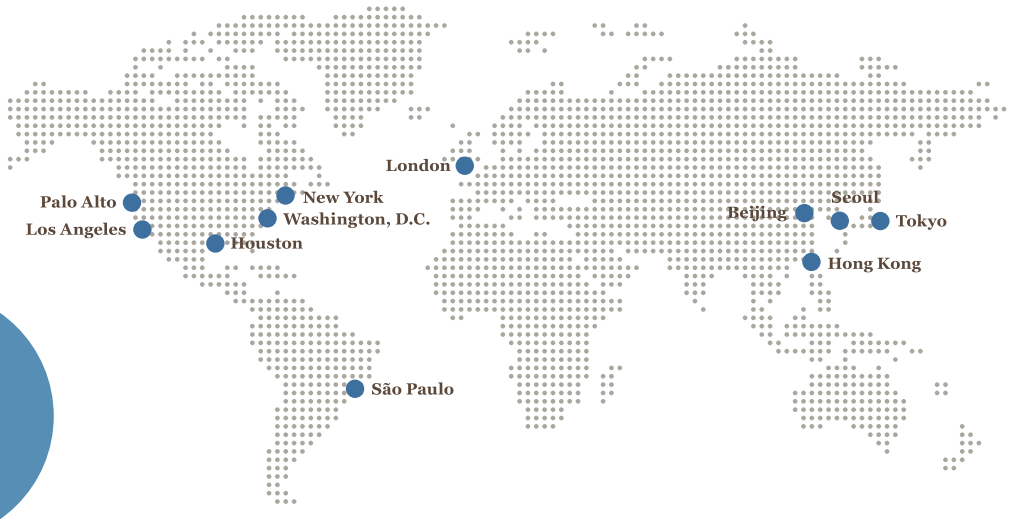

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