Simpson Thacher

# Insurance Law Alert

December 2014

This Alert discusses recent decisions relating to the stacking of insurance policies, the appropriate trigger for determining coverage under general liability and first-party property policies, and interpretation of the phrase "direct physical loss." In addition, we discuss rulings addressing insurance coverage for claims seeking restitution and for emotional distress, and an insurer's right to seek reimbursement of settlement payments from a policyholder. Finally, we report on rulings relating to the interpretation of reinsurance certificates, the assignability of statutory bad faith claims, and the scope of the common-interest doctrine. Happy Holidays!

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*–Legal 500 US*

## Two New York Courts Reject Policyholder Attempts to Stack Consecutive Policy Limits for Lead Paint Claims

The New York Court of Appeals and a New York federal district court both rejected attempts to stack insurance policies, holding that an insurer was responsible for only one policy limit in connection with lead exposure claims that spanned multiple policy periods. *Nesmith v. Allstate Ins. Co.*, 2014 WL 6633553 (N.Y. Nov. 25, 2014); *Hanover Ins. Co. v. Vermont Mut. Ins. Co.*, 2014 WL 6387061 (N.D.N.Y. Nov. 14, 2014). (click here for full article)

## Pennsylvania Supreme Court Rules That First Manifestation Trigger Governs Progressive Property Damage Claims

The Pennsylvania Supreme Court ruled that general liability coverage for ongoing property damage claims is determined by a "first manifestation" trigger rather than multiple triggers, such that only the insurer on the risk during the time the damage became reasonably apparent is liable. *Pa. Nat'l Mut. Cas. Ins. Co. v. St. John*, 2014 WL 7088712 (Pa. Dec. 15, 2014). (click here for full article)

## Seventh Circuit Applies Continuous Trigger to First-Party Property Damage Claims

Applying Wisconsin law, the Seventh Circuit ruled that a continuous trigger governed coverage under a property policy, and therefore, an insurer was liable for ongoing water damage that was not discovered until years after the policy period had ended. *Strauss v. Chubb Indem. Ins. Co.*, 771 F.3d 1026 (7th Cir. 2014). (click here for full article)

## New Jersey Court Rules That Ammonia Release Constitutes "Direct Physical Loss"

A New Jersey federal district court ruled that under New Jersey and Georgia law, the release of ammonia inside a packaging plant constituted "direct physical loss of or damage to" property under a property insurance policy. *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014). (click here for full article)

## Second Circuit Finds Reinsurance Certificate Ambiguous As to Whether Limits Apply to Expenses

The Second Circuit ruled that a reinsurance certificate was ambiguous as to whether expenses were excluded from the reinsurance limits of liability. *Utica Mut. Ins. Co. v. Munich Reins. Am., Inc.*, 2014 WL 6804553 (2d Cir. Dec. 4, 2014). (click here for full article)

## Minnesota Court Rules That Bank's "Restitution" Payments Are Not Excluded by Liability Policy

Applying Delaware law, a Minnesota federal district court ruled that a liability insurer was required to indemnify a settlement payment, even assuming that payment constituted restitution, which is generally deemed uninsurable. *U.S. Bank Nat'l Assoc. v. Indian Harbor Ins. Co.*, 2014 WL 7183851 (D. Minn. Dec. 16, 2014). (click here for full article)

## Ohio Appellate Court Rules That Emotional Distress Does Not Constitute Personal Injury

An Ohio appellate court ruled that allegations of emotional distress do not constitute "personal injury" under a personal and advertising injury provision. *G&K Mgmt. Servs., Inc. v. Owners Ins. Co.*, 2014 WL 7014723 (Ohio Ct. App. Dec. 11, 2014). (click here for full article)

## Minnesota Court Rejects Insurer's Equitable Reimbursement Claim Against Insured

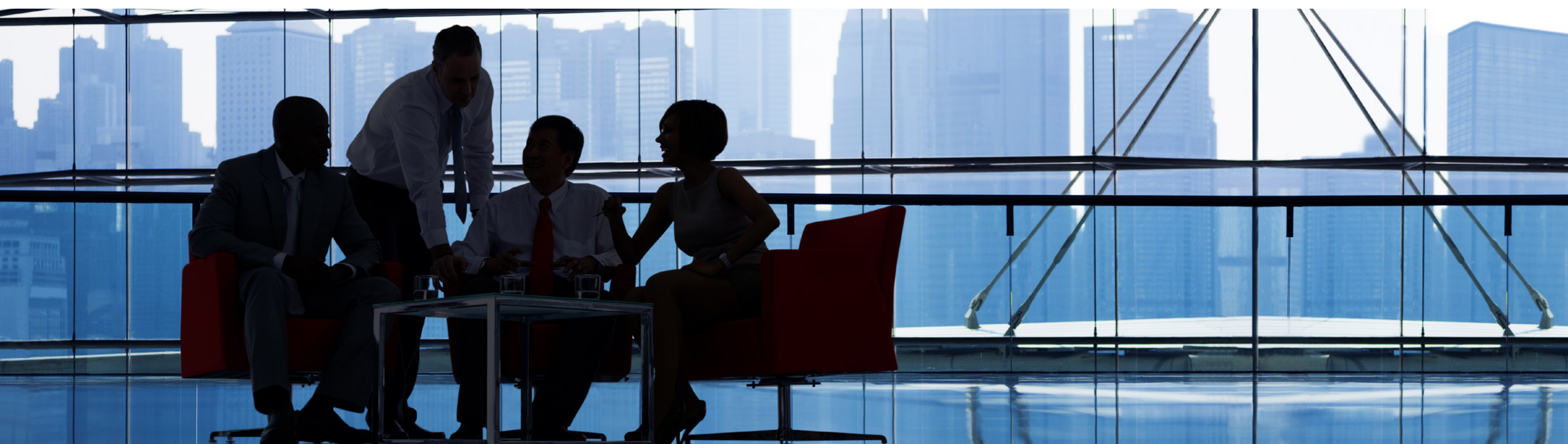
A Minnesota federal district court ruled that an insurer was not entitled to equitable reimbursement of settlement funds from a policyholder. *Select Comfort Corp. v. Arrowood Indem. Co.*, 2014 WL 7073093 (D. Minn. Dec. 12, 2014). (click here for full article)

## Pennsylvania Supreme Court Rules That Statutory Bad Faith Claims Are Assignable

The Pennsylvania Supreme Court ruled that an insured may assign the right to recover statutory bad faith damages from an insurer. *Allstate Prop. & Cas. Co. v. Wolfe*, 2014 WL 7088147 (Pa. Dec. 15, 2014). (click here for full article)

## New York Appellate Court Endorses Broad View of Common-Interest Doctrine

A New York appellate court ruled that the common-interest doctrine does not require pending or threatened litigation. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2014 WL 6803006 (N.Y. App. Div. Dec. 4, 2014). (click here for full article)



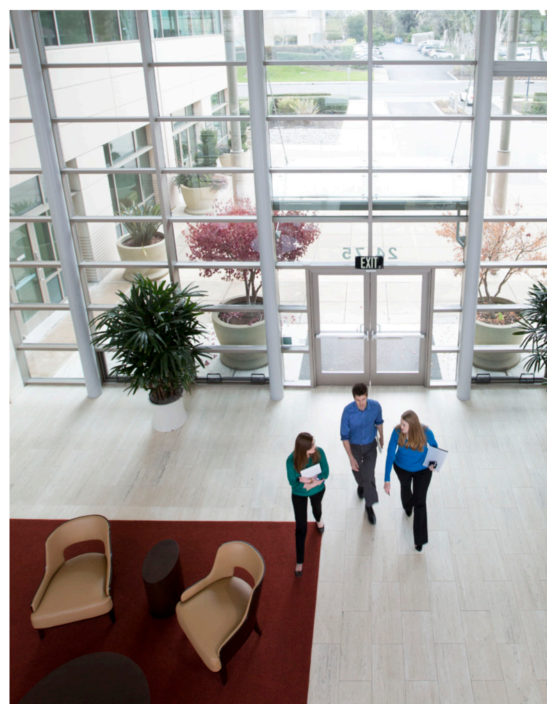
# Occurrence Limits Alert:

## Two New York Courts Reject Policyholder Attempts to Stack Consecutive Policy Limits for Lead Paint Claims

In *Nesmith v. Allstate Insurance Co.*, 2014 WL 6633553 (N.Y. Nov. 25, 2014), the New York Court of Appeals ruled that Allstate Insurance Company was responsible for only one policy limit in connection with lead exposure claims asserted by two tenants who leased the subject apartment during different policy periods.

Allstate insured the property owner under consecutive one-year policies, each with a $500,000 per occurrence limit. During one policy period, children were exposed to lead paint in the owner's apartment. During the subsequent policy period, different children were exposed to lead in the same apartment. Years later, both families brought suit claiming damages from the lead exposure. Allstate settled the first action for $350,000 and paid $150,000 toward a settlement of the second action, arguing that its liability for all lead exposures in the apartment was limited to a single policy limit of $500,000. The plaintiffs in the second action, who had reserved their rights to dispute the applicable policy limit, sued Allstate seeking to recover $350,000, the balance of a separate $500,000 policy limit. A trial court ruled that the plaintiffs were entitled to a full second policy limit. As reported in our March 2013 Alert, an appellate court reversed, ruling that there was only one occurrence because the injuries were caused by exposure to "the same general conditions" and that a non-cumulation clause limited Allstate's liability to one per occurrence limit. Last month, the New York Court of Appeals affirmed.

The non-cumulation clause provided that "[r]egardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability … for damages resulting from one accidental loss will not exceed the limit shown on the declarations page." The court ruled that under New York precedent, this language unambiguously limited Allstate's liability for both actions to one policy limit. The court noted that although two sets of children




were exposed to lead during different policy periods, the same "general conditions" continued to exist because the same lead paint hazard was present during both exposures.

A New York federal district court, faced with similar policy language, reached the same conclusion in *Hanover Insurance Co. v. Vermont Mutual Insurance Co.*, 2014 WL 6387061 (N.D.N.Y. Nov. 14, 2014). In *Hanover*, a child residing in an apartment was exposed to lead over a period covered by three consecutive policies issued by Vermont Mutual. Each policy had a $300,000 limit. Hanover provided excess coverage. Following a settlement with the policyholder, the insurers disputed whether the policies could be "stacked" to compel Vermont Mutual to provide $900,000 in coverage before Hanover was required to provide coverage under its excess policies. Hanover argued that stacking was permitted because, although the non-cumulation clause here limited coverage to the limits of a single policy "regardless of the number of insureds, claims made or persons injured," it did not refer specifically to the number of "policies involved" (unlike the clause in *Allstate*). The court rejected this argument, finding that notwithstanding this distinction, the clause in Vermont Mutual's policy was sufficient to exclude the stacking of multiple policies. As such, Vermont Mutual was obligated only to contribute $300,000 plus prejudgment interest towards the settlement.

# Trigger Alerts:

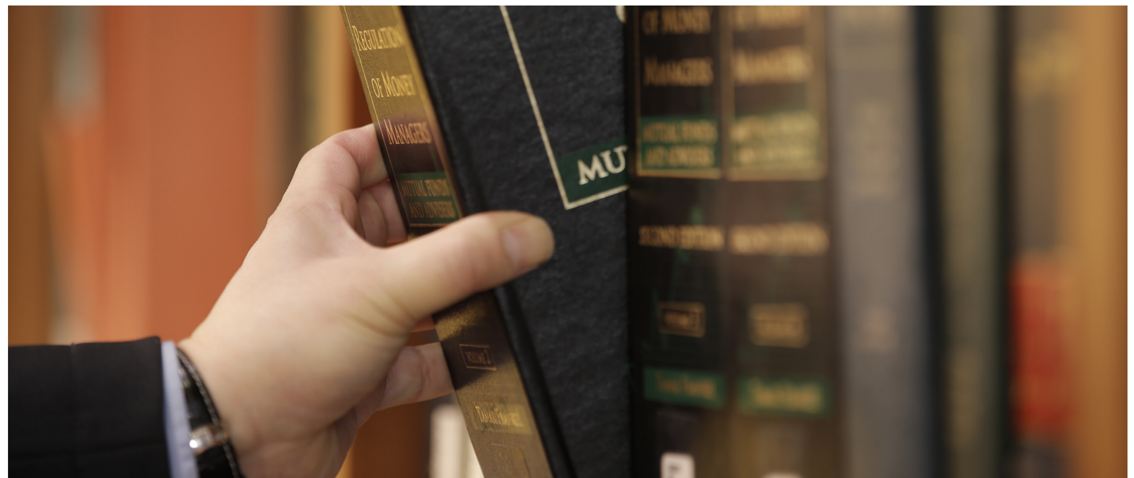
## Pennsylvania Supreme Court Rules That First Manifestation Trigger Governs Progressive Property Damage Claims

The Pennsylvania Supreme Court ruled that general liability coverage for ongoing property damage claims is determined by a "first manifestation" trigger rather than multiple triggers, such that only the insurer on the risk during the time the damage became apparent is liable. *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. St. John,* 2014 WL 7088712 (Pa. Dec. 15, 2014).

Dairy farm owners sought general liability coverage from Pennsylvania National for damages to their cow herd caused by a contaminated water supply. Penn National provided consecutive one-year liability policies to the plumbing company that had installed the defective piping that led to the contamination. Penn National argued that it was liable only under the policy in effect from 2003 to 2004, when the cows' health problems first manifested. The farm owners countered that the two policies in effect from 2005 to 2006 (a general liability policy and an umbrella policy) covered the loss because that was when the water contamination, the source of the cows' health problems, was first discovered. Alternatively, the farm owners argued that four consecutive policies were triggered pursuant to a multiple trigger theory. A Pennsylvania trial court disagreed with both of these contentions and ruled that under a manifestation trigger, only the 2003-2004 policy was implicated. An appellate court and the Pennsylvania Supreme Court both affirmed.

The Pennsylvania Supreme Court rejected application of the multiple trigger theory adopted in *J.H. France Refractories Co. v. Allstate Insurance Co.*, 626 A.2d 502 (Pa. 1993), in the context of asbestos bodily injury claims. The court reasoned that application of the multiple trigger theory in *J.H. France* was predicated primarily on the unique "etiology and pathogenesis of asbestos-related disease." In declining to apply a multiple trigger theory to "continuous, progressive property damage over successive policy periods," the court noted that, in Pennsylvania, "the first manifestation rule has served as the test for determining coverage under commercial general liability policies, with the lone exception of asbestos bodily injury claims."

With respect to application of the first manifestation trigger theory, the court ruled that a policy is triggered when damage first becomes reasonably apparent, not when the injured party is able to reasonably ascertain the source of damage. The court explained that "[w]hile knowledge of the cause of injury is pertinent to determining the date on which the statute of limitations begins to run, it has no special relevance to determining the date an insurance policy is triggered, unless specifically required by the language of the applicable policy of insurance." Here, the policy language did not support the contention that coverage is triggered when both injury and its cause are reasonably ascertainable. Therefore, the court affirmed that the only policy triggered under the first manifestation theory was the policy in effect at the time the injuries to the dairy herd became "reasonably apparent," even though the cause of those injuries was not known until a later time.

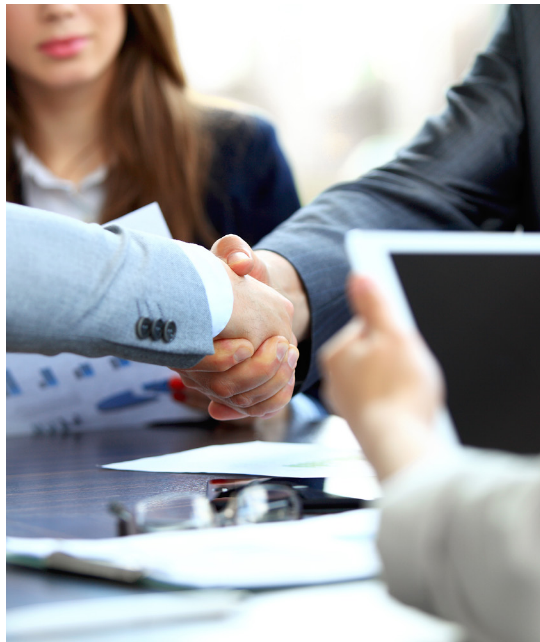


The ruling in *Pennsylvania National* serves as an important reminder that "*J.H. France* remains an exception to the general rule under Pennsylvania jurisprudence that the first manifestation rule governs a trigger of coverage analysis for policies containing standard CGL language."

## Seventh Circuit Applies Continuous Trigger to First-Party Property Damage Claims

Applying Wisconsin law, the Seventh Circuit ruled that a continuous trigger governed coverage under a property policy, and therefore, an insurer was liable for ongoing water damage that was not discovered until years after the policy period had ended. *Strauss v. Chubb Indem. Ins. Co.*, 771 F.3d 1026 (7th Cir. 2014).

The dispute arose out of water damage to a home. Water had been infiltrating the home since its completion in 1994, but was not discovered until 2010. The homeowners sought coverage under various Chubb policies in effect from 1994 to 2005. Chubb refused coverage, arguing that the "manifestation" trigger applies to all first-party property insurance and that because damage did not manifest until 2010 (after all of its policies had expired), it was not liable. Chubb also argued that the claim was barred by the applicable statute of limitations, Wis. Stat. § 631.83(1)(a). A Wisconsin federal district court ruled in favor of the policyholders, finding that the policy language required application of a "continuous" trigger, under which all policies in effect from the time the loss began until manifestation of the damage owed coverage. The district court also held that the claims were not time-barred. The Seventh Circuit affirmed.



The Seventh Circuit ruled that under Wisconsin law, the choice of trigger in any coverage dispute is solely governed by applicable policy language and that Chubb's policies mandated application of a continuous trigger. In particular, the court reasoned that the definition of "occurrence" as "continuous or repeated exposure" unambiguously contemplated a "long-lasting occurrence" that could cause damage "over an extended period of time." The policy further provided that once such an occurrence took place, the policy protected against "all risk of physical loss." The court concluded that under these provisions, the latent water infiltration constituted an occurrence during Chubb's policy periods.

The court also ruled that the coverage claims were not time-barred under state statutory law or applicable policy language. The court held that a policy provision requiring claims to be filed "within one year after a loss occurs" operated to extend the minimum limitation period established by Wis. Stat. § 631.83(1)(a), which provides that an action on a property policy must be commenced "within 12 months after the inception of the loss." The court explained that the phrase "inception of the loss" in the statute arguably started the clock running from the beginning of the water infiltration, whereas the policy phrase "after a loss occurs" is ambiguous as to progressive loss and can be reasonably interpreted to mean after a loss completes.

*Strauss* illustrates the importance of policy language in trigger analysis under Wisconsin law. The court expressly refused to adopt a bright-line rule "requiring use of the manifestation trigger theory in all first-party property insurance disputes" and reiterated its previous rejection of "this very same invitation to limit the continuous trigger to third-party coverage cases." The court emphasized that its application of a continuous trigger in this case was driven solely by policy language, suggesting that differing property policy language might warrant application of a different trigger theory.

# Property Insurance Alert:

## New Jersey Court Rules That Ammonia Release Constitutes "Direct Physical Loss"

A New Jersey federal district court ruled that under New Jersey and Georgia law, the release of ammonia inside a packaging plant constituted "direct physical loss of or damage to" property under a property insurance policy. *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014).

Gregory Packaging sought coverage from Travelers for losses sustained in connection with a factory evacuation and shutdown caused by an accidental ammonia release. Travelers denied coverage, arguing that there was no direct physical loss to the property. The court disagreed. Applying New Jersey and Georgia law, the court held that the term "physical loss" (undefined in the policy) does not require a structural change or alteration to property. Rather, the court held that a "temporary and non-structural loss of function is recognized as direct physical loss or damage under New Jersey law" and that the ammonia release satisfied this requirement because it "physically transformed the air within Gregory Packaging's facility so that it contained an unsafe amount of ammonia or that the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated." The court reached the same conclusion under Georgia law, reasoning that the ammonia discharge caused physical loss because it "physically changed the facility's condition to an unsatisfactory state needing repair." Decisions in other jurisdictions are mixed as to whether and under what circumstances non-structural property damage claims based on the release of odors, gases, or other molecular level changes allege direct physical loss. *See, e.g., Universal Image Prods., Inc. v. Fed. Ins. Co.*, 2012 WL 1181541 (6th Cir. Apr. 10, 2012) (presence of mold spores and bacteria in building do not constitute "direct physical loss") (discussed in our May 2012 Alert).

# Reinsurance Alert:

## Second Circuit Finds Reinsurance Certificate Ambiguous As to Whether Limits Apply to Expenses

Our November 2014 Alert reported on two decisions holding that reinsurance limits cap both indemnity and expenses. This month, the Second Circuit addressed the same issue, but reached a different conclusion, finding that a reinsurance certificate was ambiguous as to whether expenses were excluded from the reinsurance limits of liability. *Utica Mut. Ins. Co. v. Munich Reins. Am., Inc.*, 2014 WL 6804553 (2d Cir. Dec. 4, 2014).

The reinsurance certificate provided that Munich would indemnify Utica "against losses or damages … subject to the reinsurance limits shown in the Declarations." The Second Circuit deemed this language ambiguous. The Second Circuit agreed with Utica that it was reasonable to conclude that expenses were excluded from the reinsurance limit because the certificate was silent as to whether expenses were "subject to" the limits of liability. However, the court also reasoned that the absence of specific "subject to" verbiage as to expenses might not imply that expenses are exempt from policy limits because other provisions in the certificate (such as that relating to indemnification of settlements) did not include "subject to" language, but were nonetheless clearly subject to the reinsurance limits. Therefore, the court vacated the district court's ruling in favor of the reinsurer and remanded the matter to the district court for consideration of extrinsic evidence as to whether expenses should be subject to policy limits.

This decision is significant in its analysis of New York precedent in this context. The district court had relied upon a trio of landmark cases in ruling that the limits of liability in facultative reinsurance certificates are presumptively expense-inclusive. *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 Mut. Ins. Co.*, 822 N.E.2d 768 (N.Y. 2004). However, the Second Circuit deemed *Unigard* and *Bellefonte* distinguishable because they presented policy language that expressly made the reinsurers' obligations "subject to" the limit of liability. With respect

to *Excess Insurance*, the Second Circuit acknowledged that it arguably suggested that a limit of liability is presumptively inclusive of expenses, but held that the language at issue here might be sufficient to rebut any such presumption, stating "we do not read *Excess* as holding that any presumption of expense-inclusiveness can be rebutted only through express language or a separate limit for expenses."

Utica Mutual is represented by Simpson Thacher partner Mary Kay Vyskocil.

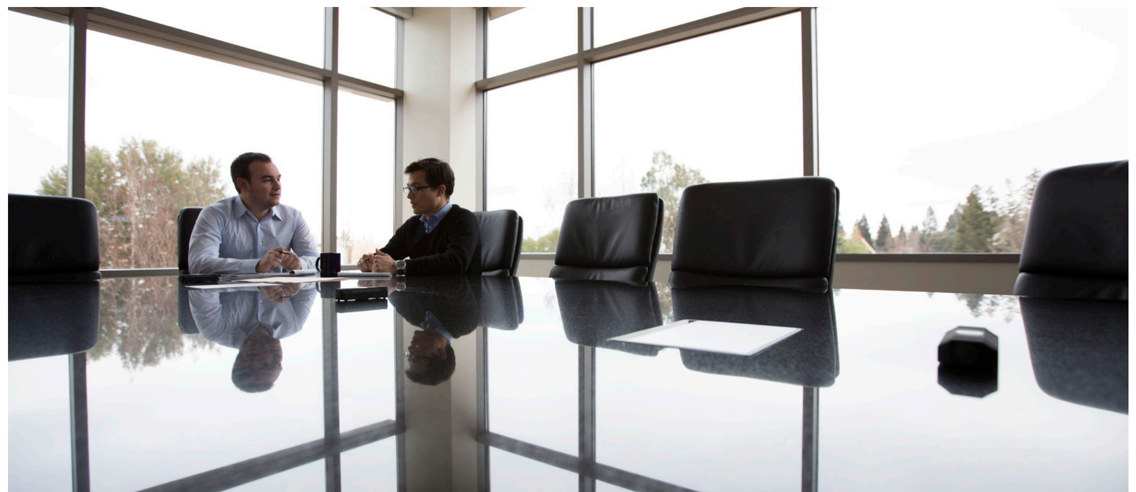
# Coverage Alerts:

## Minnesota Court Rules That Bank's "Restitution" Payments Are Not Excluded by Liability Policy

Applying Delaware law, a Minnesota federal district court ruled that a professional liability insurer was required to indemnify a bank's $30 million settlement payment, even assuming that payment constituted restitution, which is generally deemed uninsurable. *U.S. Bank Nat'l Ass'n v. Indian Harbor Ins. Co.*, 2014 WL 7183851 (D. Minn. Dec. 16, 2014).

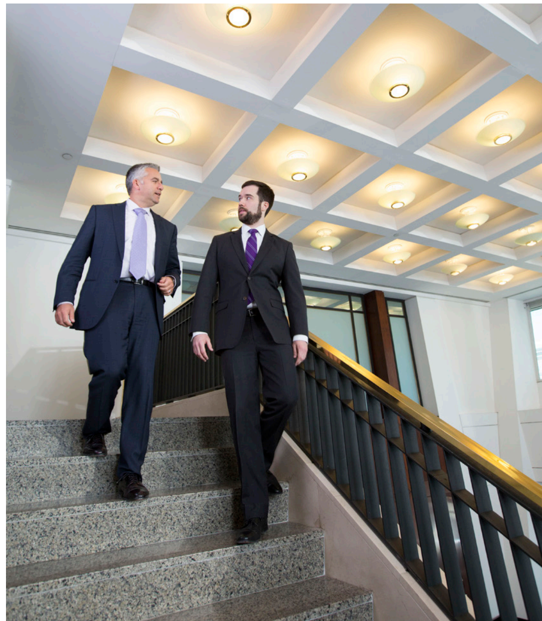
Several class actions were filed against U.S. Bank alleging overcharging of overdraft fees to customers. Those actions were resolved by a $55 million settlement, in which U.S. Bank did not admit liability and which did not characterize the payment as restitution. Indian Harbor and ACE American, two of U.S. Bank's insurers, consented to the settlement but reserved their right to challenge coverage. The insurers later denied coverage, arguing that because the settlement required U.S. Bank to return unlawfully assessed fees to its customers, the payment constituted restitution, which is uninsurable under Delaware law. The court disagreed and granted U.S. Bank's summary judgment motion.

The court concluded that it was unclear whether restitution is uninsurable under Delaware law. However, the court declined to decide this issue, and instead held that even assuming that Delaware law precludes insurance coverage for restitution as a matter of public policy, the insurance policies required a final adjudication as to restitution, rather than a settlement that resolved claims that allege ill-gotten gains and seek disgorgement of those gains. The court explained that although an Uninsurable Provision in the policies omitted restitution payments from coverage, the Ill-Gotten Gains exclusion required "a final adjudication in the underlying action." The court reasoned that "to interpret the two policy provisions consistently, the Court must read the Uninsurable Provision to bar coverage for a payment that a final adjudication in the underlying action determined is restitution." The court further explained that because a settlement is not a final adjudication, it is not excluded from coverage even if it resolves claims seeking restitution. The court distinguished decisions that deemed restitution uninsurable on the basis that they did not involve policies that included a final-adjudication requirement. In addition, the court emphasized that its ruling did not authorize parties to contract to insure an uninsurable payment (such as restitution), but rather it held that "parties may agree to ensure that a payment truly fits within a category of matters that are legally uninsurable."



### Ohio Appellate Court Rules That Emotional Distress Does Not Constitute Personal Injury

Courts across jurisdictions are split as to whether allegations of emotional distress, without accompanying physical injury, constitute "bodily injury" for purposes of general liability coverage. *See* July/August 2011 Alert. In a decision issued this month, an Ohio appellate court addressed whether allegations of emotional distress constitute "personal injury" under a personal and advertising injury provision. The court held that they do not, granting an insurer's summary judgment motion as to the duty to defend. *G&K Mgmt. Servs., Inc. v. Owners Ins. Co.*, 2014 WL 7014723 (Ohio Ct. App. Dec. 11, 2014).



A lawsuit against a dance studio alleged numerous common law and statutory claims, including intentional and negligent infliction of emotional distress. The studio's general liability insurer denied coverage and refused to defend. In ensuing litigation, an Ohio trial court ruled that the insurer had no duty to defend because the claims were outside the scope of coverage. The appellate court affirmed.

The personal and advertising injury provision defined "personal injury" as "injury other than 'bodily injury,' arising out of one or more of the following offenses: … (f) Discrimination, humiliation, sexual harassment and any violation of civil rights caused by such discrimination, humiliation or sexual harassment." The policyholder argued that under Ohio precedent, the term "humiliation" in a personal and advertising injury provision encompasses claims of emotional distress. *See Granger v. Auto Owners Ins.*, 991 N.E.2d 1254 (Ohio Ct. App. 2013) (holding that allegations of emotional distress stemming from housing discrimination are within scope of "personal injury" coverage because they allege "humiliation"), *appeal granted*, 999 N.E.2d 695. However, the court distinguished *Granger* based on differences in applicable policy language. The court explained that the policy here defined personal injury as "the *offense* of discrimination, humiliation, sexual harassment and any violation of civil rights caused by such discrimination, humiliation or sexual harassment." Therefore, allegations of humiliation as a resulting harm (as was the case here), rather than as an offense itself, were not within the scope of personal injury.

### Minnesota Court Rejects Insurer's Equitable Reimbursement Claim Against Insured

A Minnesota federal district court ruled that an insurer was not entitled to equitable reimbursement of settlement funds from a policyholder, finding that any such right to reimbursement derives only from contract terms. *Select Comfort Corp. v. Arrowood Indem. Co.*, 2014 WL 7073093 (D. Minn. Dec. 12, 2014).

The coverage dispute arose out of a putative class action suit against Select Comfort alleging personal injury caused by mold. Select Comfort tendered defense of the suit to several general liability insurers, including Arrowood. Arrowood agreed to defend under a reservation of rights, but Select Comfort argued that the reservation of rights created a conflict of interest and therefore retained its own counsel. The class action suit was ultimately settled, with Arrowood agreeing to pay 33% of the total amount. Thereafter, Select Comfort sued Arrowood seeking to recover certain unpaid defense costs. In turn, Arrowood asserted an "equitable reimbursement" counterclaim on the basis that it overpaid in the settlement. The court dismissed Arrowood's counterclaim, finding that Minnesota does not recognize an insurer's equitable reimbursement claim against a policyholder.

The court held that the relationship between an insurer and its insured is a matter of contract. The court explained that because Arrowood's policy "contain[ed] no provision, and contemplate[d] no ground, on which an amount paid by Arrowood in fulfillment of [its] obligations could later be extracted from Select Comfort and returned to Arrowood," there was no basis for Arrowood's reimbursement claim. In so ruling, the court rejected the argument that Arrowood's reservation of rights, which explicitly included the "right to seek reimbursement of any defense costs or indemnity payments," constituted an enforceable contract between the parties. The court explained that Select Comfort did not agree to the terms of the reservation of rights and that a right to reimbursement is not created "by unilateral declaration."

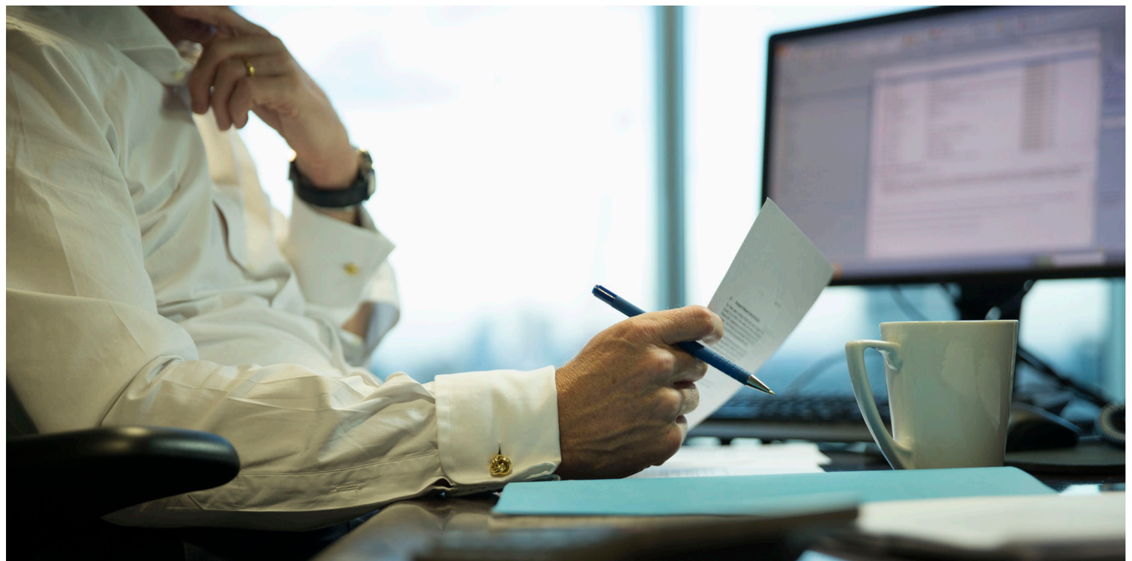
Although *Select Comfort* rejects equity-based reimbursement claims against a policyholder, the ruling is limited in several respects. First, the decision explicitly recognizes that Minnesota law allows equitable reimbursement claims between insurers based on co-insurers' "common liability" to an insured. Second, the court emphasized that where contractual language provides for a right of reimbursement against a policyholder, such provisions are enforceable under Minnesota law.

# Bad Faith Alert:

## Pennsylvania Supreme Court Rules That Statutory Bad Faith Claims Are Assignable

Answering a question certified by the Third Circuit Court of Appeals, the Pennsylvania Supreme Court ruled that an insured may assign the right to recover statutory bad faith damages from an insurer. *Allstate Prop. & Cas. Co. v. Wolfe*, 2014 WL 7088147 (Pa. Dec. 15, 2014).

Pennsylvania statutory law supplements the remedies available to a policyholder in a bad faith action against an insurer by authorizing punitive damages. 42 Pa. Cons. Stat. § 8371. Decisions have been mixed as to whether claims pursuant to Section 8371 may be assigned to a third party. Some courts have disallowed such an assignment, finding that the statute creates a form of an unliquidated tort claim, which is not subject to assignment under Pennsylvania law. In contrast, other courts have allowed the assignment of Section 8371 claims, citing to the lack of any explicit prohibition against assignment and public policy interests. In *Allstate*, the court sided with the latter view, finding that allowing an assignment comports with the legislative intent of Section 8371 and furthers various public policies, including good faith conduct, deterrence, and equity. In particular, the court noted that assignments of common law bad faith claims have long been permissible under Pennsylvania law and, had the legislature intended to curtail this right, "it would have so indicated in the statute itself."



# Privilege Alert:

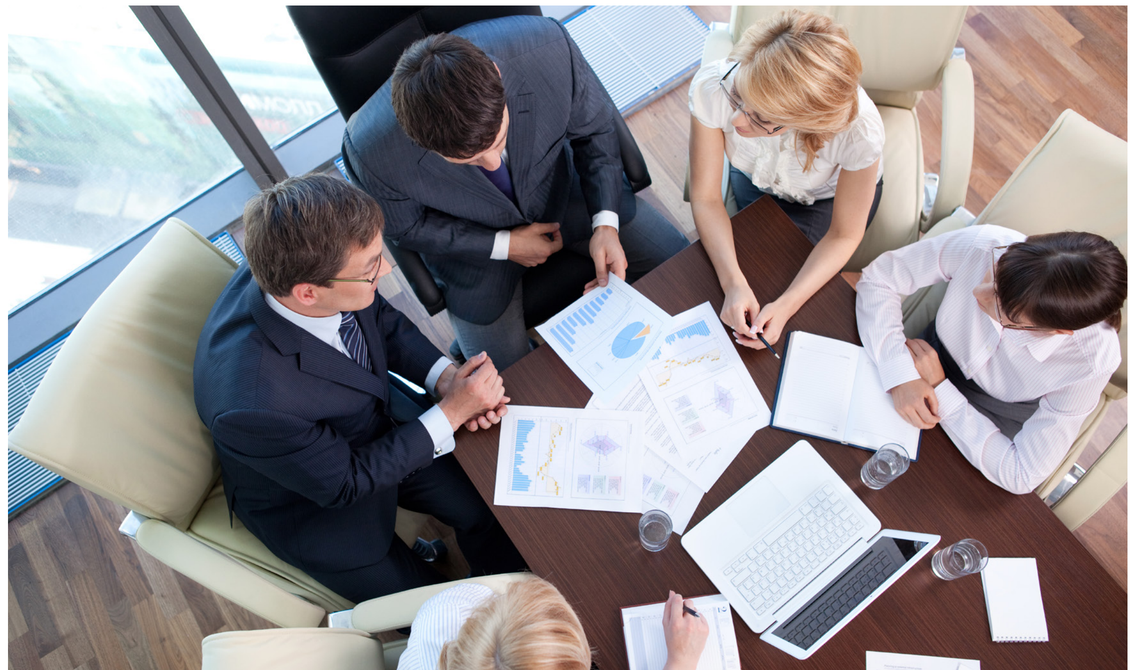
## New York Appellate Court Endorses Broad View of Common-Interest Doctrine

Recent Alerts have reported on decisions interpreting the scope of the common-interest doctrine, an exception to the waiver of privilege where the privileged materials are shared "for the purpose of furthering a nearly identical legal interest." *See* May and September 2014 Alerts; March 2011 Alert. In a decision issued this month, a New York appellate court, addressing a matter of first impression, ruled that the common-interest doctrine does not require pending or threatened litigation. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2014 WL 6803006 (N.Y. App. Div. Dec. 4, 2014).

The discovery dispute arose from a lawsuit brought by Ambac Assurance against Countrywide, alleging fraudulent inducement as to insurance transactions. Ambac also asserted claims against Bank of America, Countrywide's successor-in-interest, and sought the production of certain pre-merger communications between Countrywide and Bank of America. The defendants refused to produce the materials on the basis of privilege. They argued that all of the shared communications contained legal advice relating to compliance with various merger-related issues. A referee supervising discovery in the matter granted Ambac's motion to compel the production of the challenged communications, holding that the common-interest doctrine does not apply unless the common legal interest "impacts potential litigation involving all parties." A New York motion court refused to vacate the order, holding that New York law requires "pending or reasonably anticipated litigation in order for the common-interest doctrine to apply." The appellate court reversed.

The appellate court ruled that "in today's business environment, pending or reasonably anticipated litigation is not a necessary element of the common-interest privilege." Although the court noted that this conclusion holds "particularly true" in this case, involving merger-related communications, the court did not limit its holding in this respect. Instead, the court explained that privilege should not be tied to litigation because legal advice is frequently provided "precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client's course of conduct." Therefore, so long as the "primary or predominant purpose" of the shared communications is to obtain legal advice or further a common legal interest, the common-interest doctrine applies.

The court expressly rejected prior New York cases that have imposed a litigation requirement for the common-interest protection to apply. Delaware law similarly allows invocation of the common-interest doctrine absent litigation.



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.

**Barry R. Ostrager**
+1-212-455-2655
bostrager@stblaw.com

**Mary Kay Vyskocil**
+1-212-455-3093
mvyskocil@stblaw.com

**Andrew S. Amer**
+1-212-455-2953
aamer@stblaw.com

**David J. Woll**
+1-212-455-3136
dwoll@stblaw.com

**Mary Beth Forshaw**
+1-212-455-2846
mforshaw@stblaw.com

**Andrew T. Frankel**
+1-212-455-3073
afrankel@stblaw.com

**Lynn K. Neuner**
+1-212-455-2696
lneuner@stblaw.com

**Chet A. Kronenberg**
+1-310-407-7557
ckronenberg@stblaw.com

**Linda H. Martin**
+1-212-455-7722
lmartin@stblaw.com

**Bryce L. Friedman**
+1-212-455-2235
bfriedman@stblaw.com

**Michael D. Kibler**
+1-310-407-7515
mkibler@stblaw.com

**Michael J. Garvey**
+1-212-455-7358
mgarvey@stblaw.com

**Tyler B. Robinson**
+44-(0)20-7275-6118
trobinson@stblaw.com

**George S. Wang**
+1-212-455-2228
gwang@stblaw.com

**Deborah L. Stein**
+1-310-407-7525
dstein@stblaw.com

**Craig S. Waldman**
+1-212-455-2881
cwaldman@stblaw.com

**Elisa Alcabes**
+1-212-455-3133
ealcabes@stblaw.com

This edition of the Insurance Law Alert was prepared by Chet Kronenberg (ckronenberg@stblaw.com/+1-310-407-7557) and Deborah Stein (dstein@stblaw.com/+1-310-407-7525) with contributions by Karen Cestari (kcestari@stblaw.com).

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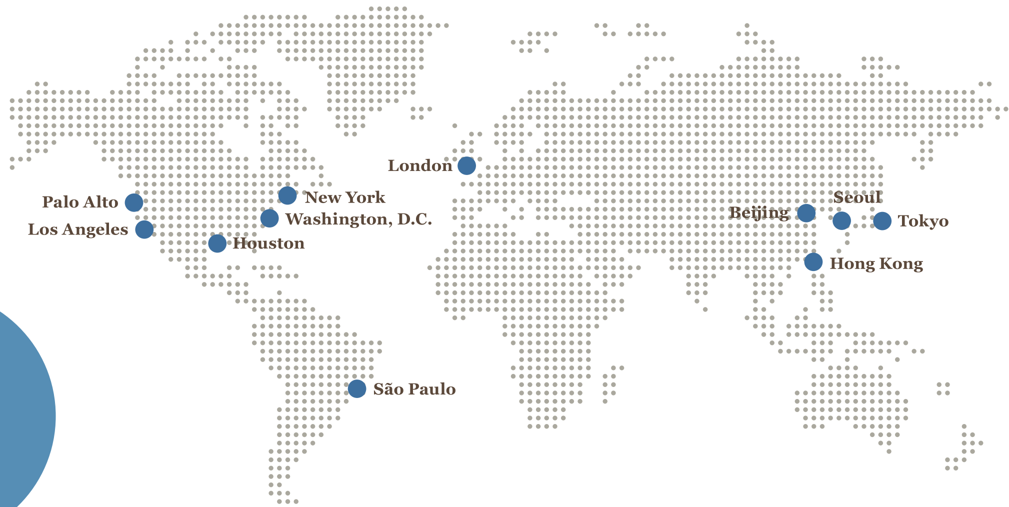


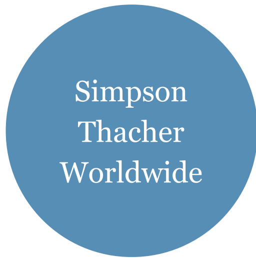


## UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
2 Houston Center
909 Fannin Street
Houston, TX 77010
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

## EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

## ASIA

Beijing
3919 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
West Tower, Mirae Asset Center 1
26 Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

## SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000