

Insurance Law Alert

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The Circuit Court of Appeals for the District of Columbia reversed in part and affirmed in part a district court's dismissal of claims arising out of a cyberattack, finding that certain plaintiffs had standing and that the complaint sufficiently alleged actual damages. *In re: U.S. Office of Personnel Mgmt. Data Sec. Breach Litig.*, 2019 WL 2552955 (D.C. Cir. June 21, 2019). ([Click here for full article](#))

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The Supreme Court of Washington ruled that under the made-whole doctrine, state statutory law and applicable policy language, an insurer is obligated to reimburse a policyholder the full deductible amount before retaining any funds for its own payments. *Daniels v. State Farm Mut. Auto. Ins. Co.*, 2019 WL 2909308 (Wash. July 3, 2019). ([Click here for full article](#))

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"[Simpson Thacher] is one of the preeminent and most sophisticated coverage litigation firms."

– *Chambers USA 2019*
(quoting a client)

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The First Circuit ruled that primary and excess insurers had no duty to provide coverage for suits brought against UBS Trust Company, finding that a specific litigation exclusion applied to all claims. *UBS Fin. Servs., Inc. v. XL Specialty Ins. Co.*, 929 F.3d 11 (1st Cir. 2019). [\(Click here for full article\)](#)

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The Sixth Circuit ruled that a flood-specific coverage limitation is not limited to property damage but rather applies to all loss or damage arising out of a flood. *Federal-Mogul LLC v. Ins. Co. of Pa.*, 2019 WL 2928961 (6th Cir. July 8, 2019). [\(Click here for full article\)](#)

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A Louisiana federal district court ruled that issues of fact exist as to whether a pollution exclusion bars coverage for losses stemming from an oil spill, notwithstanding state precedent holding that oil spills are recognized as "pollution" under such exclusions. *Cent. Crude, Inc. v. Liberty Mut. Ins. Co.*, 2019 WL 3227580 (W.D. La. July 16, 2019). [\(Click here for full article\)](#)



Defense Costs Alert:

Ninth Circuit Asks Nevada Supreme Court Whether Insurer Is Entitled To Reimbursement Of Defense Costs After No Duty To Defend Ruling

The Ninth Circuit asked the Nevada Supreme Court to decide whether an insurer that defends under a reservation of rights is entitled to reimbursement of defense costs following a ruling that the insurer had no duty to defend. *Nautilus Ins. Co. v. Access Medical, LLC*, 2019 WL 2812407 (9th Cir. July 2, 2019).

Nautilus defended its insured under a reservation of rights that expressly referenced its right to seek reimbursement of defense costs. While the underlying litigation was pending, Nautilus sought a declaration that it had no duty to defend. Neither the pleading nor a subsequent summary judgment motion referenced defense cost reimbursement. A Nevada federal district court ruled in Nautilus' favor and closed the case. Thereafter, Nautilus moved for further relief seeking reimbursement of defense costs. The court denied the motion based on the insurer's failure to include a claim for reimbursement in its complaint and the absence of Nevada law requiring such reimbursement.



On appeal, the Ninth Circuit noted a split across other jurisdictions regarding an insurer's right to reimbursement of defense costs following a no-duty-to-defend ruling. The Nevada Supreme Court has not directly addressed the issue and while some Nevada courts have held that insurers have a right to reimbursement if there is an "understanding"

between the parties as to reimbursement, Nevada law is unclear as to whether and under what circumstances an insurer's reservation of rights establishes such understanding. Therefore, the Ninth Circuit certified the following question of law to the Nevada Supreme Court:

Is an insurer entitled to reimbursement of costs already expended in defense of its insureds where a determination has been made that the insurer owed no duty to defend and the insurer expressly reserved its right to seek reimbursement in writing after defense has been tendered but where the insurance policy contains no reservation of rights?

We will keep you apprised of further developments in this matter.

Cyber Alerts:

Washington Court Rules That Policy Exclusion Bars Coverage For Fraudulent Wire Transfer

A Washington federal district court ruled that a Fraudulent Transfer Request exclusion barred coverage for losses stemming from a wire transfer initiated by a fraudulent email, rejecting arguments that the exclusion was ambiguous. *Tidewater Holdings, Inc. v. Westchester Fire Ins. Co.*, 2019 WL 2326818 (W.D. Wash. May 31, 2019).

A Tidewater accounts payable clerk altered payment details for a contractor after receiving an email from an imposter directing him to do so. As a result, Tidewater issued four payments to the imposter's bank account totaling approximately \$568,000. Tidewater sought coverage from Westchester Fire Insurance Company under a Computer Fraud provision in its corporate indemnity package policy. Instead, the insurer offered coverage under a Supplemental Funds Transfer provision, which covered loss "resulting directly from the Company having transferred . . . any Money or Securities as the direct result of a Fraudulent Transfer Request committed by a person purporting to be an Employee, customer, client, or vendor." Because this provision limited Tidewater's recovery to virtually nil, Tidewater deemed

this offer to effectively constitute a denial of coverage, rejected payment, and brought suit.

The court assumed, without deciding, that Tidewater's loss was covered by the Computer Fraud provision, which applied to loss "resulting directly from the use of any computer to fraudulently cause a transfer of that property." However, the court held that coverage was nonetheless barred by an exclusion that stated that "the Insurer shall not be liable for any loss resulting from any Fraudulent Transfer Request." The court rejected Tidewater's assertion that the exclusion was ambiguous, noting that it expressly applied to "every clause that provides coverage."

Notably, the court rejected Westchester's assertion that Ninth Circuit precedent establishes that computer fraud provisions do not encompass wire transfers initiated by fraudulent emails. *See Taylor & Lieberman v. Fed. Ins. Co.*, 681 F. App'x 627 (9th Cir. 2017) (discussed in [March 2017 Alert](#)) and *Aqua Star (USA) Corp. v. Travelers Cas. & Sur. Co. of Am.*, 719 F. App'x 701 (9th Cir. 2018) (discussed in [April 2018 Alert](#)). The court explained that the coverage denials in those matters was based on interpretation of specific policy language not at issue in the present case.

D.C. Circuit Court Reverses Dismissal Of Data Breach Privacy Claims, Finding That Plaintiffs Had Standing And Alleged Actual Damages

The Circuit Court of Appeals for the District of Columbia reversed in part and affirmed in part a district court's dismissal of claims arising out of a cyberattack, finding that certain plaintiffs had standing and that the complaint sufficiently alleged actual damages.



In re: U.S. Office of Personnel Mgmt. Data Sec. Breach Litig., 2019 WL 2552955 (D.C. Cir. June 21, 2019).

A cyberattack on the database of the U.S. Office of Personnel Management ("OPM") affected the personal information of more than 21 million government employees. The compromised information included social security numbers, names and addresses and in some cases, fingerprint records. Numerous lawsuits were brought against OPM and its security firm, which were ultimately consolidated into two complaints alleging willful failure to implement appropriate safeguards to ensure the security of plaintiffs' private information. One action—the Arnold action—was brought by a putative class of breach victims seeking monetary damages based on alleged violations of the Privacy Act of 1974 and various other statutory and common law claims. The second action was brought by the National Treasury Employees Union ("NTEU"), a putative class seeking declaratory and injunctive relief based on alleged violation of a "constitutional right to informational privacy."

The district court dismissed both complaints based on lack of standing. The court reasoned that allegations of a heightened risk of identity theft were insufficient to allege a substantial risk of future injury, and that even for plaintiffs that had alleged actual past injury, the complaint failed to allege that the misuse of their information was caused by the OPM cyberattack. The district court also held that the Arnold plaintiffs failed to plead actual damages. Finally, the district court concluded that NTEU plaintiffs failed to state a constitutional claim.

The D.C. Court of Appeals reversed in part and affirmed in part. The court ruled that both putative classes alleged facts sufficient to satisfy Article III standing, finding both complaints alleged a substantial risk of future identity theft given the highly sensitive nature of the compromised information. The court further held that the Arnold plaintiffs stated a claim for damages under the Privacy Act, concluding that in addition to unlawful charges on plaintiffs' accounts, plaintiffs incurred "actual damages" in the form of costs incurred for credit monitoring, legal fees and delayed tax refunds. The court affirmed the dismissal of the NTEU action, stating: "assuming (without deciding) the existence

of a constitutional right to informational privacy, it affords relief only for intentional disclosures or their functional equivalent—which NTEU Plaintiffs do not allege.”

Notably, the Eighth Circuit recently affirmed a dismissal of data breach privacy claims based on lack of standing, finding that plaintiffs had failed to allege a prospective injury because the likelihood of future identity theft was “purely speculative.” See [June 2019 Alert](#).

Subrogation Alert:

Supreme Court Of Washington Rules That Insurer Must Fully Reimburse Policyholder For Deductible Before Recovering Its Own Payments

The Supreme Court of Washington ruled that under the made-whole doctrine, state statutory law and applicable policy language, an insurer is obligated to reimburse a policyholder the full deductible amount before retaining any funds for its own payments. *Daniels v. State Farm Mut. Auto. Ins. Co.*, 2019 WL 2909308 (Wash. July 3, 2019).

Daniels was involved in a three-car collision. State Farm, Daniels’ insurer, paid the repair costs that exceeded the policy’s \$500 deductible. State Farm then sought recovery of its payment from GEICO, which had insured another driver involved in the accident. GEICO conceded that its insured was 70% at fault and reimbursed State Farm for that portion of the total cost of repairs. From those proceeds, State Farm reimbursed Daniels for 70% of her deductible.

Daniels brought a putative class action suit against State Farm, alleging that State Farm is not entitled to recoup its own costs unless its policyholder has been fully compensated, including the full deductible amount. A Washington trial court granted State Farm’s motion to dismiss and an appellate court affirmed. The Supreme Court of Washington reversed, ruling that Daniels stated a claim for relief for the entirety of the deductible payment under three legal theories:

The Made-Whole Doctrine: Under this common law doctrine, an insured party is generally entitled to full compensation before an insurer can recoup its own costs

from a third-party. The Supreme Court of Washington rejected the argument that the doctrine was inapplicable under appellate precedent, declaring such case law unpersuasive and counter to the doctrine’s principles. The court also rejected State Farm’s argument that allowing an insured to recover the full deductible alters the terms of the insurance contract and results in a windfall payment to the insured.



State Statutory Law: Washington regulations provide that an insurer “must include the insured’s deductible, if any, in its subrogation demands. Any recoveries must be allocated first to the insured for any deductible(s) incurred in the loss, less applicable comparative fault.” WAS 284-30-393. The parties disputed the meaning of the phrase “less applicable comparative fault.” The court sided with Daniels’ interpretation, finding that because there was no assertion or finding that Daniels was at fault in the accident (the record was silent as to whom GEICO attributed the remaining 30% of fault), a valid claim existed that State Farm violated the statute by withholding 30% of the deductible.

Policy Language: State Farm’s policy includes a provision that allows the insurer to pursue subrogation claims on behalf of the policyholder. This provision states that “[o]ur right to recover our payments applies only after the insured has been fully compensated for the bodily injury, property damage or loss.” The trial and appellate courts concluded that State Farm did not violate this provision by refusing to reimburse the deductible payment, because Daniels had already been fully compensated for her “loss” when she accepted payment from State Farm. The Supreme Court of Washington disagreed, ruling that “loss” includes full reimbursement of the deductible.

Coverage Alerts:

Third Circuit Rules That Assault And Battery Exclusion Bars Coverage For Negligence Claims Against Hotel In Sex Trafficking Suit

The Third Circuit affirmed dismissal of a coverage suit by a hotel against its insurer, finding that the allegations of negligence in the underlying complaint were encompassed by an assault and battery exclusion. *Nautilus Ins. Co. v. Motel Mgmt. Servs., Inc.*, 2019 WL 3283221 (3d Cir. July 22, 2019).

A minor female sued Motel Management Services (“MMS”), alleging that it failed to report that traffickers had enticed her to engage in commercial sex acts at its motel. According to the complaint, MMS facilitated the minor’s exploitation by knowingly renting rooms to traffickers and failing to intervene in the illegal conduct. The complaint asserted claims for negligence as well as intentional infliction of emotional distress. Nautilus brought a declaratory judgment action, seeking a ruling that it had no duty to defend the underlying suit based on an assault and battery exclusion that provided Nautilus “will have no duty to defend or indemnify any insured in any action or proceeding alleging damages arising out of any assault or battery,” “regardless of the culpability or intent of any person.”



A Pennsylvania federal district court granted Nautilus’s motion for judgment on the pleadings and the Third Circuit affirmed. The Third Circuit ruled that “arising out of” in the exclusion indicates a “but for” causation standard and explained that “if an assault or battery was a ‘but for’ cause of the plaintiff’s injuries, the assault and battery exclusion will apply to allegations that the insured’s

negligence contributed to the injuries.” Applying this standard to the underlying allegations, the Third Circuit concluded that the exclusion barred coverage for all claims, including the negligent failure to prevent or report, because all injuries alleged in the complaint were the result of the exploitation and assault by the traffickers and customers. In so ruling, the court noted the absence of any allegations that MMS’s negligence directly caused the plaintiff’s injuries or resulted in independent harms.

First Circuit Rules That Specific Litigation Exclusion Bars Coverage For All Claims Against UBS

The First Circuit ruled that primary and excess insurers had no duty to provide coverage for suits brought against UBS Trust Company, finding that a specific litigation exclusion applied to all claims. *UBS Fin. Servs., Inc. v. XL Specialty Ins. Co.*, 929 F.3d 11 (1st Cir. 2019).

From 2009 to 2012, UBS was the subject of various proceedings related to its sale of shares in closed-end funds to brokerage customers in Puerto Rico. Two such proceedings were a 2009 Securities and Exchange Commission (“SEC”) investigation and a 2010 lawsuit brought by fund investors. In 2011, UBS secured primary and excess insurance coverage. The policies contained a specific litigation exclusion that precluded coverage for “any Claim in connection with [the 2009 SEC investigation and the 2010 fund investor lawsuit], or in connection with any Claim based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any such proceeding or any fact, circumstance or situation underlying or alleged therein.”

UBS was the target of additional litigation and investigations during and after 2012 (the “Disputed Matters”). The insurers denied coverage for those claims on the basis of the specific litigation exclusion. A Puerto Rico federal district court, applying Puerto Rico law, granted summary judgment to the insurers, finding that the Disputed Matters were excluded from coverage because they were related to the prior litigation referenced in the exclusion. The First Circuit affirmed.

The First Circuit rejected UBS’s assertion that the exclusion applies only when there

is a “substantial overlap” of relevant facts between the prior litigation and Disputed Matters, explaining that the broadly-worded exclusion included no such requirement. In so ruling, the court noted that UBS had sought to narrow the exclusionary language during contract negotiations but ultimately agreed to the stated verbiage. The court also rejected UBS’s contention that the exclusion rendered coverage illusory because any claim connected to the closed-end funds, which are a “core business” of UBS, would be excluded. The court reasoned that the exclusion, “although expansive,” does not bar coverage for all claims. Finally, the court rejected UBS’s argument that the specific litigation exclusion bars coverage for only those portions of claims with the requisite nexus to the Disputed Matter.

Bad Faith Alert:

Insurer’s Refusal To Pay Policy Limits Settlement Demand Not Bad Faith, Says Georgia Appellate Court

The Court of Appeals of Georgia ruled that an insurer’s failure to pay a policy limits settlement demand was not bad faith, notwithstanding a subsequent jury award in excess of policy limits. *Taylor v. Gov’t Employees Ins. Co.*, 2019 WL 2559482 (Ct. App. Ga. June 21, 2019).

Following a car accident involving Taylor and Edwards, Taylor received \$25,000 from Edward’s automobile insurer. Taylor also sent a demand letter to GEICO, her uninsured motorist carrier, seeking \$25,000 (the full amount of benefits under the policy) based on medical expenses and lost wages. After investigating the claim, GEICO offered Taylor \$750, which she rejected. Thereafter, Taylor sued Edwards and a jury awarded her more than \$120,000 in damages. After the jury verdict, GEICO paid Taylor the \$25,000 policy limit. Taylor sued GEICO, alleging that the insurer’s failure to pay her \$25,000 within 60 days of her demand letter constituted bad faith under Georgia statutory law. A Georgia trial court granted GEICO’s summary judgment motion and the appellate court affirmed.

The appellate court ruled that the bad faith claim failed as a matter of law because Taylor

could not establish that GEICO’s refusal to pay was frivolous or unfounded. The court emphasized that an experienced claim examiner conducted a thorough investigation and analysis of the claim. The court further noted that Taylor failed to identify any steps or measures that GEICO should have taken, aside from alleging that the insurer should have agreed to a policy limits settlement. In addition, the court rejected the assertion that the \$120,000 jury award established (or even created a triable issue of fact regarding) GEICO’s bad faith refusal to settle for policy limits.



Property Policy Alert:

Reversing District Court, Sixth Circuit Rules That Coverage Limit For Flood Applies To All Losses, Not Just Property Damage

The Sixth Circuit ruled that a flood-specific coverage limitation is not limited to property damage but rather applies to all loss or damage arising out of a flood. *Federal-Mogul LLC v. Ins. Co. of Pa.*, 2019 WL 2928961 (6th Cir. July 8, 2019).

Federal-Mogul’s factory was damaged in a flood, resulting in \$39 million in property damage and \$25 million in economic losses. The company’s insurer refused to pay more than \$30 million on the basis of a Flood for High Hazard Zone limitation (the “Flood Sublimit”). Although the policy provided up to \$200 million for all covered loss or damage, the Flood Sublimit capped coverage at \$30 million if the flooding occurred in a “high hazard zone.” The parties disputed whether

the Flood Sublimit applied only to physical property damage caused by the flood, or to all loss, including economic loss, that resulted from the flood.

A Michigan district court concluded that the Flood Sublimit applied only to property damage and did not limit coverage for “Time Element” losses, defined by the policy as various economic losses resulting directly from a flood. The Sixth Circuit reversed, finding that there was no policy provision limiting the Flood Sublimit to property damage. The court explained that “when the policy limits the Insurance Company’s liability for ‘Flood,’ it limits the insurer’s liability for losses from a particular type of peril rather than a particular type of coverage.”

Pollution Exclusion Alert:

Louisiana Court Questions Application Of Pollution Exclusion To Oil Spill

A Louisiana federal district court ruled that issues of fact exist as to whether a pollution exclusion bars coverage for losses stemming from an oil spill, notwithstanding state precedent holding that oil spills are recognized as “pollution” under such exclusions. *Cent. Crude, Inc. v. Liberty Mut. Ins. Co.*, 2019 WL 3227580 (W.D. La. July 16, 2019).

Central Crude, an oil transport company, sought coverage for property damage and remediation costs stemming from an oil pipeline leak. Great American argued that a pollution exclusion in its umbrella policy barred coverage for the loss. The court acknowledged that under Louisiana law, oil spills are recognized as “pollution” for the purposes of pollution exclusions, but nonetheless declined to grant Great American’s summary judgment motion on this issue.

The court reasoned that in the context of this case, the exclusion is ambiguous or potentially invalidated based on Following Form Endorsements in the Great American policy. Those endorsements indicate that excess coverage mirrors the coverage provided

under a primary policy, which expressly encompasses property damage and cleanup costs arising from the discharge or release of pollutants at any premises owned or occupied by Central Crude. The court further noted that a Premises Operations Liability Endorsement in Great American’s policy excludes liability arising out of Central Crude’s premises or operations, “unless such liability is covered by valid and collectible Underlying Insurance.”

The court acknowledged that explicit exclusions in umbrella policies are not nullified by follow form clauses, but concluded that application of Great American’s pollution exclusion raised questions of fact. The court stated:

Given Central Crude’s line of business—the transport of oil—it could yield absurd results to interpret the [premises operations liability] endorsement in a way that gave it any independent effect while simultaneously barring any coverage for oil spills under the Pollution Exclusion. In other words, such a reading would require the court to find that Central Crude purchased an umbrella policy that provided no coverage for one of the major risks of its line of business. While this may ultimately be the case, Louisiana law still permits further interpretation in light of the potential absurdity.

We will keep you apprised of further developments in this matter.



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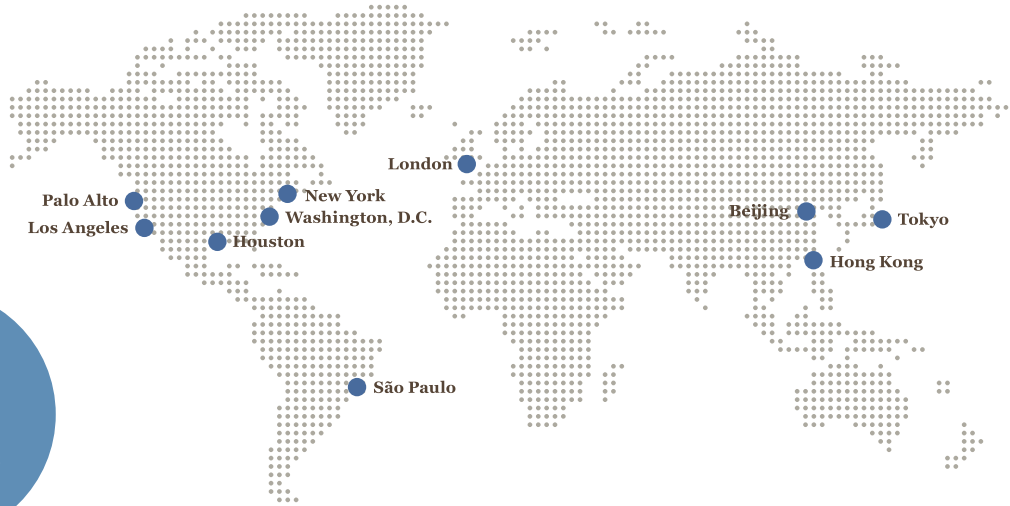
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