SIMPSON THACHER
INSURANCE LAW ALERT
JULY/AUGUST 2011

This Alert features decisions relating to the scope of "bodily injury" and "advertising injury" coverage under general liability policies. It also discusses recent rulings relating to late notice, contribution, exhaustion, and the consequences of an insurer's breach of its duty to defend. In addition, we address recent case law interpreting attorney-client and work product privilege in the context of insurance coverage disputes. Finally, this Alert summarizes potentially significant decisions allowing use of credit scores in underwriting, permitting suits against retirement plans, and allowing a new brand of unfair trade practice suits. Please "click through" to view articles of interest. Enjoy the rest of your summer.

- ***New Jersey Supreme Court Rules That Emotional Distress Claim Triggers General Liability Insurer's Duty to Defend under "Bodily Injury" Provision***

  The New Jersey Supreme Court ruled that an emotional distress claim based on witnessing injury to a family member constitutes potential "bodily injury" for purposes of triggering an insurer's duty to defend, even where no physical injuries have been alleged. *Abouzaid v. Mansard Gardens Assocs. LLC*, 2011 WL 2450570 (N.J. June 21, 2011). *Click here for full article*

- ***California Appellate Court Rules That Failure to Warn Claim Does Not Allege "Bodily Injury" under General Liability Policy***

  A California Court of Appeals ruled that a lawsuit alleging that nail products contained harmful toxins did not trigger a CGL insurer's duty to defend because the complaint did not allege "bodily injury." *Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Cas. Co. of Am.*, 2011 WL 2279527 (Cal. Ct. App. July 10, 2011). *Click here for full article*

- ***Fifth Circuit Rules That Trade Secret Claims Do Not Constitute "Advertising Injury" under General Liability and Excess Policies***

  The Fifth Circuit held a general liability and excess insurer had no duty to defend or indemnify a policyholder accused of misappropriating trade secrets because such allegations did not constitute advertising injury. *Continental Cas. Co. v. Consolidated Graphics Inc.*, 2011 WL 2644736 (5th Cir. July 7, 2011). *Click here for full article*

- ***New York Court Rules That Fictitious Madoff Profits Are Not Covered Losses***

  A New York court ruled that two investment entities were not entitled to insurance coverage for false profits lost in Bernard Madoff's Ponzi scheme. *U.S. Fire Ins. Co. v. Nine Thirty FEF Invs. LLC*, 2011 WL 2552335 (N.Y. Sup. Ct. June 16, 2011). *Click here for full article*

- ***Louisiana Supreme Court Rules That Insurer's Breach of Duty to Defend Does Not Result in Waiver of Policy Defenses***

  The Louisiana Supreme held that an insurer's breach of its duty to defend does not warrant the relinquishment of valid policy defenses. *Arceneaux v. Amstar Corp.*, 2011 WL 2591701 (La. July 1, 2011). *Click here for full article*

- ***Pennsylvania District Court Rules That Prejudice Required for Reinsurer's Late Notice Defense***

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- ***New York Appellate Court Rules That Late Notice Precludes Insurer's Reimbursement Claims against Co-Insurer***

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- ***California Appellate Court Endorses Horizontal Exhaustion of Primary Coverage***

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  A California appellate court ruled that the attorney-client privilege applies to communications between multiple counsel and other parties representing the client, and an absolute work product privilege applies to an attorney's unwritten impressions, opinions or theories. *Fireman's Fund Ins. Co. v. Superior Court*, 2011 WL 2536502 (Cal. Ct. App. June 28, 2011). *Click here for full article*

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- ***California Appellate Court Permits Policyholder to Pursue Unfair Competition Suit against Insurance Company***

  A California appellate court held that a policyholder has a direct right of action against his insurer based on the company's alleged practice of steering customers to particular repair shops without informing the customer of his/her right to select his/her own repair dealer. *Hughes v. Progressive Direct Ins. Co.*, 126 Cal. Rptr. 3d 750 (Cal. Ct. App. 2011). *Click here for full article*

Bodily Injury Alerts:

New Jersey Supreme Court Rules That Emotional Distress Claim Triggers General Liability Insurer's Duty to Defend under "Bodily Injury" Provision.

The New Jersey Supreme Court ruled that an emotional distress claim based on witnessing injury to a family member constitutes potential "bodily injury" for purposes of triggering an insurer's duty to defend, even where no physical injuries have been alleged. *Abouzaid v. Mansard Gardens Assocs. LLC*, 2011 WL 2450570 (N.J. June 21, 2011). The duty to defend such claims continues until "the question of physical injury clearly drops out of the case."

The case arose out of a residential fire that caused injury to several children. The parents of the children sued their landlord, alleging, among other things, severe emotional distress based on watching their children sustain injuries. The complaint did not allege physical injury to the parents or that their emotional distress was accompanied by physical manifestations. The landlord notified its general liability insurer of the lawsuit, and the insurer agreed to defend certain claims under a reservation of rights, but denied coverage for the parents' emotional distress claim.

The New Jersey Supreme Court ruled that the emotional distress claim triggered the insurer's duty to defend. The court reasoned that:

> [A]lthough [the claim] was silent regarding the existence of physical manifestations, it did not exclude the possibility that such manifestations would be proved during the course of litigation. Accordingly, it was indefinite whether the claim was within the scope of coverage. In those circumstances, a potential for plaintiffs to prove a covered claim existed and doubts regarding the duty to defend should [be] "resolved in favor of the insured."

Although the ruling seems to expand the scope of coverage for emotional distress claims, its impact may be limited. The decision addressed only one discrete category of emotional distress claims—those based

on witnessing injury to family members. The court reasoned that such claims are presumed to allege an "extraordinary level of emotional distress," which, "in most cases, bear with it a physical component." The court distinguished such claims from "garden-variety emotional distress claim[s]." In addition, the court based its decision, in part, on application of the "reasonable expectations" doctrine and on New Jersey precedent which allows consideration of facts outside of the underlying complaint in evaluating an insurer's duty to defend. Numerous other jurisdictions have not endorsed a "reasonable expectations" doctrine and/or have declined to consider facts outside of the

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four corners of the complaint in assessing an insurer's defense obligations. Generally speaking, jurisdictions are split as to whether allegations of emotional harm, standing alone, constitute a covered "bodily injury."

California Appellate Court Rules That Failure to Warn Claim Does Not Allege "Bodily Injury" under General Liability Policy

Affirming a lower court decision, a California Court of Appeals ruled that a lawsuit alleging that nail products contained harmful toxins did not trigger a CGL insurer's duty to defend. *Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Cas. Co. of Am.*, 2011 WL 2279527 (Cal. Ct. App. July 10, 2011). No duty to defend or indemnify existed, the court explained, because the complaint did not allege "bodily injury."

The sole count in the underlying complaint, seeking civil penalties and injunctive relief pursuant to Proposition 65 (the California Safe Drinking Water and Toxic Enforcement Act of 1986), alleged that the defendants knew that their products contained a harmful toxin, that consumers were exposed to the toxin, and that warnings were not provided as to the toxicity of the products. The complaint did not allege that any particular individual suffered bodily injury as a result of exposure to the products, or even that the plaintiff had purchased or used the products. In light of these facts, the court concluded that there was no possibility of coverage.

Ulta is significant in at least two respects. First, it illustrates strict enforcement of the "potential for coverage" standard used in evaluating an insurer's duty to defend. The court squarely rejected the notion that a potential for coverage can be established by speculating about facts extraneous to the underlying complaint, or ways in which the complaint might be amended in the future. Second, the decision highlights an emerging issue in insurance coverage litigation: the question of whether and under what circumstances exposure to a potentially harmful substance can constitute "bodily injury" for insurance coverage purposes. The court's observation here—that "mere *exposure* to a chemical that may cause cancer, birth defects, or other reproductive harm, is not the same as suffering bodily injury as a consequence of such exposure"—is one upon which courts disagree. In this context, some courts have focused on whether the complaint, at its core, alleges actual physical harm, or some other grievance, such as a failure to warn or a loss of use of a product. *See Medmarc Cas. Ins. Co. v. Avent Am., Inc.*, 612 F.3d 607 (7th Cir. 2010) (class action suits alleging that baby bottles were contaminated with toxic chemical did not seek damages for "bodily injury," and thus insurers had no duty to defend) (discussed in our September 2010 Alert).

ADVERTISING ALERT:

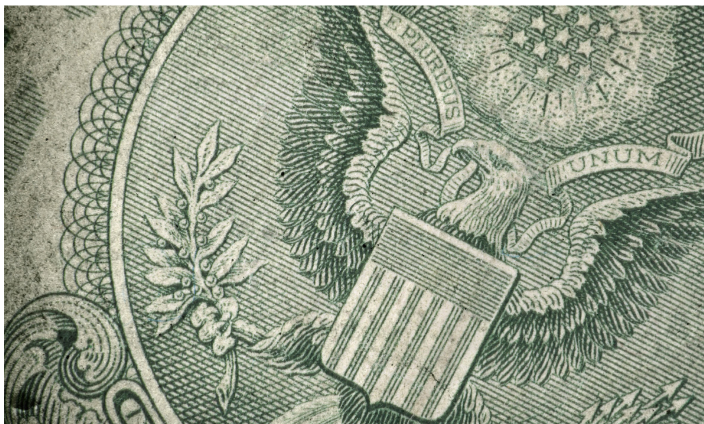
Fifth Circuit Rules That Trade Secret Claims Do Not Constitute "Advertising Injury" under General Liability and Excess Policies

The Fifth Circuit held a general liability and excess insurer had no duty to defend or indemnify a policyholder accused of misappropriating trade secrets. *Continental Cas. Co. v. Consolidated Graphics Inc.*, 2011 WL 2644736 (5th Cir. July 7, 2011). Applying Texas law, the court held that allegations that a company obtained and misappropriated trade secrets did not constitute allegations of injury "committed in the course of advertising." Although the term "advertising" was not defined in the policies, the court reasoned that the act of advertising necessarily entails a "measure of public dissemination." As such, direct dealings between a few select entities cannot be considered advertising—even if they involve the misappropriation of pricing or other promotional information. As the court noted, this reasoning comports with numerous other coverage decisions in this context. *See, e.g., Capital Specialty Ins. Corp. v. Indus. Elec., LLC*, 2009 WL

3347112 (W.D. Ky. Oct. 14, 2009) (insurer has no duty to defend lawsuit arising out of breach of confidentiality agreement because misappropriation of customer and price lists does not constitute "advertising injury"), *aff'd*, 2011 WL 96521 (6th Cir. Jan. 12, 2011), discussed in our February 2011 Alert.

Coverage Alert:
New York Court Rules That Fictitious Madoff Profits are Not Covered Losses

A New York court ruled that two limited liability companies, formed to make investments for their owners, were not entitled to insurance coverage for false profits lost in Bernard Madoff's Ponzi scheme.



U.S. Fire Ins. Co. v. Nine Thirty FEF Invs. LLC, 2011 WL 2552335 (N.Y. Sup. Ct. June 16, 2011). The court held that the policyholders' direct losses were limited to their initial investment amount (less sums paid out to them), and did not include money reflected in financial statements. The court stated, "they did not suffer a direct loss by not receiving the money reflected in the November 2008 statement, as that money never belonged to them. In fact, the money never existed." This ruling is consistent with a decision issued by a New York district court in *Horowitz v. Am. Int'l Grp., Inc.*, 2010 WL 3825737 (S.D.N.Y. Sept. 30, 2010), discussed in our November 2010 Alert.

Defense Alert:
Louisiana Supreme Court Rules That Insurer's Breach of Duty to Defend Does Not Result in Waiver of Policy Defenses

Reversing a lower court decision, the Louisiana Supreme Court held that an insurer's breach of its duty to defend does not warrant the relinquishment of valid policy defenses. Rather, the appropriate remedy under such circumstances is the reimbursement of reasonable defense costs, the court held. *Arceneaux v. Amstar Corp.*, 2011 WL 2591701 (La. July 1, 2011).

The coverage dispute arose when Continental Casualty Company withdrew from the defense of certain bodily injury lawsuits against its policyholder. Continental had provided a defense of the claims for approximately four years, without a reservation of rights, but subsequently (yet erroneously) determined that exclusions under all relevant policies barred coverage for the claims at issue. In actuality, one of the eight policies issued did not contain the applicable exclusion and thus potentially covered the bodily injury claims. After Continental withdrew its defense, the policyholder settled the underlying claims and then sought reimbursement from Continental. Although Continental agreed to reimburse all defense costs, Continental refused to fund the full settlement amount. Instead, Continental offered to pay a pro rata share of the total settlement, reflecting the time frame of the sole applicable policy.

The trial court held, and the Louisiana Supreme Court agreed, that because potential coverage existed under one policy, Continental's withdrawal of its defense did constitute a breach of its duty to defend. However, the Louisiana Supreme Court disagreed with the lower court as to the appropriate remedy for this breach. The trial court had held that by breaching its defense obligations, Continental waived its policy defenses and was thus responsible for the entire settlement amount. The Louisiana Supreme Court disagreed, stating: "The remedy created by the lower courts in this case

judicially imposes a result that would permit insureds to reap a windfall of potentially enormous profits, far beyond the natural consequences of the insurer's bad faith breach of the duty to defend, and far beyond the scope of the insurer's contractual undertaking." Rather, the appropriate remedy for a breach of the duty to defend is based on "ordinary contract law principles"—the policyholder's reasonable defense costs, which had already been paid by Continental. As such, the court reversed a $4 million verdict (representing the full amount of indemnity for settlement costs) against Continental and instead imposed a judgment of approximately $175,000, representing the pro rata share of the settlement that was covered by Continental's sole applicable policy.

Reinsurance Alert:
Pennsylvania District Court Rules That Prejudice Required for Reinsurer's Late Notice Defense

A federal court in Pennsylvania ruled that a ceding insurer's breach of a notice provision did not eliminate coverage under a reinsurance treaty unless the reinsurer could establish prejudice as a result of the late notice. *Pacific Employers Ins. Co. v. Global Reins. Corp. of Am.*, 2011 WL 2003359 (E.D. Pa. May 23, 2011).

The treaty at issue required the cedent to provide a statement of loss to its reinsurer as a "condition precedent." Applying Pennsylvania law, the court predicted that the Pennsylvania Supreme Court would require a reinsurer to establish prejudice from late notice in order to avoid coverage. The court relied on Third Circuit precedent (applying New Jersey law) holding that the notice-prejudice rule applies to reinsurance contracts. The court found persuasive the Third Circuit's reasoning that the role of notice in the reinsurance context is "substantially less important" than in the direct insurance context given that it is typically the "sole obligation of the ceding insurer to investigate, litigate, settle, or defend claims."

Pacific Employers and other similar rulings may answer the question of whether prejudice is required for a late notice defense in the reinsurance context, but they leave unanswered the more complex and fact-driven question of what constitutes prejudice in the reinsurance context. To address this issue, courts will likely focus not only on whether particular contractual rights have been denied (such as the right to associate), but also on whether and how the outcome would have been different had timely notice been provided.

Contribution Alert:
New York Appellate Court Rules That Late Notice Precludes Insurer's Reimbursement Claims against Co-Insurer

A New York appellate court ruled that an insurer is not entitled to reimbursement of defense costs from a co-insurer because timely notice of the claims was not provided to the co-insurer. *Continental Cas. Co. v. Employers Ins. Co. of Wausau*, 923 N.Y.S.2d 538 (N.Y. App. Div. 2011).

Keasbey, an asbestos installation company, was insured under several general liability and excess policies issued by CNA. CNA provided a defense for Keasbey in numerous asbestos-related actions

for approximately thirty years, until coverage under its policies was exhausted. At that point, asbestos claimants sought additional coverage from Keasbey's insurers under a new theory of liability (operations coverage). In defending against this claim, CNA undertook a comprehensive review of Keasbey's records to determine whether other insurance coverage was available. CNA discovered two "wrap-up" policies issued by OneBeacon which provided liability coverage on certain construction projects involving Keasbey. Thereafter, CNA commenced a declaratory judgment action, seeking a judgment that OneBeacon was obligated to assume Keasbey's defense in present and future asbestos actions and to reimburse CNA for defense costs expended by CNA since the date upon which it provided notice to OneBeacon.

The trial court held that Keasbey's defense costs should be shared equally among CNA, OneBeacon, and a third co-insurer. The appellate court reversed. As a preliminary matter, the appellate court confirmed that the only applicable coverage under the CNA policies had long been exhausted and CNA is not responsible for Keasbey's present or future defense costs. With respect to CNA's reimbursement claim, the court held that CNA's notice to OneBeacon was unreasonable under the circumstances. In particular, the court observed that CNA's notice of one lawsuit did not constitute notice of the thousands of actions that CNA defended and for which it sought reimbursement from OneBeacon. Furthermore, even as to the lawsuit specified in CNA's notice letter, the court found notice deficient. Although CNA contacted OneBeacon promptly after it learned of the existence of the OneBeacon policies, the Keasbey records from which CNA learned of the OneBeacon policies had been in the possession of CNA's defense counsel for more than a decade. Finally, the court observed that even if OneBeacon received notice of the Keasbey action from a different insured, it would not cure CNA's defective notice because "notice by one insured cannot be imputed to another."

Continental sends a clear message about the importance of timely notice in the context of co-insurer reimbursement claims. However, it appears that the appellate court's decision was driven not only by the late notice doctrine, but also by notions of equity given the particular facts of the case. In reaching its decision, the court noted the "vast difference in the scope of coverage" between the CNA policies (which insured Keasbey for approximately three decades) and the two OneBeacon policies (which were not issued directly to Keasbey and which insured only two particular sites for a two month period).

Allocation Alert:

California Appellate Court Endorses Horizontal Exhaustion of Primary Coverage

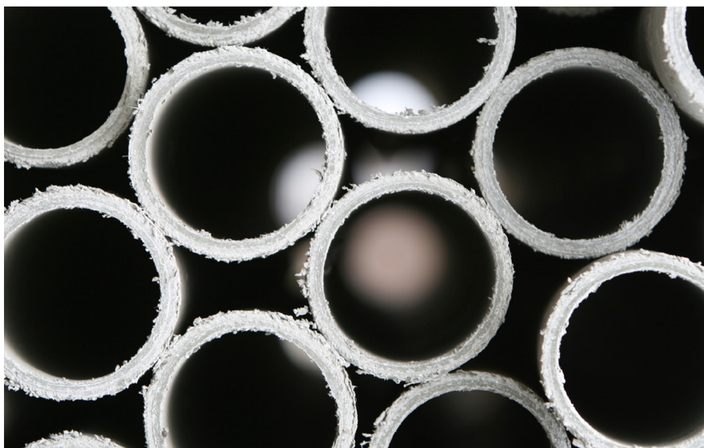
A California Court of Appeals ruled that an excess insurer's indemnity obligations did not attach until all collectible primary insurance policies were exhausted. The court also held that a primary insurer's per occurrence coverage limits could not be "stacked" in determining whether primary coverage had been exhausted. *Kaiser Cement and Gypsum Corp. v. Ins. Co. of the State of Pennsylvania*, 126 Cal. Rptr. 3d 602 (Cal. Ct. App. 2011).

The coverage dispute arose after thousands of asbestos claims were filed against Kaiser Cement and Gypsum Corp. During the relevant time frame, Kaiser obtained primary insurance policies from several companies, including Truck Insurance Exchange. An excess policy issued by the Insurance Company of the State of Pennsylvania ("ICSOP") sat above the Truck policy. At issue here was whether ISCOP's excess obligations were conditioned on exhaustion of all available primary insurance (horizontal exhaustion) or only exhaustion of the immediate underlying primary insurance policy issued by Truck.

The court ruled that ISCOP was not obligated to indemnify Kaiser until all primary policies had been exhausted. The ISCOP policy provided coverage for losses in excess of Kaiser's retained limit, which

was defined as the underlying policies "plus the applicable limit(s) of *any other underlying insurance* collectible by the Insured." This language, the court reasoned, evidenced intent to require exhaustion of all underlying policies, rather than one specific underlying policy. This holding is consistent with many other decisions in this context (in both California and other jurisdictions), including a recent Sixth Circuit ruling in which the court held that umbrella policy language referring to one specific primary policy as well as "any other underlying insurance collectible by the insured" required exhaustion of all applicable primary policies in order to trigger umbrella coverage. *Federal-Mogul U.S. Asbestos Personal Injury Trust v. Continental Cas. Co.*, 2011 WL 2652232 (6th Cir. July 8, 2011).

Having resolved the threshold exhaustion issue, the court turned to the question of whether Kaiser's primary coverage had, in fact, been exhausted. On this issue, the central dispute was whether Truck's primary policy required indemnification of policy limits only once per occurrence, or once per occurrence per year—a concept known as "stacking." The court concluded that Truck's "per occurrence" policy language was "facially inconsistent" with the concept of stacking. The majority of California courts (and courts in other jurisdictions) have likewise rejected attempts to stack limits, criticizing stacking as an improper expansion of bargained-for insurance coverage. However, a small number of California appellate courts (and a number of courts in Louisiana, Maryland and Wisconsin) have permitted stacking under various circumstances.



Although the horizontal exhaustion and anti-stacking rulings in *Kaiser* are clear cut, the court emphasized that the decision did not represent a "generalized 'anti-stacking' rule." The court left open the possibility that factually distinguishable cases might justify a different conclusion.

Discovery Alerts:

California Appellate Court Gives Expansive Protection under Attorney-Client and Work Product Privilege

Reversing a trial court decision, a California appellate court ruled that (1) the attorney-client privilege applies to communications between multiple counsel and other parties representing the client, and (2) an absolute work product protection applies to an attorney's unwritten impressions, opinions or theories. *Fireman's Fund Ins. Co. v. Superior Court*, 2011 WL 2536502 (Cal. Ct. App. June 28, 2011). The court explained that attorney-client privilege is not limited to communications between a client and his/her attorney, but rather extends to any legal opinions formed by counsel during representation of the client—even if those opinions have not been transmitted to the client. And such privilege is not destroyed when it is shared with other attorneys within the law firm or with non-attorneys retained to assist with the client's representation. With respect to the work product protection, the court emphasized that enforcement is not dependent upon whether the attorney's impressions were reduced to writing or not. Rather, California's privilege statute, Cal. Civ. Proc. Code § 2018.030, provides absolute (rather than qualified) protection to both written and unwritten opinion work product. In light of these holdings, the trial court erred in requiring an insurance company's counsel to answer questions that implicated privileged information.

Virginia District Court Rules That Insurer's Claim File Notes Are Protected by Work Product and Attorney-Client Privilege

A federal court in Virginia denied a policyholder's motion to compel, finding that (1) an insurer's claim file notes were protected by the work product doctrine, and (2) the attorney-client privilege protecting other documents had not been implicitly waived. *Botkin v. Donegal Mut. Ins. Co.*, 2011 WL 2447939 (W.D. Va. June 15, 2011). With respect to the work product protection, the court agreed with the insurance company that the "pivotal date" is the date upon which the insurer denied coverage to the policyholders, because at that point, litigation became "fairly foreseeable." Therefore, claim file documents generated after the denial of coverage were not created in the ordinary course of business, but rather "in anticipation of litigation." In reaching its decision, the court rejected the policyholders' argument that because insurance companies routinely settle claims as an integral part of their business operations, documents created in connection with coverage settlements are created in the ordinary course of business and thus not entitled to work product privilege. Rather, assertions of work product privilege must be evaluated on a case-by-case basis, the court held. With respect to documents protected by attorney-client privilege, the court rejected the policyholders' argument that the insurer waived privilege by placing communications with counsel "at issue" in the litigation. The insurer did not take the affirmative step of placing the advice of counsel at issue nor pled advice of counsel as an affirmative defense. Rather, the insurer merely relied on its counsel's coverage opinions in denying claims. Such reliance does not waive privilege, the court held. As the court observed, "[t]here would be little point in retaining coverage counsel to issue an opinion if a party did not intend to rely on it. Likewise, if reliance always gave rise to waiver in this circumstance, no one would seek coverage counsel's advice."

Statutory Alerts:

Ninth Circuit Rules That Insurers May Be Sued for Retiree Benefits under ERISA

Changing course from prior precedent, an en banc panel of the Ninth Circuit held that there is no statutory or case law impediment that prevents lawsuits against insurers that fund company-operated retirement or benefit plans. *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202 (9th Cir. 2011). The matter arose when a former employee of a company sought increased disability benefits based on a retroactive salary increase. The disability benefits were provided under a program insured and controlled by Reliance Standard Life Insurance Company. Reliance denied the increase in benefits, and a lawsuit ensued. The central issue before the court was whether Reliance—although not a plan itself or a plan administrator—could be sued for benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B). Answering this question in the affirmative, the court issued the following ruling:

> Some of our previous decisions have indicated that only a benefit plan itself or the plan administrator of a benefit plan covered under ERISA is a proper defendant in a lawsuit under that provision. We conclude that the statute does not support that limitation, however, and that an entity other than the plan itself or the plan administrator may be sued under that statute in appropriate circumstances.

Although the court did not enumerate a list of "appropriate circumstances," it found that here, Reliance was "a logical defendant for an action by [the former employee] to recover benefits due to her under the terms of the plan" because it possessed decision-making authority over the benefits in question. In the wake of this decision, insurers that fund and/or operate benefit or retirement plans may be included as defendants in benefits-related litigation.

Texas Supreme Court Rules That Insurance Companies May Utilize Credit Score Factors That Have Racially Disparate Impact

Answering a question certified by the Ninth Circuit, the Texas Supreme Court held that Texas statutory law does not preclude an insurance company from utilizing race neutral credit score factors that have a racially disparate impact. *Ojo v. Farmers Grp., Inc.*, 2011 WL 2112778 (Tex. May 27, 2011). The court reasoned that although the Texas Insurance Code prohibits the use of race-based credit scoring, neither the statutory language nor legislative history supported a cause of action based on a racially disparate impact. Furthermore, the court held that the Texas Insurance Code reverse-preempted the plaintiffs' discrimination claims brought under the federal Fair Housing Act. Reverse-preemption under the McCarran-Ferguson Act was appropriate, the court explained, because (1) the federal Fair Housing Act does not relate specifically to insurance; (2) the applicable Texas Insurance Code provisions were enacted for the purpose of regulating insurance; and (3) the application of the Fair Housing Act would frustrate state insurance regulation.

California Appellate Court Permits Policyholder to Pursue Unfair Competition Suit against Insurance Company

Well-established California law forbids private rights of action against insurers based on violations of the Unfair Insurance Practices Act ("UIPA"). And while a recent appellate court decision acknowledged this longstanding prohibition, it allowed a policyholder to sue his insurer over the company's alleged practice of steering customers to particular repair shops without informing the customer of his/her right to select his/her own repair dealer. *Hughes v. Progressive Direct Ins. Co.*, 126 Cal. Rptr. 3d 750 (Cal. Ct. App. 2011). Although significant, the holding is narrow in scope. The court reasoned that because the policyholder's unfair competition suit was based on an alleged violation of Insurance Code section 758.5, which is not part of UIPA, the ban on UIPA-based private rights of action did not apply. The court set forth the following rule of law:

> In sum, if a plaintiff relies on conduct that violates the UIPA but is not otherwise prohibited, the principles of [state law precedent] require that a civil action under UCL [Unfair Competition Law] be considered barred. An alleged violation of other statutes applicable to insurers, however, whether part of the Insurance Code or … the Business and Professions Code, may serve as the predicate for a UCL claim absent an express legislative direction to the contrary.

Given the limited scope of the holding in *Hughes*, other California courts may be unlikely to view the decision as a green light to unfair business practice claims by consumers against their insurance companies. Furthermore, the continued vitality of *Hughes* may depend on an anticipated ruling by the California Supreme Court in an analogous case, *Zhang v. Superior Court*, 100 Cal. Rptr. 3d 803 (Cal. Ct. App. 2009), *review granted*, 105 Cal. Rptr. 3d 886 (Cal. Feb. 10, 2010). There, the California Supreme Court is expected to rule on whether an insured may bring a cause of action against its insurer under California's Unfair Competition Law based on allegations that the insurer misrepresented and falsely advertised its prompt payment of claims.

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

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"Clients and peers herald [Simpson Thacher] as a true leader when it comes to insurer-side dispute work, be it on a local or national level."

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