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INSURANCE LAW ALERT

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This Alert features decisions relating to allocation, the availability of excess coverage when a policyholder settles with its primary insurer for less than policy limits, the use of extrinsic evidence in evaluating an insurer's duty to defend, and interpretation of "other insurance" clauses in overlapping policies. It also discusses rulings on the pollution exclusion, medical monitoring claims, and the enforcement of a bond posting statute. Finally, we summarize two recent decisions interpreting the scope of D&O coverage. Please "click through" to view articles of interest.

- ***Periods of "No Insurance" Caused by Insurer Insolvency Allocated to Policyholder, Not Insurers, Says Minnesota District Court***

  A federal district court in Minnesota held that where a policyholder is liable for continuous injury spanning multiple policy periods, the policyholder is responsible for periods covered by insolvent insurers. *H.B. Fuller Co. v. United States Fire Ins. Co.*, 2011 WL 2884711 (D. Minn. July 18, 2011). *Click here for full article*

- ***Excess Insurers Not Required to Contribute to Underlying Settlement where Primary Insurer Settled with Policyholder for Less Than Primary Policy Limits***

  The Fifth Circuit ruled that where a policyholder agreed to a settlement with its primary insurer for an amount less than the primary policy's limits, the policyholder could not access excess coverage. *Citigroup Inc. v. Federal Ins. Co.*, 2011 WL 3422073 (5th Cir. Aug. 5, 2011). *Click here for full article*

- ***Eighth Circuit States That Insurer May Rely on Interrogatory Reponses in Denying a Defense***

  The Eighth Circuit stated that sworn interrogatories provided in an underlying tort action may provide a valid basis for an insurer's denial of coverage. *AMCO Ins. Co. v. Inspired Technologies, Inc.*, 2011 WL 3477188 (8th Cir. Aug. 10, 2011). *Click here for full article*

- ***Policy Term "You" Means "Named Insured" and Does Not Encompass Additional Insureds, Says First Circuit***

  Interpreting identical "other insurance" clauses in two general liability policies in order to determine the priority of coverage, the First Circuit held that the term "you" refers only to the named insured and does not include additional insureds. *Wright-Ryan Construction, Inc. v. AIG Ins. Co. of Canada*, 647 F.3d 411 (1st Cir. 2011). *Click here for full article*

- ***Substance Need Not Be Inherently Harmful to Constitute an "Irritant" within Meaning of Pollution Exclusion, Says Eleventh Circuit***

  The Eleventh Circuit held that bacterial poisoning injuries, caused by exposure to "millings from roadwork" mixed with floodwater, constituted pollutants under a general liability policy's pollution exclusion. *Markel International Ins. Co., Ltd. v. Florida West Covered RV &Boat Storage, LLC*, 2011 WL 3505217 (11th Cir. Aug. 11, 2011). *Click here for full article*

- ***New York Court Rules That Non-Resident Plaintiff May Not Enforce Bond Statute against Foreign Insurer***

  A federal district court in New York rejected a non-resident plaintiff's attempt to enforce New York's pre-pleading security provision against a foreign insurer. *Dukes Bridge LLC v. Security Life of Denver Ins. Co.*, 2011 WL 2971392 (E.D.N.Y. July 20, 2011). *Click here for full article*

- ***California Court Requires D&O Insurer to Fund Legal Fees Incurred by Policyholder in Obtaining Representation for Subpoenaed Employees***

  A federal court in California ruled that an excess directors and officers insurer was required to pay legal fees incurred in complying with subpoenas issued to several company employees, even though the employees were neither directors or officers nor named in the underlying securities action. *Gateway, Inc. v. Gulf Ins. Co.*, 2011 WL 3607335 (S.D. Cal. Aug. 15, 2011). *Click here for full article*

- ***Bankruptcy Code Invalidates Policy Exclusion and D&O Insurer Must Defend Claims against Directors of Bankrupt Company, Says Illinois Appellate Court***

  An Illinois appellate court affirmed a lower court ruling that a directors and officers insurer must defend directors in an underlying lawsuit filed by the bankruptcy trustee, finding that Section 541(c) of the Bankruptcy Code invalidated an otherwise applicable bankruptcy exclusion and that an "insured v. insured" exclusion was inapplicable. *Yessenow v. Executive Risk Indemnity, Inc.*, 2011 WL 2623307 (Ill. Ct. App. June 30, 2011). *Click here for full article*

- ***Third Circuit Denies Class Certification in Medical Monitoring Action***

  The Third Circuit affirmed a district court's denial of class certification for medical monitoring relating to plaintiffs' exposure to an alleged carcinogen, concluding that individual issues predominated over common questions relating to exposure, causation, and the need for medical monitoring. *Gates v. Rohm and Haas Co.*, 2011 WL 3715817 (3d Cir. Aug. 25, 2011). *Click here for full article*

Allocation Alert:

Periods of "No Insurance" Caused by Insurer Insolvency Allocated to Policyholder, Not Insurers, Says Minnesota District Court

Ruling on a matter of first impression under Minnesota law, a federal district court held that where a policyholder is liable for continuous injury spanning multiple policy periods, the policyholder is responsible for periods covered by insolvent insurers. *H.B. Fuller Co. v. United States Fire Ins. Co.*, 2011 WL 2884711 (D. Minn. July 18, 2011).

H.B. Fuller Co., a manufacturer of asbestos-containing products, was named in numerous bodily injury lawsuits. Fuller had collectible insurance for several policy periods, but insurers from which it purchased coverage for a four year period had subsequently become insolvent. Fuller sought a declaration that allocation of funding for asbestos-related settlements or judgments should exclude that four year period, thereby shifting the pro rata burden of that time frame onto solvent co-insurers. In response, the co-insurers argued that because insurance was available in the marketplace during the four year period at issue, the pro rata portion of liability for that period should be allocated to the policyholder.

Minnesota, like many other jurisdictions, endorses a pro rata approach to allocation, allowing for pro-ration to the insured for periods in which insurance was available, and the policyholder had voluntarily chosen to self-insure. However, the Minnesota courts have not addressed whether a lack of insurance caused by insurer insolvency is akin to voluntary self-insurance or to an unavailability of insurance. Siding with the co-insurers, the court ruled that insurer insolvency was akin to self-insurance for purposes of pro rata allocation to the policyholder. The court focused on the fact that insurance was, in fact, "available" in the marketplace during the relevant time frame, despite the ultimate insolvency of the subject insurers. The "availability" analysis took precedence over the question of whether the resulting self-insurance was "voluntary," the court held. As the court observed, this ruling comports with decisions in two analogous contexts—(1) situations in which a policyholder inadvertently under-insures, and is held responsible for such periods of insufficient insurance, and (2) situations in which a policyholder, rather than an excess insurer, has been required to cover the limits of an insolvent primary insurer. *Fuller* is consistent with decisions issued by courts in New York, New Jersey and Illinois, reasoning that the risk of insurer insolvency should be borne by the policyholder rather than "another carrier that was a stranger to the [insurance] selection process."

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Excess Insurance Alert:

Excess Insurers Not Required to Contribute to Underlying Settlement where Primary Insurer Settled with Policyholder for Less Than Primary Policy Limits

The Fifth Circuit ruled that where a policyholder agreed to a settlement with its primary insurer for an amount less than the primary policy's limits, the policyholder could not access excess coverage. The court explained that coverage under the excess policies was contingent upon exhaustion of the primary policy. *Citigroup Inc. v. Federal Ins. Co.*, 2011 WL 3422073 (5th Cir. Aug. 5, 2011).

Citigroup sought coverage from one primary insurer and nine excess insurers for the settlement of two lawsuits—a fraud-based class action and a suit brought by the Federal Trade Commission alleging violations of the truth in lending statutes. Lloyd's of London, the primary insurer, entered into a settlement with Citigroup, agreeing to provide $15 million of its $50 million limit of liability in exchange for a release from coverage. Citigroup then sued its excess insurers, seeking additional coverage for the underlying settlement. The district court held, and the Fifth Circuit agreed, that the excess insurers' liability did not attach unless and until Lloyd's paid its full $50 million limit. Because Citigroup had settled with Lloyd's for an amount less than $50 million, it was not entitled to coverage from the excess insurers as a matter of law. Although the exhaustion language in each of the excess policies differed somewhat, the court concluded that all of their terms (e.g., "full amount," "total" limit of liability paid "in legal currency," and "exhaustion of all of the limit(s) of liability") evidenced a requirement that the primary insurer pay the full primary limits to the policyholder in order to trigger excess coverage. Many other courts have likewise interpreted standard excess policy language to require actual payment of primary limits in connection with a settlement or judgment in order to trigger excess coverage. These rulings appear to be having a significant effect on policyholders' efforts to settle high-dollar coverage disputes on anything but a global basis.

Defense Alert:

Eighth Circuit States That Insurer May Rely on Interrogatory Reponses in Denying a Defense

The Eighth Circuit stated that sworn interrogatories provided in an underlying tort action may provide a valid basis for an insurer's denial of coverage. *AMCO Ins. Co. v. Inspired Technologies, Inc.*, 2011 WL 3477188 (8th Cir. Aug. 10, 2011).

A competitor sued the policyholder, Inspired Technologies, Inc., for unfair trade practices and false advertising. Inspired tendered defense of the action to AMCO Insurance Company, its general liability insurer. AMCO agreed to fund the defense and a later settlement, but subsequently filed a declaratory judgment action, arguing that certain policy exclusions

negated its duty to defend and indemnify the underlying suit. Agreeing with AMCO, the district court held that AMCO had no duty to defend by virtue of the policy's "knowledge-of-falsity" exclusion. The court reasoned that interrogatory responses provided by the plaintiff in the underlying action established the policyholder's "intent to deceive," which triggered the relevant policy exclusion.

On appeal, the policyholder argued that the district court afforded too much weight to the interrogatory answers and improperly disregarded the allegations in the underlying complaint, which gave rise to a duty to defend. The Eighth Circuit disagreed. Applying Minnesota law, the appellate court wrote that the district court's (and AMCO's) reliance on the interrogatory responses to deny a defense was not error. The court explained that although an insurer's duty to defend is generally determined by the allegations in the complaint, "the complaint is not controlling when actual facts clearly establish the existence or nonexistence of an obligation to defend." Here, the sworn interrogatories constituted such "actual facts" negating the duty to defend. However, the Eighth Circuit reversed the district court on other grounds, finding that although the policy exclusion barred coverage for some underlying claims, it did not conclusively preclude coverage for *all* underlying claims. Therefore, the court explained, AMCO was still obligated to defend the underlying action.

Minnesota law is not alone in allowing consideration of facts outside the complaint to determine an insurer's duty to defend. Numerous other jurisdictions permit the use of extrinsic evidence in evaluating an insurer's defense obligations, but more frequently such evidence is used to establish, rather than defeat, an insurer's duty to defend.

Additional Insured Alert:

Policy Term "You" Means "Named Insured" and Does Not Encompass Additional Insureds, Says First Circuit

When construction-related claims give rise to insurance coverage disputes, two inter-related issues frequently arise: (1) the scope of "additional insured" coverage under a contractor or sub-contractor's general liability policy, and (2) the priority of coverage between overlapping insurance policies. The First Circuit addressed both issues in *Wright-Ryan Construction, Inc. v. AIG Ins. Co. of Canada*, 647 F.3d 411 (1st Cir. 2011).

The dispute arose after an injured worker, who had been hired by a sub-contractor, sued the general contractor for negligence in connection with the accident. Acadia Insurance Company, the general contractor's liability insurer, defended and ultimately settled the suit, and then sought reimbursement for the defense and settlement costs from AIG, the sub-contractor's liability insurer. Acadia argued that AIG's defense and indemnity obligations were triggered because the general contractor was listed as an "additional insured" in the AIG policy. Both insurers moved for summary judgment. The district court held that coverage under AIG's "additional insured" provision was triggered because the accident arose out of the sub-contractor's operations for the general contractor. The court also ruled that the AIG policy was excess to the Acadia policy, and because the settlement was within the limits of the Acadia policy, AIG owed no coverage.

The sole issue on appeal was whether the district court had correctly concluded that the AIG policy was excess to the Acadia policy. The First Circuit reversed, focusing on interpretation of identical "other insurance" provisions included in both policies. These "other insurance" clauses purported to make each policy's coverage excess to other available insurance coverage. The First Circuit resolved this conflict by

interpreting the phrase "any other primary insurance available *to you*" (which appeared in both "other insurance" clauses) to mean primary insurance available *to the named insured* only. By interpreting "you" in this manner, the result was that the AIG policy was primary and the Acadia policy excess. The court rejected the argument that "you" should be interpreted to included both the named insured as well as any additional insureds—the reasoning endorsed by the district court.

Wright-Ryan's interpretation comports with other construction-based coverage decisions within and outside the First Circuit. However, when "other insurance" conflicts cannot be reconciled by contractual language interpretation, numerous courts have concluded that conflicting "excess" clauses cancel each other out and that losses must be shared on a co-primary, pro rata basis.

Pollution Exclusion Alert:

Substance Need Not Be Inherently Harmful to Constitute an "Irritant" within Meaning of Pollution Exclusion, Says Eleventh Circuit

Disputes regarding the scope of pollution exclusions are commonplace and frequently center on whether the exclusion should be interpreted to include only traditional environmental contamination, or to include injury or damage caused by substances that may not traditionally be considered "pollutants." An issue that has arisen in this context is whether a substance may be a classified as an "irritant" or "contaminant" even though the substance may be harmless, or even useful, in certain circumstances.

In *Markel International Ins. Co., Ltd. v. Florida West Covered RV &Boat Storage, LLC*, 2011 WL 3505217 (11th Cir. Aug. 11, 2011), the Eleventh Circuit affirmed a district court ruling that bacterial poisoning injuries, caused by exposure to "millings from roadwork"

mixed with floodwater, constituted pollutants under a general liability policy's pollution exclusion. The underlying plaintiff alleged that after wading through flood water in the policyholder's commercial storage facility, he contracted a bacterial infection. The storage facility sought coverage under its general liability policy, and the insurer denied coverage pursuant to the pollution exclusion. The district court granted summary judgment in the insurer's favor, finding that the absolute pollution exclusion barred coverage for the injuries. The Eleventh Circuit affirmed.

Applying Florida law, the appellate court ruled that the millings mixed with flood water constituted a "pollutant" within the meaning of the exclusion. In so ruling, the court emphasized that "it is a product's 'ability to produce an irritating effect [that] places the product [ ] within the policies' definition of an 'irritant,'" and therefore "a product that causes no harm when used properly still may be classified as a pollutant under the exclusion." Other courts have reached similar conclusions, applying the pollution exclusion to bar coverage where otherwise innocuous substances have caused harm. *See, e.g., Federated Mut. Ins. Co. v. Abston Petroleum, Inc.*, 967 So.2d 705, 711 (Ala. 2007) ("The focus of the inquiry under the absolute pollution exclusion is not on the nature of the substance alone, but on the

substance *in relation* to the property damage or bodily injury. Even if a substance such as gasoline is commercially useful in one context, it may become a pollutant when it is released and becomes a 'foreign' substance in another medium.").

Bond Posting Alert:

New York Court Rules That Non-Resident Plaintiff May Not Enforce Bond Statute against Foreign Insurer

A federal district court in New York rejected a non-resident plaintiff's attempt to enforce New York's pre-pleading payment security provision against a foreign insurer. *Dukes Bridge LLC v. Security Life of Denver Ins. Co.*, 2011 WL 2971392 (E.D.N.Y. July 20, 2011). The court reasoned that the plaintiff seeking to enforce the contract (and the security statute) was not entitled to do so because it was a Delaware corporation.

New York Insurance Law § 1213(c)(1) requires unauthorized foreign or alien insurers to deposit a bond with the clerk of the court, sufficient to secure payment of final judgment which may be rendered in the action, prior to filing a pleading in any proceeding against it. Here, the defendant, a foreign insurer, argued that the plaintiff was not entitled to enforce the security provision because the plaintiff was a non-New York resident. The court agreed. New York courts have consistently held that the statute was intended to protect New York residents (or non-resident corporations who are authorized to do business within New York), and as such, may not be enforced by non-residents. The court was not persuaded by the fact that the original holder of the policy (which had been transferred to the Delaware corporation through a series of transactions) was a New York trust. The court explained that New York law does not support the argument that an assignee of a contract can invoke § 1213 simply because the original party in interest would have been able to do so. Furthermore, the court held, even if assignees could invoke security protection based on the original party's residency, the plaintiff here—who acquired the policy at a public auction following three assignments—"can hardly be characterized as a typical assignee" and "bears little connection to the original policyholder."

D&O Alerts:

California Court Requires D&O Insurer to Fund Legal Fees Incurred by Policyholder in Obtaining Representation for Subpoenaed Employees

A federal court in California ruled that an excess directors and officers insurer was required to pay legal fees incurred in complying with subpoenas issued to several company employees who were neither directors or officers nor named in the underlying securities action. *Gateway, Inc. v. Gulf Ins. Co.*, 2011 WL 3607335 (S.D. Cal. Aug. 15, 2011).

The decision turned primarily on interpretation of policy provisions which defined the category

of persons who could be considered "directors and officers" for coverage purposes. In seeking coverage, the insured company relied on a provision which stated that where a securities law violation is alleged, "all persons who were, now are, or shall be employees of the Company" are directors and officers. In contrast, the insurer relied on a provision which stated that "coverage for employees who are not directors or officers shall only apply when an employee is named as a co-defendant with a director or officer of the Company." The court concluded that the two provisions must be read independently, and that the broad scope of the former provision was not affected by the limiting language of the latter provision. Alternatively, the court ruled that the parties' competing interpretations created an ambiguity that must be resolved in favor of the reasonable expectations of the insured.

Gateway illustrates the importance of careful policy drafting, particularly where multiple policy provisions address the same or similar coverage issues, or where jurisdictional law endorses the reasonable expectations doctrine.

Bankruptcy Code Invalidates Policy Exclusion and D&O Insurer Must Defend Claims against Directors of Bankrupt Company, Says Illinois Appellate Court

An Illinois appellate court affirmed a lower court ruling that a directors and officers insurer must defend two directors in an underlying lawsuit filed by the bankruptcy trustee. *Yessenow v. Executive Risk Indemnity, Inc.*, 2011 WL 2623307 (Ill. Ct. App. June 30, 2011). The court ruled that Section 541(c) of the Bankruptcy Code invalidated an otherwise applicable bankruptcy-related exclusion in the policy, and that an "insured v. insured" exclusion was inapplicable.

Former directors of two bankrupt companies

sought D&O coverage for a lawsuit filed by a court-appointed trustee alleging that the directors engaged in mismanagement and breached their fiduciary duties. The insurer denied coverage for that lawsuit and several others brought against the former directors, citing the bankruptcy exclusion and the "insured v. insured" exclusion. Both parties moved for summary judgment, and the trial court ruled in favor of the directors, finding that neither exclusion precluded coverage. The appellate court affirmed.

The bankruptcy exclusion stated that "[i]n the event that a bankruptcy or equivalent proceeding is commenced by or against the Company, no coverage will be available under the Policy…" The court acknowledged that this exclusion squarely applied to the lawsuit brought by the trustee, but held that it was unenforceable in light of Bankruptcy Code Section 541(c)(1)(B). Section 541(c)(1)(B) provides that a debtor's property (here, the D&O policy) "becomes property of the [bankruptcy] estate notwithstanding any provision in an agreement that is conditioned on the insolvency or financial condition of the debtor [or] on the commencement of a case under this title and that effects a forfeiture, modification, or termination of the debtor's interest in property." 11 U.S.C. § 541(c)(1)(B). The court observed that cases involving the appointment of receivers under state statutes with language that differs from Section 541(c) are inapposite.

The court also ruled that the "insured v. insured" exclusion did not void the insurer's duty to defend

the directors. The court rejected the notion that the trustee was an "insured" because he was acting "by or on behalf of or in the name or right of the Company" in filing the lawsuit against the directors. Rather, the court explained that the court-appointed trustee was "an instrument of the law and an agent of the court" and thus a separate entity from the insured company. Importantly, the court distinguished cases in which an "insured v. insured" exclusion barred claims brought by a debtor-in-possession of a bankrupt company. The court stated that "[a] court-appointed trustee, unlike a debtor-in-possession, is acting with the imprimatur of the court, reducing the fear of collusion, which … is 'among the kinds of moral hazard that the insured versus insured exclusion is intended to avoid.'"

Disputes regarding the applicability of the "insured v. insured" exclusion following a policyholder's bankruptcy are not uncommon. Circuit courts are split as to whether the exclusion bars coverage for the claims of a bankruptcy trustee and other such entities. Rulings have focused on the policy language at issue (including, in particular, the phrase "on behalf of"), the nature of the entity asserting the claims, and the types of claims asserted. Although the appellate court did not rule on the question of whether the "insured v. insured" exclusion is ambiguous, the trial court declared the exclusion ambiguous, reasoning that the insurer could have "sidestepped any ambiguity [in the exclusion] by including trustees and debtors-in-possession in either the definition of the 'insured' or the language of the insured versus insured exclusion." Other courts have also found the exclusion ambiguous in the bank failure context.

Medical Monitoring Alert:
Third Circuit Denies Class Certification in Medical Monitoring Action

Previous Alerts have discussed whether medical monitoring claims can trigger coverage under general liability insurance policies. Although dozens of courts have addressed whether medical monitoring actions are recognizable, there is no judicial consensus. Decisions appear to turn on a multitude of factors, including the nature of the complaint's allegations, the precise relief sought, and the jurisdiction in which the dispute is litigated. And even where medical monitoring claims are recognized, the viability of such actions may depend on class certification of such claims. Such was the case in a recent Third Circuit case, *Gates v. Rohm and Haas Co.*, 2011 WL 3715817 (3d Cir. Aug. 25, 2011). There, the Third Circuit affirmed a district court's denial of class certification for medical monitoring relating to plaintiffs' exposure to an alleged carcinogen. The court concluded that individual issues predominated over common questions relating to exposure, causation, and the need for medical monitoring, and thus that the putative class lacked the cohesiveness necessary to maintain a class under Rule 23(b)(2), and did not present common issues of fact and law as required by Rule 23(b)(3).

Gates illustrates the significant hurdles faced by plaintiffs seeking to assert medical monitoring claims on a class basis. As the court noted, the very elements necessary to substantial a medical monitoring claim (e.g., causation and medical necessity) often require individual analysis.

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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