SIMPSON THACHER
INSURANCE LAW ALERT
JUNE 2012

This Alert addresses decisions relating to a non-settling insurer's right to seek contribution from a settling insurer, the validity of a new exclusion in a renewal policy, and the scope of D&O coverage for acts performed by an insured executive in his personal capacity. It also discusses three noteworthy decisions relating to the duty to defend: the statute of limitations for a claim alleging breach of the duty to defend, an insurer's forfeiture of the right to control a policyholder's defense, and an insurer's advancement of defense costs to individual insureds notwithstanding an order freezing the assets of the insured company. We also discuss a Florida Supreme Court decision rejecting common law first-party bad faith claims against an insurer, and a Texas Supreme Court decision categorizing stop-loss policies as direct insurance, rather than reinsurance. Finally, we address a decision enforcing a professional services exclusion and a discovery ruling rejecting the "selective waiver" of privilege in a bad faith action. Please "click through" to view articles of interest.

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- ***Sixth Circuit Dismisses Non-Settling Insurer's Contribution Claim against Settling Insurer***

  The Sixth Circuit ruled that a non-settling excess insurer may not seek contribution from a settling primary insurer, reasoning that a settled policy is "exhausted for purposes of equitable contribution." *OneBeacon America Ins. Co. v. American Motorists Ins. Co.*, 2012 WL 1728757 (6th Cir. May 17, 2012). *Click here for full article*

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- ***Insurer's Initial Denial of Defense Results in Forfeiture of Right to Select Counsel, Says California Court***

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- ***Missouri Court Allows Insurer to Advance Defense Costs to Individual Insureds Despite Order Freezing Insured Company's Assets***

  A Missouri court held that an insurer may advance defense costs to individual insureds notwithstanding an asset freeze order issued against the insured company. *Sec. and Exch. Comm'n v. Burton Douglas Morriss*, 2012 WL 1605225 (E.D. Mo. May 8, 2012). *Click here for full article*

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- ***Stop-Loss Insurance Sold to Self-Funded Employee Health Benefit Plans Is Direct Insurance, Not Reinsurance, Says Texas Supreme Court***

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- ***Washington Appellate Court Finds No D&O Coverage Where Executive Officer Acted in Personal, Not Official Capacity***

  A Washington appellate court held that a directors and officers policy that provides coverage to executives for acts performed in their official capacity does not insure against losses stemming from an officer's guaranty of a bank loan made to his company. *Sauter v. Houston Cas. Co.*, 2012 WL 1699447 (Wash. Ct. App. May 14, 2012). *Click here for full article*

- ***Policyholder's Alleged Ignorance of New Exclusion in Renewal Policy Does Not Warrant Reformation, Says Ohio Court***

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- ***California Appellate Court Declines to Limit Scope of Professional Services Exclusion***

  A California appellate court ruled that an insurer had no duty to defend a negligence and wrongful death suit against a real estate broker because the acts giving rise to the suit were within the scope of a professional services exclusion. *Golden Eagle Ins. Corp. v. Lemoore Real Estate and Prop. Mgmt., Inc.*, 2012 WL 1670475 (Cal. Ct. App. May 14, 2012). *Click here for full article*

- ***Kentucky Court Rejects Selective Disclosure Argument and Holds That Insurer Waives Privilege by Asserting Advice of Counsel Defense to Bad Faith Claim***

  A federal court in Kentucky ruled that when an insurer asserts an advice of counsel defense to a bad faith claim, it waives attorney-client privilege as to all documents concerning the bad faith issue. *Lee v. Med. Protective Co.*, 2012 WL 1533388 (E.D. Ky. Apr. 30, 2012). *Click here for full article*

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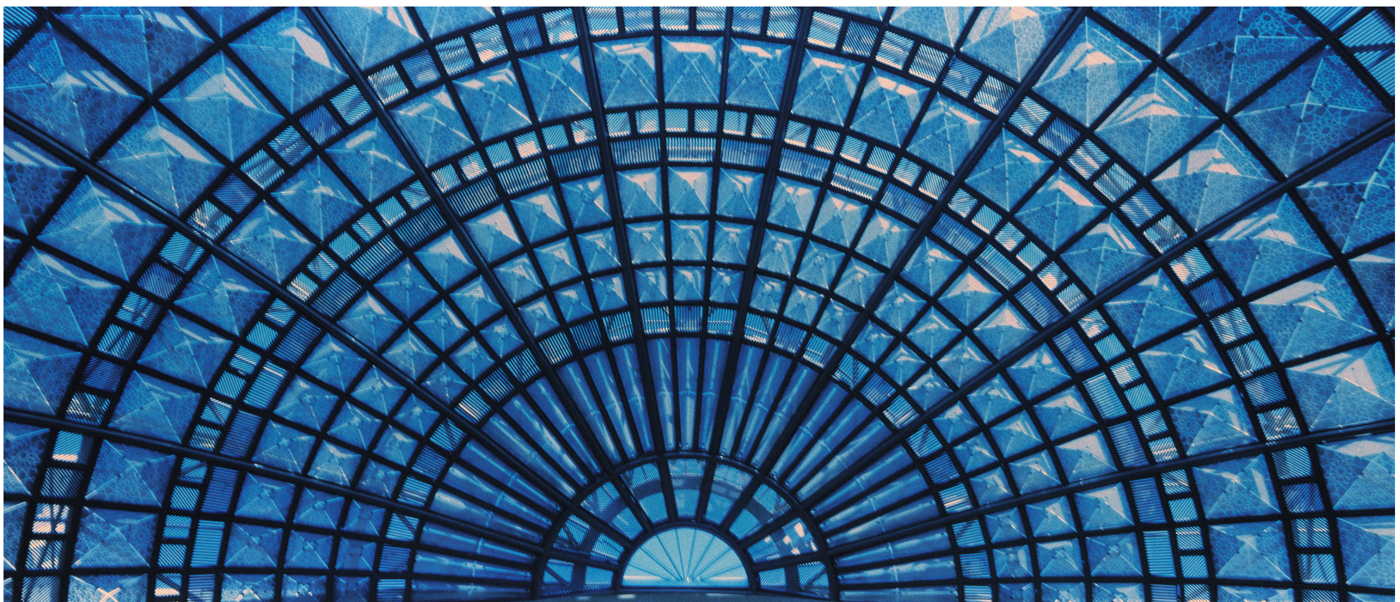
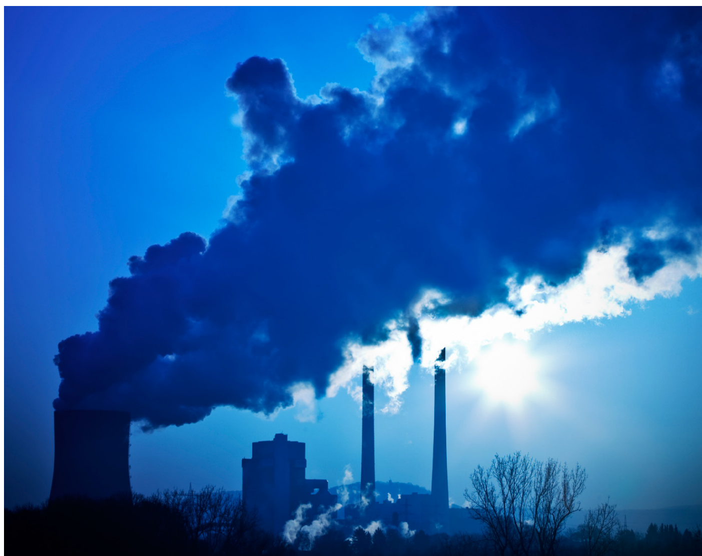


## Contribution Alert:

### *Sixth Circuit Dismisses Non-Settling Insurer's Contribution Claim against Settling Insurer*

Affirming an Ohio district court decision, the Sixth Circuit ruled that a non-settling excess insurer may not seek contribution from a settling primary insurer, reasoning that a settled policy is "exhausted for purposes of equitable contribution." *OneBeacon America Ins. Co. v. American Motorists Ins. Co.*, 2012 WL 1728757 (6th Cir. May 17, 2012).

American Motorists Insurance Company ("AMICO") and OneBeacon both insured B.F. Goodrich Corporation, a company held liable for environmental cleanup costs at a Kentucky plant. AMICO, a primary insurer, settled with Goodrich, but OneBeacon, an excess carrier, did not and went to trial. An Ohio state court jury found in favor of Goodrich and held OneBeacon jointly and severally liable (with a co-defendant) for approximately $75 million in damages, attorneys' fees and prejudgment interest. Although the award against OneBeacon was reduced by $20 million to reflect its position as an excess insurer, the state court denied OneBeacon's request for settlement credits to reflect amounts paid by AMICO and other settling insurers, explaining that the "universe of claims that AMICO and other insurers settled via their agreements with Goodrich was not coextensive with the claim for which OneBeacon was found liable." The trial court alternatively held that the finding of bad faith against OneBeacon "precluded the court from engaging in the equitable practice of granting settlement credits." OneBeacon then filed an action for equitable contribution. A federal district court in Ohio dismissed the action and the Sixth Circuit affirmed.



Although Ohio courts have allowed a targeted insurer to pursue an equitable contribution claim against a non-targeted insurer, *see, e.g., Pa. Gen. Ins. Co. v. Park-Ohio Indus.*, 930 N.E.2d 800 (Ohio 2010), the Sixth Circuit found Ohio law unsettled as to whether a non-settling insurer may seek equitable contribution from an insurer that has entered into a settlement with the policyholder. Citing two Ohio district court opinions and a Third Circuit opinion, the Sixth Circuit concluded that a settlement with an insured extinguishes all claims against a settling insurer, including equitable contribution claims by a non-settling insurer. Noting Ohio's strong public policy favoring settlements in general, the Sixth Circuit explained that "allowing OneBeacon to pursue equitable contribution from AMICO would not only fail to encourage settlements, it would actively discourage such settlements. An insurer would have no incentive to settle with a policyholder if it knew that it would be liable to another insurer down the road." While the Sixth Circuit noted that settlement credits are typically issued in order to remedy any overpayments, here the underlying state court decision denying settlement credits to OneBeacon (which was

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affirmed by a state appellate court) was not before the Sixth Circuit for review.

*OneBeacon* runs counter to the ruling in *Potamac Ins. Co. of Ill. v. Pa. Mfr.s' Assoc. Ins. Co.*, 2012 WL 1231841 (N.J. Super. Ct. App. Div. Apr. 13, 2012), discussed in our May 2012 Alert. There, a New Jersey appellate court held that an insurer's equitable right to seek contribution of defense costs from other insurers is not extinguished by those insurers' settlements with the policyholder.

Notably, by basing its decision on Ohio's strong public policy favoring settlements, the Sixth Circuit avoided answering two important legal issues raised in this case: (1) whether Ohio law permits "interclass" (i.e., primary vs. excess) contribution actions, and (2) whether a jury's finding of bad faith bars the equitable remedy of contribution.

## Defense Alerts:

### *Statute of Limitations for Breach of Duty to Defend Does Not Begin to Run Until Judgment Is Issued in the Underlying Litigation, Says Pennsylvania Court*

A Pennsylvania district court ruled that the statute of limitations for an action alleging a breach of an insurer's duty to defend begins to run upon judgment against the insured in the underlying litigation, rather than upon an insurer's denial of a defense. *Wiseman Oil Co., Inc. v. TIG Ins. Co.*, 2012 WL 1866290 (W.D. Pa. May 22, 2012). In so ruling, the court cited to case law in Pennsylvania and other jurisdictions which similarly holds that the statute of limitations for a breach of contract claim against an insurer does not accrue until the conclusion of the underlying litigation against the policyholder. Such decisions have typically reasoned that because "an insurer's duty to defend is a continuing

contractual obligation which may yet be performed so long as the underlying action continues … the cause of action is not complete until the underlying action is over."

Notably, other courts have reached a contrary conclusion in this context, holding that the applicable statute begins to run when the insurer issues an unconditional denial of coverage. *See Land O' Lakes, Inc. v. Emp'rs Mut. Liab. Ins. Co. of Wisconsin*, 2012 WL 699456 (D. Minn. Mar. 6, 2012) (six-year statute of limitations for policyholder's duty to defend claims against insurer began to run at the time the insurers denied a defense; therefore, claims are time barred); *Siebe, Inc. v. Louis M. Gerson Co., Inc.*, 908 N.E.2d 819, 831 (Mass. App. Ct. 2009) ("The limitations period for an insured's cause of action against an insurer alleging breach of duty to defend begins to run when the insured is sued for negligence, the insurer refuses to defend, and the insured begins to incur defense costs."); *General Motors Corp. v. Royal & Sun Alliance Ins. Group, PLC*, 2007 WL 299362 (Mich. Cir. Ct. Jan. 22, 2007) (insured's cause of action against insurer for breach of contract is barred by six-year statute of limitations, which accrued immediately upon insurer's denial of coverage). Alternatively, some courts have ruled that the statute begins to run at the time the insurer refuses to defend, but is equitably tolled until the underlying action reaches final judgment. *See Brannon v. Continental Cas. Co.*, 137 P.3d 280, 284–87 (Alaska 2006) (citing cases).

## *Insurer's Initial Denial of Defense Results in Forfeiture of Right to Select Counsel, Says California Court*

A federal court in California held that when an insurer initially refuses to defend claims against its policyholder, that insurer waives the right to control the defense. *Travelers Prop. Cas. Co. of America v. Centex Homes*, 2012 WL 1657121 (N.D. Cal. May 10, 2012).

After being sued in several construction defect suits, Centex Homes tendered its defense of these actions to Travelers. Because Travelers initially denied a defense, Centex retained its own counsel in the underlying litigations. Several months later, Travelers agreed to provide a defense under a reservation of rights and sought to replace Centex's existing counsel with its own choice of counsel. When Centex refused to change counsel, Travelers brought suit alleging that Centex breached the cooperation clause and the implied covenant of good faith and fair dealing. The court granted Centex's motion for partial summary judgment.

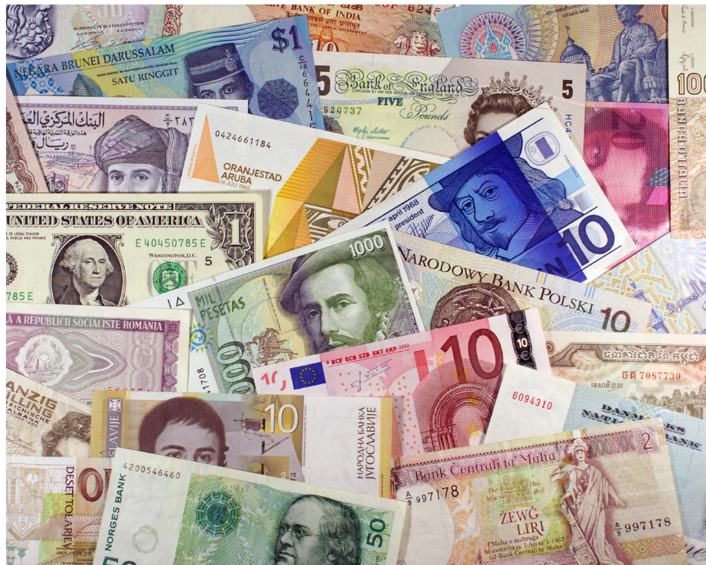
The court held that once an insurer breaches its duty to defend, the policyholder is "relieved of his or her obligation to allow the insurer to manage the litigation and may proceed in whatever manner is deemed appropriate." Here, the court reasoned that because Travelers breached its duty by failing to immediately provide a defense upon tender, it was divested of the right to control that defense. Significantly, the court distinguished a case in which an insurer's delay in providing a defense may be attributed to conduct of the policyholder. Under such circumstances, a policyholder may be bound, pursuant to a cooperation clause, to accept the insurer's choice of counsel. *See Travelers Prop. v. Centex Homes*, 2011 WL 1225982 (N.D. Cal. Apr. 1, 2011).

*Centex Homes* serves as an important reminder about the doctrine of waiver. Although courts often reject policyholder arguments that an insurer has waived coverage defenses by refusing to defend or by defending under a reservation of rights, *Centex* illustrates that courts may be more receptive to a waiver argument with respect to an insurer's right to control the policyholder's defense. *Centex* holds that for purposes of controlling a policyholder's defense, a delay in accepting tender, standing alone, may be sufficient to establish waiver.

## *Missouri Court Allows Insurer to Advance Defense Costs to Individual Insureds Despite Order Freezing Insured Company's Assets*

Last month's Alert discussed a New York bankruptcy court ruling allowing insurers to reimburse and/or advance defense costs to debtors' current and former officers, directors and employees named as defendants in pending class action lawsuits in connection with ongoing investigations. *In re MF Global Holdings Ltd.*, 2012 WL 1191892 (Bankr. S.D.N.Y. Apr. 10, 2012). There, the court rejected the arguments made by one debtor's commodity customers and another debtor's security holders—plaintiffs in pending actions—that (1) the proceeds of the policies were property of the debtor's estate; and (2) allowing insurers to pay the individual insureds' defense costs would improperly diminish the amount of funds available to compensate victims. Faced with analogous circumstances, a Missouri district court reached the same conclusion in *Sec. and Exch. Comm'n v. Burton Douglas Morriss*, 2012 WL 1605225 (E.D. Mo. May 8, 2012).

In *Burton Douglas Morriss*, the SEC filed suit against several investment entities, alleging fraud and misappropriation of funds. The court appointed a receiver and froze the assets of the investment companies. One of the companies, Acartha, turned to Federal Insurance Company for defense of itself and two of its executives. Federal accepted tender and began advancing defense costs as required by the




policy. Federal also advanced defense costs to Acartha and one of its executives in connection with a later-filed investor suit. The receiver objected to the advancement of defense costs, arguing that the insurance policy belonged to the receivership estate and that under principles of equity, it should be preserved for compensating defrauded investors.

As in *In re MF Global Holdings*, the Federal policy here provided coverage to both the company and the individual officers. Thus, the court held that the determination of whether policy proceeds belonged to the receiver or alternatively could be used to fund the individuals' defense turned on the specific policy language. Here, several provisions in the Federal policy justified the advancement of defense costs: (1) a priority of payment provision requiring Federal to first pay claims against individuals before claims against the organization, and (2) an advancement of defense costs provision requiring Federal to pay defense costs without regard to other potential liability or future payment obligations. The court's rational suggests that other courts may reach a different result in the absence of specific policy language dictating the priority afforded to the advancement of defense costs in similar factual settings.

# Bad Faith Alert:

## *Florida Law Does Not Recognize Common Law First-Party Bad Faith Claim against Insurer, Says Florida Supreme Court*

Answering a question certified by the Eleventh Circuit, the Supreme Court of Florida held that there is no common law first-party bad faith action claim under Florida law. *QBE Ins. Corp. v. Chalfonte Condo. Apt. Assoc., Inc.*, 2012 WL 1947863 (Fla. May 31, 2012). Rather, such actions must be brought under state statutory law, Fla. Stat. § 624.155, which governs bad faith claims against insurers.

Homeowners sought to recover hurricane-related damages from their property insurer, QBE Insurance Corporation. Dissatisfied with QBE's investigation and claims handling, the homeowners filed suit alleging breach of contract, breach of the implied warranty of good faith and fair dealing and violations of Florida statutory law, Fla. Stat. § 627.701(4)(a) (a statute that mandates specific language and font size for provisions relating to hurricane deductibles). A jury found in favor of the homeowners on all claims. Numerous post-trial motions and appeals ensued, and ultimately, the Eleventh Circuit deemed it necessary to certify several questions to the Florida Supreme Court. The first question asked: "Does Florida law recognize a claim for breach of the implied warranty of good faith and fair dealing by an insured against its insurer based on the insurer's failure to investigate and assess the insured's claim within a reasonable period of time?" The Florida Supreme Court answered this question in the negative, concluding that the exclusive remedy for alleged bad faith is the statutory bad faith action created by Fla. Stat. § 624.155.

Answering other certified questions, the Florida Supreme Court also held that (1) Fla. Stat. § 627.701(4)(a), which specifies particular language and font size for hurricane deductible provisions, does not provide for a private right of action, and (2) QBE's violation of

this statute did not operate to nullify the hurricane deductible provision in its policy. In declining to void the deductible provision, the court noted that creating coverage not bargained for by the parties nor reflected in the premiums would constitute a "severe penalty which alters the very terms of the deal between the parties."

*QBE* represents a significant victory for insurers on several fronts—(1) limiting bad faith claims to that provided by state statutory law, (2) declining to allow private rights of action against insurers for violations of statutes where no such right is explicitly provided, and (3) declining to void a policy provision for failure to comply with statutory regulations where no such penalty is expressly authorized.

## Reinsurance Alert:

### *Stop-Loss Insurance Sold to Self-Funded Employee Health Benefit Plans Is Direct Insurance, Not Reinsurance, Says Texas Supreme Court*

Reversing an appellate court decision, the Texas Supreme Court held that stop-loss insurance issued to a self-funded employee benefit plan constitutes direct insurance and is thus subject to state insurance regulation. In so ruling, the court rejected the notion that such stop-loss insurance should be treated as reinsurance, which is outside of the scope of regulation. *Texas Dep't of Ins. v. American Nat'l Ins. Co.*, 2012 WL 1759457 (Tex. May 18, 2012).

American National Insurance Company sold stop-loss insurance to employee benefit plans, under which it agreed to reimburse the plans for costs that exceeded a contractually predetermined amount. During a routine audit, the Texas Department of Insurance discovered that American had violated numerous regulatory requirements in issuing certain stop-loss policies. American argued that its stop-loss policies were reinsurance, over which the Department lacked regulatory authority. In contrast, the Department contended that the policies were direct insurance, subject to the Texas Insurance Code and its regulatory authority.

The trial court agreed with the Department and granted summary judgment in its favor. The appellate court reversed, concluding that an employer that self funds a benefit plan is an "insurer" in the "business of insurance" under the Insurance Code, and thus that stop-loss policies purchased in order to transfer a portion of those risks constitutes reinsurance. The Texas Supreme Court reversed. Concluding that the Texas Insurance Code was ambiguous as to how stop-loss insurance should be treated, the Texas Supreme Court instead relied on the Department's longstanding history of categorizing stop-loss coverage as direct insurance rather than reinsurance. The court stated: "[t]he Department's construction is reasonable, was formally promulgated, and is not expressly contradicted by the Insurance Code. We accordingly agree with the Department's construction and hold that stop-loss insurance sold to a self-funded employee health-benefit plan is not reinsurance, but rather direct insurance subject to regulation under the Insurance Code."

# D&O Alert:

## *Washington Appellate Court Finds No D&O Coverage Where Executive Officer Acted in Personal, Not Official Capacity*

A Washington appellate court held that a directors and officers policy that provides coverage to executives for acts performed in their official capacity does not insure against losses stemming from an officer's guaranty of a bank loan made to his company. *Sauter v. Houston Cas. Co.*, 2012 WL 1699447 (Wash. Ct. App. May 14, 2012).

S-J Management, LLC, a rental property management company, entered into a business loan agreement with Commerce Bank. The loan agreement required S-J Management to furnish a guaranty of the loan. Accordingly, Michael Sauter, chief executive officer and manager of S-J Management, executed a guaranty of full payment of the loan which he secured with deeds of trust on real estate property he owned. When S-J Management failed to pay its debt upon maturity of the loan, Commerce Bank sought payment from Sauter. Sauter, in turn, demanded indemnification from S-J Management, but the company was financially unable to provide such indemnification. Thereafter,

S-J Management tendered to Houston Casualty, its D&O insurer, the demand on Sauter's guaranty obligation, Sauter's demand for indemnification to S-J Management, and bank notices of default on Sauter's personal property. Houston Casualty denied coverage. Sauter filed a declaratory judgment action seeking a judgment that Houston Casualty was obligated to cover his losses. Houston Casualty moved for summary judgment, arguing that Sauter did not commit a "Wrongful Act" and did not suffer a "Loss" as defined by the policy. The trial court agreed, and granted summary judgment in favor of Houston Casualty. The appellate court affirmed.

The policy provided coverage for a "Wrongful Act," defined as an act by any "director, officer, general partner, manager, or equivalent executive of an Insured Organization" "while acting in their capacity as … such on behalf of the Insured Organization." Thus, the court explained, in order for an act to be within the scope of coverage under this provision, the insured individual must be acting in his/her official capacity as a director, officer or other equivalent executive position. Here, the court concluded that Sauter acted in a personal capacity when he executed and subsequently defaulted on the guaranty. The court noted that Sauter signed the guaranty using only his name (as opposed to his name and title, which he used when executing the original loan agreement on behalf of the company) and that the very nature of the guaranty demonstrated the personal nature of the act. The court stated: "Had Sauter acted in his official capacity … when he executed the guaranty … [S-J Management] would be both the debtor and the guarantor with regard to the Commerce Bank loan. Such cannot be the case." It mattered not, the court held, that Sauter executed the guaranty *because* he was S-J Management's CEO, nor that S-J Management's Board unanimously agreed that he had executed the guaranty in his official capacity.

The court also concluded that Sauter's liability did not constitute a "Loss resulting from any Claim … for a Wrongful Act" as required by the policy. The court explained that regardless of whether the

repayment of a loan constituted a "loss" under the policy, such "loss" did not result from a wrongful act, but instead from Sauter's execution of the guaranty. In so ruling, the court cited to other decisions similarly denying insurance coverage for liability arising from contractual obligations, citing to the absence of a predicate wrongful act.

## Policy Alert:

### *Policyholder's Alleged Ignorance of New Exclusion in Renewal Policy Does Not Warrant Reformation, Says Ohio Court*

An Ohio magistrate judge declined to nullify a policy exclusion on the basis that the policyholder was unaware of the new exclusion in renewal policies. The court held that because the insurer had provided sufficient notice of the exclusion, the exclusion was valid and enforceable regardless of whether the policyholder had actual knowledge of it. *MDC Acquisition Co. v. N. River Ins. Co.*, No. 5:10CV2855 (N.D. Ohio May 15, 2012) (Report and Recommendation).

The policyholder was sued in a class action alleging violations of the Telephone Consumer Protection Act and the Junk Fax Prevention Act. The policyholder tendered defense of the action to Travelers, its general and excess liability insurer. Travelers denied a defense, relying primarily on an Unsolicited Communications Endorsement, which barred coverage for claims "arising out of unsolicited communications by or on behalf of any insured." In turn, the policyholder filed a declaratory judgment action, seeking reformation of the insurance policies. The policyholder argued that because the Endorsement was not included in Travelers' earlier policies, and because the policyholder did not receive notice of the Endorsement when it was added to the policies, the policy should be reformed to

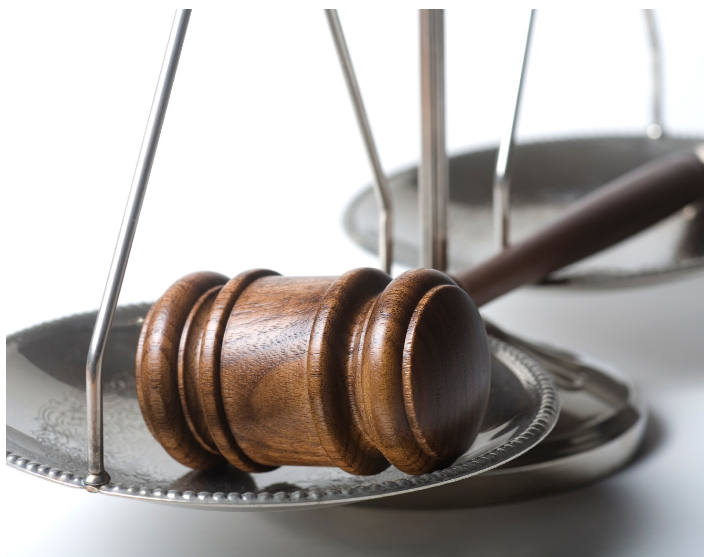
provide the same coverage that was in existence prior to the promulgation of the exclusion. The court rejected these contentions.

The court held that because Travelers took appropriate steps to provide sufficient notice of the policy changes, the Endorsement was valid—regardless of whether any individual employed by the policyholder actually received and/or read the communication. In particular, the court found it sufficient that Travelers sent written notice of the Endorsement to the policyholder and its insurance broker, as well as an email proposal for the policy renewal which specifically referenced the new Endorsement. Travelers was not required to address the postal letter to any specific individual because "it was reasonable for Travelers to assume that a letter addressed to the named insured would reach the appropriate party."

*MDC* highlights the importance of providing policyholders and/or brokers with clear notice regarding changes in policy renewals. As the court noted, "a separately attached and clearly worded letter describing the modifications" is advised, because the issuance of a modified renewal policy alone, even if accompanied by instructions to "carefully read the policy" may not constitute adequate notice of policy changes.

# Professional Services Alert: *California Appellate Court Declines to Limit Scope of Professional Services Exclusion*

Courts are frequently called upon to address the scope of professional services exclusions. Although most courts agree that the focus of such inquires is on the nature of the particular act(s) giving rise to the policyholder's liability, courts have reached different conclusions as to what particular types of acts may be



considered "professional" for the purposes of enforcing a professional services exclusion.

Affirming a lower court decision, a California appellate court ruled that an insurer had no duty to defend a negligence and wrongful death suit against a real estate broker because the acts giving rise to the suit were within the scope of a professional services exclusion. *Golden Eagle Ins. Corp. v. Lemoore Real Estate and Prop. Mgmt., Inc.*, 2012 WL 1670475 (Cal. Ct. App. May 14, 2012).

Lemoore, a licensed real estate broker, contractually agreed to provide property management services to the Northgate Apartments. A fire at Northgate resulted in the death of five people. Relatives of the decedents sued Lemoore, alleging negligence in the maintenance and control of the complex and failure to keep the property in a safe condition. Lemoore tendered defense of the action to Golden Eagle. Golden Eagle declined to defend and filed a declaratory relief action, seeking a ruling that it had no duty to defend or indemnify Lemoore by virtue of the professional services exclusion. The court agreed, concluding that the exclusion unambiguously applied to the property management services rendered by Lemoore that gave rise to the liability in the underlying action. The appellate court affirmed.

The professional services exclusion barred coverage for injury or damage caused by the "rendering or failure to render any professional service." The court addressed whether the exclusion was limited to acts that require specialized skill, training and knowledge, or whether it extended to include unskilled or even mundane tasks, so long as those acts were an integral part of the operations of the policyholder's profession. Endorsing the latter view, the court held that an act falls within the professional services exclusion if it arises out of the policyholder's occupation or employment, regardless of whether the act requires specialized knowledge or training. Therefore, even though Lemoore's liability in the underlying action was based, in part, on a failure to perform mundane tasks such as replacing batteries in smoke detectors, those acts were within the professional services exclusion because they were "part and parcel of [Lemoore's] professional services as a property management company." In so ruling, the court rejected the policyholder's argument that the exclusion was ambiguous because it provided a list of activities that constituted professional services which did not include property management services. The court explained that the list, which was preceded by the words "includes but is not limited to" "was not intended to limit the scope of the exclusion, but to provide illustrative examples of the services to which the exclusion applied."

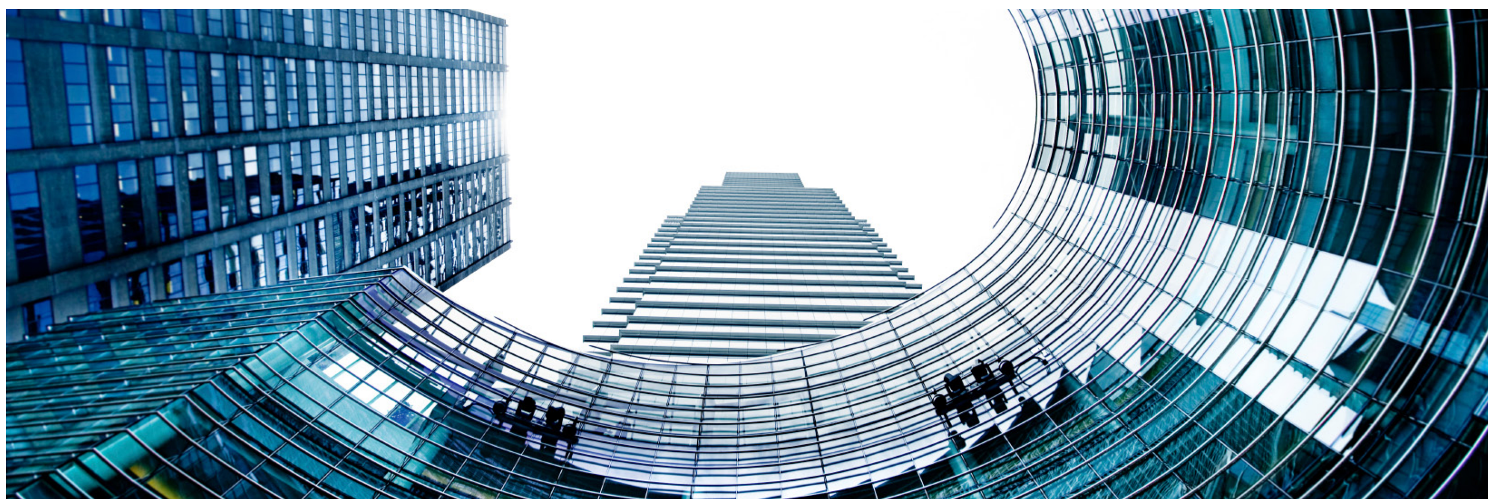
## Discovery Alert:
### *Kentucky Court Rejects Selective Disclosure Argument and Holds That Insurer Waives Privilege by Asserting Advice of Counsel Defense to Bad Faith Claim*

Reversing a discovery order issued by a magistrate judge, a federal court in Kentucky ruled that when an insurer asserts an advice of counsel defense to a bad faith claim, it waives attorney-client privilege as to all documents concerning the bad faith issue. *Lee v. Med. Protective Co.*, 2012 WL 1533388 (E.D. Ky. Apr. 30, 2012). In so ruling, the court rejected the notion that a party may selectively waive privilege as to documents prepared by one set of counsel (here, appellate counsel), but retain privilege with respect to documents prepared by another counsel (here, trial counsel). The court relied on Federal Rule of Evidence 502, which states that waiver extends to undisclosed communication if "the disclosed and undisclosed communications or information concern the same subject matter … and ought in fairness to be considered together." The court reasoned that these criteria applied squarely to the present case, in which the disclosed and undisclosed material both concerned the issue of the insurer's good faith. *Lee* stands for the proposition that party may not use privilege as "both a sword and a shield" by selectively waiving privilege as to some documents, while retaining privilege as to others, where all such documents are part of the same "seamless web."

## STB News Alerts

Partner Mary Kay Vyskocil was named the "Best in Insurance & Reinsurance" at the inaugural Americas Women in Business Law Awards presented by Euromoney Legal Media Group. She is recognized for her representation of major domestic and foreign insurers in complex coverage litigation. The Americas Women in Business Law Awards were developed to celebrate the achievements of women leading the field in the legal sector across the Americas.

Partner Chet Kronenberg authored an article entitled "Duty to Defend: Johnson Controls' Attempt to Turn Excess Insurance into Primary Insurance," featured in the June 2012 *Insurance Coverage Law Bulletin*. The article discusses the Wisconsin Supreme Court's controversial decision in *Johnson Controls, Inc. v. London Market*, 784 N.W.2d 579 (2010), which held that an indemnity only umbrella excess policy contained a duty to defend by virtue of "follow form" policy language.



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"[Simpson Thacher's insurance litigation group] stands out for [its] 'fantastic business acumen and industry knowledge, street smart and winning litigation advice.'"

*—The Legal 500 United States 2012 quoting a client*

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