

This Alert discusses two recent rulings relating to the allocation of defense and indemnity costs among multiple insurers in the context of continuous injury or property damage spanning numerous policy periods. We also address decisions relating to late notice under a reinsurance policy, the scope of coverage under an advertising injury provision and application of a pollution exclusion to carbon monoxide claims. In addition, we summarize decisions relating to an insurer's duty to notify its policyholder of the right to an explanation of damages in arbitration, and a fidelity insurer's duty to indemnify the insured for the theft of funds from clients' accounts. Finally, we discuss a Third Circuit ruling relating to bad faith claims against an insurer and an insurer's duty to defend a sanctions proceeding and claims initiated by the policyholder. Please "click through" to view articles of interest.

- ***New York Endorses Pro Rata Allocation***

A New York court endorsed pro rata time-on-the-risk allocation under multiple insurers' policies for defense and indemnity costs arising from asbestos bodily injury claims against a Corning subsidiary. *Mt. McKinley Ins. Co. v. Corning Inc.*, No. 602454/02 (N.Y. Sup. Ct. Sept. 7, 2012). [Click here for full article](#)

- ***California Endorses "All Sums" Allocation With Stacking***

The California Supreme Court endorsed "all-sums-with-stacking" allocation in an environmental coverage litigation, holding that each insurer whose policy was triggered by ongoing injury was liable up to its policy limits and that the insured was permitted to stack consecutive policies. *State v. Continental Ins. Co.*, 281 P.3d 1000 (Cal. 2012).

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- ***Third Circuit Says Reinsured's Failure to Satisfy "Condition Precedent" Notice Provision Bars Reinsurance Recovery, Regardless of Whether Reinsurer Was Prejudiced***

The Third Circuit, applying New York law, held that a "condition precedent" notice provision in a reinsurance certificate requires notice to the reinsurer promptly after a claim or occurrence is reported to the reinsured, and that a failure to comply with this provision results in the forfeiture of coverage, regardless of prejudice to the reinsurer. *Pacific Employers Ins. Co. v. Global Reinsurance Corp. of Am.*, Nos. 11-3234, 11-3262 (3d Cir. Sept. 7, 2012).

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- ***Minnesota Supreme Court Holds That Insurer Must Notify Policyholder of Right to Receive Explanation of Damages Award from Arbitrator***

The Minnesota Supreme Court held that when an insurer agrees to defend an arbitration under a reservation of rights, the insurer has a duty to disclose to the policyholder its right to obtain an explanation of damages from the arbitrator. *Remodeling Dimensions, Inc. v. Integrity Mutual Ins. Co.*, No. 2012 WL 3587825 (Minn. Aug. 22, 2012).

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- ***Insurers Have No Duty to Defend Antitrust Claims, Says New York Court***

A New York federal court held that commercial general liability insurers have no duty under the advertising injury provision of their policies to defend a lawsuit alleging that the insured company publicly misstated that it had not engaged in certain anticompetitive conduct. *Suwannee Am. Cement LLC v. Zurich Ins. Co.*, 2012 WL 3155879 (S.D.N.Y. Aug. 3, 2012).

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- ***Sixth Circuit Finds That Bank's Fidelity Policy Provides Coverage for Theft of Funds from Clients' Accounts***

The Sixth Circuit held that fidelity policies issued to three financial institutions provided coverage for the theft of funds from clients' brokerage accounts by an employee of a bank-holding company. *First Defiance Financial Corp. v. Progressive Cas. Ins. Co.*, 688 F.3d 265 (6th Cir. 2012).

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- ***California Law Prohibits the Assignment of Insurance Coverage to a Successor Company in Violation of a Consent-to-Assignment Clause, Says California Appellate Court***

Reaffirming state precedent, a California appellate court held that anti-assignment clauses are valid and enforceable, even with respect to pre-acquisition losses, unless and until a claim is reduced to a sum of money due under the policy. *Fluor Corp. v. Superior Court*, 2012 WL 3741979 (Cal. Ct. App. Aug. 30, 2012).

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- ***Third Circuit Dismisses Bad Faith Claim and Limits Scope of Insurer's Defense Obligations***

The Third Circuit affirmed the dismissal of a bad faith claim against a professional liability insurer, finding that the insurer had a reasonable basis for denying coverage. The court also held that the insurer's duty to defend encompassed part of a sanctions proceeding but did not extend to a lawsuit initiated by the policyholder. *Post v. St. Paul Travelers Ins. Co.*, 2012 WL 3095352 (3d Cir. July 31, 2012).

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- ***Eleventh Circuit Rules That Pollution Exclusion Bars Coverage for Carbon Monoxide Poisoning***

The Eleventh Circuit held that a general liability insurer had no duty to defend carbon monoxide bodily injury claims by virtue of the policy's pollution exclusion. *Scottsdale Ins. Co. v. Pursley*, 2012 WL 3553405 (11th Cir. Aug. 20, 2012) (unpublished opinion).

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PRO RATA VS. ALL SUMS ALLOCATION ALERT:

New York Endorses Pro Rata Allocation

In a decision issued this week, a New York court endorsed pro rata time-on-the-risk allocation under multiple insurers' policies for defense and indemnity costs arising from asbestos bodily injury claims against a Corning subsidiary. *Mt. McKinley Ins. Co. v. Corning Inc.*, No. 602454/02 (N.Y. Sup. Ct. Sept. 7, 2012). With respect to indemnity costs, the court held that language in the relevant primary, umbrella and excess general liability policies, which limits each insurer's indemnity obligations to injury that occurs "during the policy period," comported with pro rata allocation. In so ruling, the court rejected Corning's contention that "all sums" or joint and several allocation was appropriate in light of the policies' non-cumulation or non-stacking clauses. Additionally, the court expressly disapproved of *Viking Pump v. Century Indem. Co.*, 2 A.3d 76 (Del. Ch. 2009), in which a Delaware Chancery court, applying New York law, applied joint and several allocation. (See [December 2009 Alert](#)). The *McKinley* court found that "*Viking Pump* ignores established New York precedent, is not controlling on this court and is limited to the facts and policy language of that case itself."



The *McKinley* court also adopted pro rata allocation with respect to defense costs. The court based its decision on principles of equity, finding that "joint and several allocation does not comport with fairness to be found in the benefit of the bargain to which Corning agreed with its respective primary insurers." The court held that pro rata allocation is the proper method of apportioning defense costs among primary insurers that issued successive policies covering the same risk, together with an insolvent insurer and periods of self-insurance.

California Endorses "All Sums" Allocation With Stacking

In contrast to New York's pro rata approach endorsed in *McKinley*, the California Supreme Court endorsed an "all-sums-with-stacking" allocation rule in *State v. Continental Ins. Co.*, 281 P.3d 1000 (Cal. 2012), an environmental coverage litigation involving continuous damage spanning multiple policy periods. Relying on California precedent, the court affirmed an appellate court ruling holding that each insurer whose policy was triggered by the ongoing injury was liable up to its policy limits. In so ruling, the court rejected a pro rata allocation scheme, reasoning that the phrase "during the policy period" did not operate to limit each insurer's indemnity obligation to the insured. However, the court noted that if the entire loss was within the limits of one insurer's policy, that insurer could subsequently "seek contribution from other insurers on the risk during the same loss."

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The court also held that the insured was permitted to stack the consecutive policies and recover up to the policy limits of those policies. The court noted that the policies did not contain anti-stacking clauses and that stacking comported with the “immeasurable aspects of a long-tail injury.” Prior to *Continental*, courts in California had issued mixed decisions on stacking, but the *Continental* court specifically disapproved of anti-stacking rulings in the absence of clear policy language precluding stacking. In this respect, *Continental* highlights the importance of policy language in allocation and stacking rulings. As the court observed, “contracting parties can write into their policies whatever language they agree upon, including limitations on indemnity, equitable pro rata coverage allocation rules, and prohibitions on stacking.”

Importantly, *Continental*'s endorsement of “all sums” allocation does not alter two fundamental tenets of insurance coverage: (1) before any allocation considerations come into play, a policy must be triggered in the first place by injury “during the policy period”; and (2) regardless of “all sums” language, once policy limits have been exhausted, an insurer has no further indemnity obligation.

REINSURANCE/LATE NOTICE ALERT:

Third Circuit Says Reinsured's Failure to Satisfy “Condition Precedent” Notice Provision Bars Reinsurance Recovery, Regardless of Whether Reinsurer Was Prejudiced

Applying New York law, the Third Circuit held that a notice provision in a reinsurance certificate expressly containing “condition precedent” language requires notice to the reinsurer promptly after a claim

or occurrence is reported to the reinsured company, and that a failure to comply with this provision results in the forfeiture of coverage, regardless of whether the reinsurer was prejudiced by the late notice. *Pacific Employers Ins. Co. v. Global Reinsurance Corp. of Am.*, Nos. 11-3234, 11-3262 (3d Cir. Sept. 7, 2012).

A predecessor of Global Reinsurance Corp. issued a reinsurance certificate to Pacific Employers Insurance Company. The operative notice provision in the certificate stated: “As a condition precedent, the Company shall promptly provide the Reinsurer with a definitive statement of loss on any claim or occurrence reported to the Company and brought under this Certificate which involves a death, serious injury or lawsuit.” The Third Circuit held that this provision required Pacific Employers to provide Global with a definitive statement of loss promptly after claims were reported to Pacific Employers, *not* promptly after Pacific Employers first demanded payment from Global. In reaching this conclusion, the court noted that prompt notice allows the reinsurer to “assess for itself whether the matter might develop into something so significant that it could activate its reinsured layer” and permits the reinsurer to establish adequate loss reserves and/or elect to associate in the defense of the claims. The Third Circuit further held that because the notice provision, unlike other provisions in the certificate, explicitly makes prompt notice a condition precedent to Global's indemnity obligation, a failure to comply with its terms results in the forfeiture of coverage altogether—not merely a forfeiture of the right to prompt payment as argued by Pacific Employers.

The Third Circuit applied New York rather than Pennsylvania law (which was applied by the district court) to determine whether the reinsurer must show prejudice as a result of the late notice in order to deny coverage. Although the Pennsylvania Supreme Court has not specifically ruled on the issue of prejudice, the Third Circuit “assumed without deciding, solely for the sake of [the] choice-of-law analysis, that Pennsylvania would apply a must-show-prejudice rule to reinsurance contracts, even when the contract makes the notice

provision an express condition precedent to coverage,” as the district court had ruled. In contrast, the Third Circuit determined that under New York law, “when a reinsurance contract expressly requires a reinsured to provide its reinsurer with prompt notice of a claim or occurrence as a condition precedent to coverage and the reinsured fails to do so, that failure excuses the reinsurer from its duty to perform, regardless whether the reinsurer suffered prejudice as a result of the late notice.” Here, Pacific Employers first received notice of certain asbestos-related bodily injury claims in April 2001, yet did not notify Global of those claims until April 2008. Although Pacific Employers claimed that in October 2005, it directed its broker to keep all reinsurers informed about the relevant claims, Global was not so informed until 2008. Finding both the four and seven year delay untimely as a matter of law, the Third Circuit remanded the matter to the district court with instructions to enter a judgment of non-liability in favor of Global.

DAMAGES ALLOCATION ALERT: *Minnesota Supreme Court Holds That Insurer Must Notify Policyholder of Right to Receive Explanation of Damages Award from Arbitrator*

The Minnesota Supreme Court held that when an insurer agrees to defend an arbitration under a reservation of rights, the insurer has a duty to disclose to the policyholder its right to obtain an explanation of damages from the arbitration panel, if available. If an insurer fails to provide such notice, and the policyholder suffers prejudice because of its failure to obtain an explanation of damages, the burden of proving allocation of the damages award as to covered versus non-covered claims shifts from the policyholder to the insurer. *Remodeling Dimensions, Inc. v. Integrity*



Mutual Ins. Co., No. 2012 WL 3587825 (Minn. Aug. 22, 2012).

Integrity Mutual Insurance Company agreed to defend its policyholder, a contractor, under a reservation of rights in a construction defect arbitration. After the arbitrator entered an award against the insured contractor, the contractor’s attorney requested but was denied an explanation of the award. This lack of an explanation of damages was critical because only some of the claims against the contractor were covered by Integrity’s policy. In evaluating coverage, the Minnesota Supreme Court relied on general principles relating to an insurer’s reservation of rights and the doctrine of estoppel to find that an insurer that fails to inform a policyholder of its right to an explanation of damages bears the burden of establishing the portion of the award that is not covered and is estopped from claiming that the insured has that burden.

Importantly, the court limited the scope of the insurer’s duty of disclosure in several respects. First, the duty applies only where a written explanation of an award is available and where the insurer had the opportunity to provide notice of the availability of such an explanation. Second, untimely notice in this context must result in prejudice to the policyholder in order for the burden of allocation to shift to the insurer. Because the case presented factual uncertainty as to

these issues, the court remanded the case to the district court.

Integrity Mutual serves as a caution to insurers to include in a reservation of rights the availability of an explanation of damages (where applicable). Although *Integrity Mutual* was decided in the context of arbitration, policyholders may argue for its application to court cases where special jury verdict forms, jury interrogatories, findings of fact and conclusions of law, or any other procedural device through which the fact finder may apportion a damage award among multiple claims would be available to the insured.

ADVERTISING INJURY ALERT: *Insurers Have No Duty to Defend Antitrust Claims, Says New York Court*

A New York federal court held that commercial general liability insurers have no duty under the advertising injury provision of their policies to defend a lawsuit alleging that the insured company publicly misstated that it had not engaged in certain anticompetitive conduct. *Suwannee Am. Cement LLC v. Zurich Ins. Co.*, 2012 WL 3155879 (S.D.N.Y. Aug. 3, 2012).



In seeking coverage under CGL policies, the insured company argued that alleged misstatements about the company's illegal conduct could be viewed as "advertisements" made in order to promote sales. The court rejected this notion, explaining that even if such statements could be construed as advertising, coverage under the advertising injury provision required the misappropriation of an advertising idea, not merely the act of advertising. The court further held that even if the idea of a false statement originated with a co-conspirator of the policyholder and not the policyholder itself, it was not "misappropriated" within the meaning of the policy. The court also found that the insurers' duty to defend was negated by a criminal acts exclusion.

The decision comports with numerous other rulings holding that general liability insurers have no duty to defend antitrust claims under advertising injury coverage. Consistent with *Suwannee American*, courts have reasoned that construing advertising injury coverage to indirectly cover the risk of antitrust violations is unreasonable.

FIDELITY INSURANCE ALERT: *Sixth Circuit Finds That Bank's Fidelity Policy Provides Coverage for Theft of Funds from Clients' Accounts*

Affirming an Ohio district court ruling, the Sixth Circuit held that fidelity policies issued to three financial institutions provided coverage for the theft of funds from clients' brokerage accounts by an employee of a bank-holding company. *First Defiance Financial Corp. v. Progressive Cas. Ins. Co.*, 688 F.3d 265 (6th Cir. 2012).

The insurance coverage dispute arose after an employee of First Defiance Financial Corp., a bank-holding company, stole nearly \$1 million from various

client brokerage accounts. After First Defiance learned of the theft, it reimbursed the stolen money, plus funds to cover lost interest and unrealized client income. First Defiance then filed a proof of loss with Progressive, its fidelity insurer, which Progressive denied on the ground that the loss did not arise from theft of the insured's own funds but rather from theft of the insured's clients' accounts. In the ensuing coverage litigation, an Ohio federal court held that First Defiance's losses were covered under the policy as a matter of law. The Sixth Circuit affirmed.



Although fidelity policies are typically called upon to cover an insured's own direct losses arising from employee dishonesty, the Sixth Circuit held that the policy language at issue provided coverage for losses stemming from the theft of money from third-parties (here, the clients). The Sixth Circuit reasoned that coverage was implicated because the following three policy requirements were met: (1) the stolen money was "covered property"; (2) the theft caused a "direct loss" to the insured entity; and (3) the dishonest act was committed "with the manifest intent" to cause the loss. Under the policy, "covered property" included property "owned and held by someone else under circumstances which make the [i]nsured responsible for the [p]roperty prior to the occurrence of the loss." The court explained that because First Defiance had authority over the

clients' discretionary accounts, and owed the clients a fiduciary duty in that respect, the funds fell within the definition of "covered property." Employing the same reasoning, the court also concluded that the insured banks suffered a "direct loss" even though the funds were stolen from customer accounts, rather than from the institutions themselves.

SUCCESSOR LIABILITY ALERT: *California Law Prohibits the Assignment of Insurance Coverage to a Successor Company in Violation of a Consent-to- Assignment Clause, Says California Appellate Court*

Previous Alerts have discussed decisions relating to whether coverage for pre-acquisition losses may be transferred to a successor company without the insurer's consent, notwithstanding an anti-assignment clause in the insurance policy. *See* (citing cases and corresponding Alerts). Case law across jurisdictions is mixed and courts have focused on various issues in this context, including whether the losses have been reduced to a "chose in action," whether a transfer of insurance rights can occur "by operation of law," and whether the policy language provides an unambiguous prohibition on transfers. Under California law, as set forth in *Henkel Corp. v. Hartford Accident & Indem. Co.*, 129 Cal. Rptr. 2d 828 (Cal. 2003), anti-assignment or consent-to-assignment clauses are valid and enforceable, even with respect to pre-acquisition losses, unless and until a claim is reduced to a sum of money due under the policy (a "chose in action"). In a recent decision, a California appellate court reinforced the precedential authority of *Henkel* and rejected a policyholder's argument that coverage could be transferred pursuant to a century-old state statute. *Fluor Corp. v. Superior Court*, 2012 WL



3741979 (Cal. Ct. App. Aug. 30, 2012).

In *Fluor*, the central issue was whether one Fluor entity could assign its rights under several liability policies to another Fluor entity through corporate restructuring, despite a failure to obtain the insurers' consent in accordance with consent-to-assignment clauses in the policies. The court held that this issue was addressed squarely by *Henkel*, which remains binding precedent in California. In so ruling, the court rejected the policyholder's contention that an 1872 state statute controlled the assignability of third-party insurance rights. The court explained that because liability insurance did not exist in 1872, the statute could not provide "controlling power over a medium that had yet to come into being." Instead, the court reiterated the precedential authority of *Henkel* in this context, noting that "the mere fact that the events giving rise to liability—exposure to asbestos—took place before the reverse spinoff does not automatically expand the universe of insureds with whom Hartford [the insurer] owes a relationship."

Henkel was followed by the Indiana Supreme Court in *Travelers Cas. & Sur. Co. v. Unites States Filter Corp.*, 895 N.E.2d 1172 (Ind. 2008), but rejected by the Ohio Supreme Court in *Pilkington North America, Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121 (Ohio 2006).

BAD FAITH ALERT:

Third Circuit Dismisses Bad Faith Claim and Limits Scope of Insurer's Defense Obligations

The Third Circuit affirmed the dismissal of a bad faith claim against a professional liability insurer, finding that because the insurer had a reasonable basis for denying coverage, the claim failed as a matter of law. In addition, the court held that the insurer's duty to defend did not encompass the obligation to fund a lawsuit initiated by the policyholder, regardless of whether that lawsuit was related to the original underlying action against the policyholder. *Post v. St. Paul Travelers Ins. Co.*, 2012 WL 3095352 (3d Cir. July 31, 2012).

An attorney brought suit against his legal malpractice insurer, Travelers, alleging breach of contract and bad faith. The insured attorney had been named as a defendant in a malpractice action and was also the subject of a sanctions petition in connection with alleged discovery misconduct. In turn, the attorney filed a defamation and tortious interference suit against the petitioners in the sanctions proceeding. In the ensuing coverage litigation, the district court ruled that Travelers' policy covered both the legal malpractice claim and the sanctions petition. The court also held that because the attorney's counter-suit against the sanctions petitioners was inextricably intertwined with the covered claims, Travelers was required to cover the prosecution of that lawsuit. However, the court found in favor of Travelers on the bad faith claim, finding that Travelers had a reasonable basis to deny coverage. The Third Circuit reversed in part and affirmed in part.

First, the Third Circuit held that Travelers had no obligation to cover the costs of the attorney's counter-suit. The court explained that although a policyholder's counterclaims are generally covered defense costs, a separate civil action in a different venue is beyond the scope of coverage, regardless of whether the claims

are related to the original underlying action against the policyholder. In rejecting an analysis based on “relatedness,” the court stated that “[s]uch a holding would place insurers in the difficult and unenviable situation of having to determine whether related cases are related enough—*i.e.*, ‘inextricably intertwined’—to trigger coverage for the insured’s counterclaims.” Instead, the court adopted the following bright line rule: “[A]n insurer has a duty to cover an insured’s expenses for prosecuting counterclaims in the initial proceeding, but that the insurer has no duty to cover the expenses incurred by an insured in prosecuting an entirely new and separate action (even if that action is related to the underlying case).”



Second, the Third Circuit held that the bad faith claim against Travelers was properly dismissed on summary judgment. Under Pennsylvania law, bad faith must be proven by clear and convincing evidence and may be defeated where an insurer establishes that it had a reasonable basis for denying coverage.

Finally, the Third Circuit affirmed Travelers’ duty to defend the malpractice and sanctions actions, but limited the scope of that duty, finding that Travelers’ defense obligation in the sanctions proceeding did not begin until a formal demand for damages was made against the attorney—an event that did not occur until several months after the sanctions proceeding began.

POLLUTION EXCLUSION ALERT: *Eleventh Circuit Rules That Pollution Exclusion Bars Coverage for Carbon Monoxide Poisoning*

Applying Georgia law, the Eleventh Circuit held that a general liability insurer had no duty to defend carbon monoxide bodily injury claims by virtue of the policy’s pollution exclusion. *Scottsdale Ins. Co. v. Pursley*, 2012 WL 3553405 (11th Cir. Aug. 20, 2012) (unpublished opinion). The court rejected the policyholder’s argument that pollution exclusions apply only to conventional environmental pollution, reasoning that “no language in the policy supported restricting application of the exclusion to traditional environmental pollution.”

Whether a standard absolute pollution exclusion bars coverage for carbon monoxide-related claims has become a frequent source of litigation, with mixed results. While numerous jurisdictions have found the exclusion applicable to such claims (including courts in Georgia, Iowa, Minnesota and Pennsylvania), other courts have concluded that the exclusion is not intended to apply to small scale injury caused by exposure to carbon monoxide (including courts in Connecticut, Wisconsin, Tennessee and Ohio).

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