SIMPSON THACHER

INSURANCE LAW ALERT

NOVEMBER 2012

This Alert reports on recent decisions relating to late notice, the availability of a rescission remedy to an insurer who continues to accept premiums, the application of the pollution exclusion to lead-related claims, the viability of claims against excess carriers following a policyholder's settlement with underlying insurers, and enforcement of a follow the settlements clause in a reinsurance contract, among others. Please "click through" to view articles of interest.

- ***Ninth Circuit Retreats From Previous Ruling Imposing Duty to Seek Settlement Proactively***

  Retreating from a prior decision, the Ninth Circuit declined to impose a heightened duty upon insurers to seek settlement proactively when liability is clear, absent a settlement demand from underlying claimants. *Yan Fang Du v. Allstate Ins. Co.*, 2012 WL 4748679 (9th Cir. Oct. 5, 2012). *Click here for full article*

- ***New York Court Rejects Insurer's Rescissionary Damages Claim for Mortgage-Backed Securities Policy***

  A New York state court dismissed a rescissionary damages claim brought by an insurer, finding that the insurer's continued acceptance of premiums foreclosed its rescission-based claim. *Assured Guar. Municipal Corp. v. DLJ Mortg. Capital, Inc.*, 2012 WL 5192752 (N.Y. Sup. Ct. Oct. 11, 2012). *Click here for full article*

- ***Pollution Exclusion Relieves Insurer of Duty to Defend Bodily Injury Lead Claims, Says Missouri Court***

  A Missouri district court ruled that a pollution exclusion excused an insurer from any duty to defend claims arising out of exposure to harmful lead products. *Doe Run Resources Corp. v. Lexington Ins. Co.*, 2012 WL 4480732 (E.D. Mo. Sept. 28, 2012). *Click here for full article*

- ***Ohio Court Dismisses Claims Against Excess Insurers on Justiciability Grounds***

  Citing to the policyholder's decision to settle with underlying insurers on a "horizontal" basis, an Ohio court dismissed claims against several excess insurers on justiciability grounds. *MW Custom Papers LLC v. Allstate Ins. Co.*, No. 2012 CV 03228 (Ohio Ct. Com. Pl., Montgomery Cnty. Sept. 21, 2012). *Click here for full article*

- ***Late Notice Ruling as to Initial Complaint Does Not Automatically Apply to Amended Complaint, Says Eleventh Circuit***

  The Eleventh Circuit held that a finding of late notice as to claims in an original underlying complaint does not necessarily void an insurer's defense or indemnity obligations as to an amended complaint in the same underlying action. *State Farm Fire & Cas. Co. v. LeBlanc*, 2012 WL 5199253 (11th Cir. Oct. 22, 2012) (unpublished opinion). *Click here for full article*

- ***Illinois Court Enforces Follow the Settlements Clause and Rejects Reinsurer's Late Notice Defense***

  An Illinois district court held that a reinsurer was obligated to fund settlement amounts pursuant to a follow the settlements clause and that the reinsurer's late notice defense had no merit. *Arrowood Indem. Co. v. Assurecare Corp.*, 2012 WL 4340699 (N.D. Ill. Sept. 19, 2012). *Click here for full article*

- ***New Jersey Court Addresses Late Notice Under Retrocessional Contracts***

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- ***New York's Highest Court Rules That Earth Movement Exclusion Applies to "Man Made" Causes***

  The New York Court of Appeals held that an earth movement exclusion in a property policy applied to damage arising from "man made" activity. *Bentoria Holdings, Inc. v. Travelers Indem. Co.*, 2012 WL 5256119 (N.Y. Oct. 25, 2012). *Click here for full article*

- ***Ninth Circuit Affirms Dismissal of Global Warming Nuisance Suit***

  The Ninth Circuit affirmed the dismissal of a global warming-based public nuisance suit on the grounds that federal statutory law displaced plaintiffs' common law claims. *Kivalina v. ExxonMobil Corp.*, 2012 WL 4215921 (9th Cir. Sept. 21, 2012). *Click here for full article*

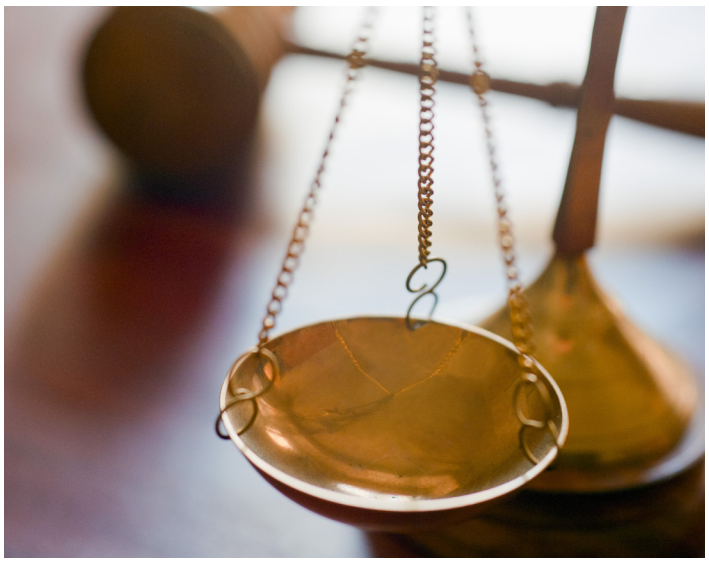
- ***Fifth Circuit Affirms That Reservation of Rights Does Not Create Conflict of Interest for Purposes of Selecting Defense Counsel***

  The Fifth Circuit held that a reservation of rights did not create an actual conflict of interest between the insurer and the policyholder sufficient to divest the insurer of its contractual right to select counsel. *Coats, Rose, Yale, Ryman & Lee, P.C. v. Navigators Specialty Ins. Co.*, 2012 WL 4858194 (5th Cir. Oct. 15, 2012). *Click here for full article*

Bad Faith Alert:

Ninth Circuit Retreats From Previous Ruling Imposing Duty to Seek Settlement Proactively

Our July/August Alert discussed a Ninth Circuit decision requiring insurance companies to work proactively toward a settlement when liability is clear, even absent a settlement demand from underlying claimants. *Yan Fang Du v. Allstate Ins. Co.*, 681 F.3d 1118 (9th Cir. 2012). Although the court ultimately determined that the factual record did not support a finding of bad faith, the court's pronouncement of law was significant and arguably imposed a heightened duty on insurers to effectuate settlements in certain circumstances. Last month, however, the Ninth Circuit reversed course, issuing an amended ruling which upheld the insurer's victory on the bad faith claim without imposing an affirmative duty to settle. *Yan Fang Du v. Allstate Ins. Co.*, 2012 WL 4748679 (9th Cir. Oct. 5, 2012). In the amended opinion, the court sidestepped the legal question of whether a duty to settle can be breached absent a settlement demand from a third-party claimant, and instead resolved the dispute on the basis that the facts presented did not support a bad faith jury instruction in the first place. The Ninth Circuit also backtracked on another important bad faith issue. In the prior holding, the court held that the "genuine dispute" doctrine, which shields insurance companies from bad faith claims for unsettled legal issues, did not apply to bad faith claims based on an insurer's duty to settle third-party claims. The amended ruling, by resolving the dispute solely on factual issues, avoided deciding this issue altogether.



While the amended ruling in *Yan Fang Du* represents a clear victory for insurers, questions relating to an insurer's duty to proactively seek settlement in the absence of a demand are unlikely to disappear. As the Ninth Circuit noted, California case law in this context is inconsistent, and policyholders are likely to continue asserting bad faith claims for failure to proactively seek settlements.

Rescission Alert:

New York Court Rejects Insurer's Rescissionary Damages Claim for Mortgage-Backed Securities Policy

A New York state court dismissed an insurer's rescissionary damages claim against DLJ Mortgage Capital and Credit Suisse Securities, finding that the insurer's continued acceptance of premiums foreclosed all rescission-related claims. *Assured Guar. Municipal Corp. v. DLJ Mortg. Capital, Inc.*, 2012 WL 5192752 (N.Y. Sup. Ct. Oct. 11, 2012).

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Assured issued financial guaranty policies in connection with several transactions involving the sale of residential mortgage-backed securities. In each transaction, DLJ transferred a pool of mortgage loans to Credit Suisse, which then assigned them to trusts. The trusts issued securities collateralized by the loans, which were marketed to investors. Assured's policies guaranteed that Assured would pay any shortfall if cash flow from the loans was insufficient to make payments due to the securities-holders. Ultimately, a substantial number of the loans became delinquent. During re-underwriting of the defaulted loans, Assured discovered purportedly "severe and pervasive breaches of the representations" in various documents "that materially affected the Insurers." Assured filed suit alleging breach of contract claims and seeking rescissionary and consequential damages. Defendants moved to dismiss several causes of action, including Assured's demand for rescissionary damages. The court granted the motion in part.

The court dismissed Assured's rescissionary damages claims, reasoning that Assured was estopped as a matter of law from "avoiding the Policies" because it accepted premiums after discovering the alleged misrepresentations. Rejecting the notion that an insurer can accept premiums in order to "protect" a policyholder during the pendency of a rescission action, the court held that New York law prohibits an insurer from rescinding a policy if it continues to accept premiums after learning of misrepresentations. *See Security Mut. Life Ins. Co. of N.Y. v. Rodriguez*, 880 N.Y.S.2d 619 (1st Dep't 2009).

The court also dismissed Assured's breach of contract claims based on statements in the commitment and engagement letters issued in connection with the transactions. The court noted that the defendants had not made any promises of credit quality in the commitment letters and that the engagement letters were "unenforceable agreements to agree." Finally, the court rejected Assured's claims for consequential damages and fees, explaining that certain transactional documents, to which Assured was a third-party beneficiary, set forth the exclusive forms of available damages and that common law did not permit the recovery of extra-contractual damages where such damages were not contemplated by the parties.

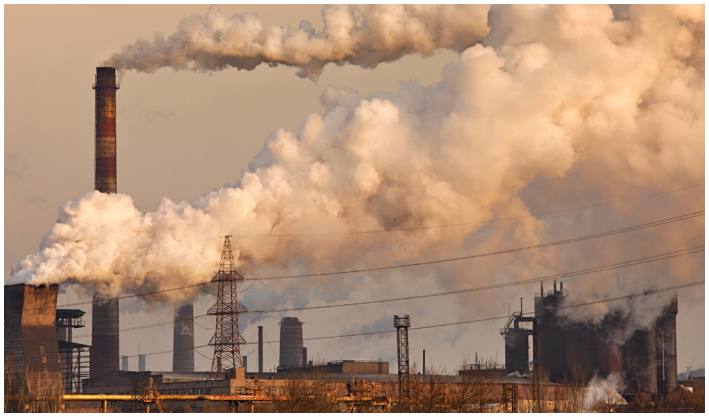
Pollution Exclusion Alert:

Pollution Exclusion Relieves Insurer of Duty to Defend Bodily Injury Lead Claims, Says Missouri Court

A Missouri district court ruled that a pollution exclusion excused an insurer from any duty to defend claims arising out of exposure to harmful lead products. *Doe Run Resources Corp. v. Lexington Ins. Co.*, 2012 WL 4480732 (E.D. Mo. Sept. 28, 2012). The court reasoned that the exclusion unambiguously applied to claims alleging the continuous release of lead-based pollutants into the environment during the course of business operations. Although straightforward, the decision is noteworthy for several reasons:

First, the court rejected the notion that the exclusion was ambiguous and/or did not encompass lead-based claims because lead was not specifically listed in the provision. Even construing the exclusion narrowly, the court concluded that the term "pollutants" plainly encompassed lead and other toxic chemicals released from the plant.

Second, the ruling reinforced the principle, endorsed by many jurisdictions, that extrinsic evidence should not be considered when interpreting an unambiguous policy term. Here, having deemed the exclusion unambiguous, the court afforded no significance to two emails discussing the applicability of the exclusion to lead-related claims. The court also declined to consider Doe Run's objection to the inclusion of a lead exclusion during contract negotiations with Lexington.



Third, the decision limits the scope of *Hocker Oil Co. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510 (Mo. Ct. App. 1999), and other decisions that have declined to enforce a pollution exclusion or found the exclusion ambiguous. In *Hocker Oil*, a Missouri appellate court ruled that an absolute pollution exclusion was ambiguous as to whether it encompassed claims arising out of an isolated gasoline leak from an underground tank. The *Hocker Oil* court reasoned that because gasoline was not specifically listed as a pollutant and because the policyholder's business related to the transporting and storing of gasoline, the policyholder would likely not consider gasoline a pollutant.

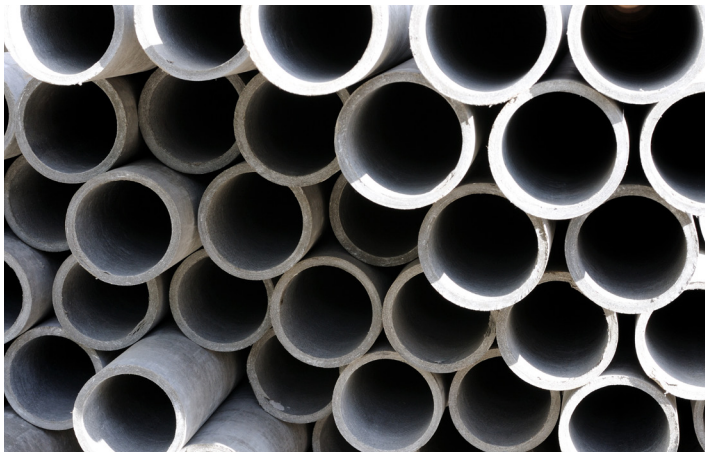
In sum, the decision supports insurers' denial of defense or indemnity for lead-related claims based on the pollution exclusion, consistent with a number of recent decisions. *See Hussey Copper, Ltd. v. Arrowood Indem. Co.*, 391 Fed. Appx. 207 (3d Cir. 2010); *Bituminous Cas. Corp. v. Aaron Ferer & Sons Co.*, 2007 WL 2066452 (D. Neb. July 16, 2007); *Cincinnati Ins. Co. v. Thomas*, 2006 WL 3569195 (Ohio App. Dec. 11, 2006).

Excess Alert:

Ohio Court Dismisses Claims Against Excess Insurers on Justiciability Grounds

Previous Alerts have discussed decisions regarding a policyholder's ability to access excess coverage following settlement with underlying insurers. In a recent ruling, an Ohio court dismissed a policyholder's claims against several excess insurers on justiciability grounds. *MW Custom Papers LLC v. Allstate Ins. Co.*, No. 2012 CV 03228 (Ohio Ct. Com. Pl., Montgomery Cnty. Sept. 21, 2012).

The policyholder, faced with asbestos liability claims, had entered into cost sharing agreements with its underlying carriers. The court held that by electing to allocate its claims "horizontally" in the cost sharing agreements, the policyholder did not have viable claims against its excess carriers at this time. The court cited to *GenCorp., Inc. v. AIU Ins. Co.*, 138 Fed. Appx. 732 (6th Cir. 2005), in which the Sixth Circuit rejected a policyholder's attempt to access excess coverage after settling with its primary carriers for less than full policy limits. The *GenCorp.* court reasoned that because the policyholder "had made the choice to allocate its liability as broadly as possible, ... it had to demonstrate that its liabilities would exceed the cumulative limits of all the primary and umbrella policies before it could trigger the excess policies."



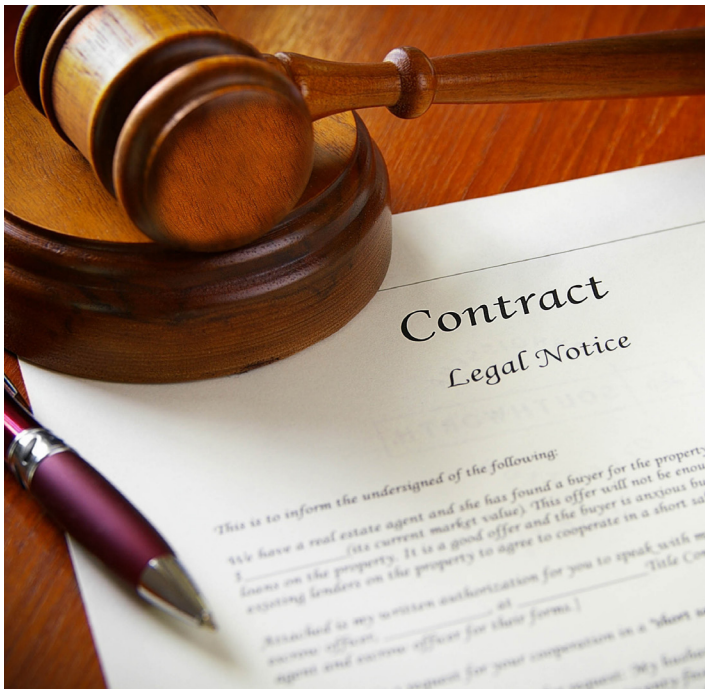
In addition, the court noted that the policyholder here had not presented its asbestos claims to the excess carriers—a prerequisite to a justiciable insurance coverage controversy under Ohio law. *See Kincaid v. Erie Ins. Co.*, 941 N.E.2d 805 (Ohio 2011) (a matter is not justiciable "[u]nless and until the insured has presented a claim to his or her insurer and (where appropriate) proof of how much is owed, and the insurer has either (1) denied the claim or (2) failed to respond to the claim").

Notice Alert:

Late Notice Ruling as to Initial Complaint Does Not Automatically Apply to Amended Complaint, Says Eleventh Circuit

The Eleventh Circuit held that a finding of late notice as to the claims in an original complaint in an underlying action does not necessarily apply to claims asserted in an amended complaint in the same underlying action. *State Farm Fire & Cas. Co. v. LeBlanc*, 2012 WL 5199253 (11th Cir. Oct. 22, 2012) (unpublished opinion).

A trademark infringement lawsuit was filed against the policyholder. The policyholder waited approximately four months before notifying State Farm of the suit. Nonetheless, State Farm agreed to defend under a reservation of rights. Approximately two years later, when the underlying plaintiffs filed an amended complaint adding additional defendants and new causes of action, the policyholder provided immediate notice to State Farm. Following a jury verdict in the underlying suit, State Farm filed a declaratory judgment action seeking a ruling that it had no duty to defend or indemnify the policyholders under three policies. A Georgia district court granted summary judgment in favor of State Farm, finding that the policyholder breached the notice provisions in two of the policies



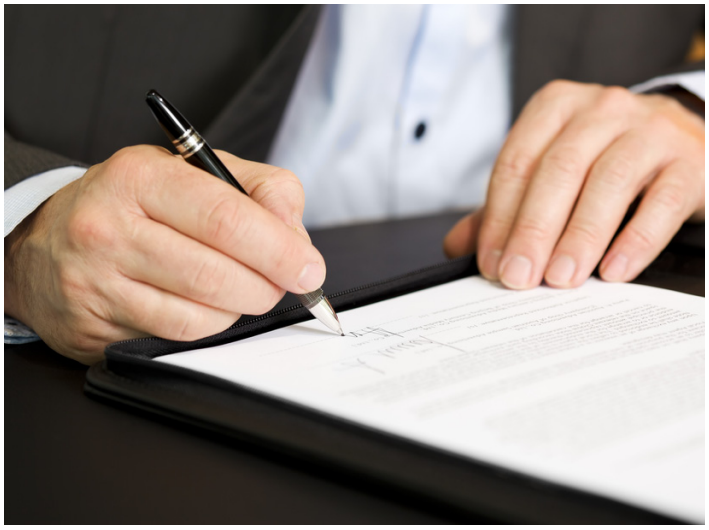
and that the third policy did not cover the underlying occurrences. The Eleventh Circuit affirmed in part and reversed in part.

Applying Georgia law, the Eleventh Circuit ruled that the four-month delay in providing notice of the original complaint was untimely as a matter of law. The court reasoned that there was no legitimate explanation for the delay and that the question of prejudice to State Farm was irrelevant because the notice provision made timely notice a condition precedent to coverage. In particular, the court concluded that language stating that "you must see to it that we receive prompt written notice" and that "[w]e may not provide coverage if you refuse to provide adequate notice" sufficed to make prompt notice a condition precedent to coverage. As to the amended complaint, however, the Eleventh Circuit reversed the lower court's entry of summary judgment as to late notice, explaining that a court must "separately analyze the timeliness of notice for each claim asserted." In so ruling, the court declined to "adopt a blanket rule that if notice on an initial complaint is untimely, then notice on an amended version of that complaint is also untimely, even if the amended version alleges new and unforeseeable claims."

REINSURANCE ALERTS:

Illinois Court Enforces Follow the Settlements Clause and Rejects Reinsurer's Late Notice Defense

An Illinois district court granted summary judgment to a ceding company on a breach of contract suit against its reinsurer, finding that the reinsurer was obligated to fund settlement amounts pursuant to a follow the settlements clause, and that the reinsurer's late notice defense had no merit. *Arrowood Indem. Co. v. Assurecare Corp.*, 2012 WL 4340699 (N.D. Ill. Sept. 19, 2012).



Arrowood sought payment of settlement amounts from Assurecare under a quota share reinsurance treaty. Assurecare contested payment, arguing that because the settlement fell outside the scope of both Arrowood's underlying policy and the reinsurance treaty, it was not subject to the follow the settlements clause. The court disagreed.

Applying Connecticut law, the court held that Assurecare was bound by Arrowood's good faith settlement decisions pursuant to the follow the settlements clause. The court rejected Assurecare's argument that, because the settlement was based on a coverage position (relating to the number of covered occurrences) contrary to the litigation position taken by Arrowood, the clause was inapplicable. The court held that absent a showing of bad faith, collusion or fraud, a reinsurer may not second-guess settlement decisions. The court also rejected Assurecare's contention that the settlement was not covered under the reinsurance treaty because it resolved bad faith claims against Arrowood. The court found the treaty's "Extra Contractual Expenses" provision arguably covered settlements of bad faith claims.

In rejecting Assurecare's late notice defense, the court held that a treaty provision requiring Arrowood to "furnish the Reinsurer with a report summarizing the Net Subject Written Premium ceded and the Net Subject Earned Premium ceded ... and net balance due either party" was a reporting provision rather than a notice provision. Moreover, the court held that a reinsurer's late notice defense requires a showing of prejudice, which was not alleged by Assurecare.

As *Arrowood* demonstrates, a follow the settlements clause can limit a reinsurer's ability to question a ceding company's settlement decisions. *See Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of America*, 419 F.3d 181, 188 (2d Cir. 2005) ("a cedent's post-settlement allocation is subject to follow-the-fortunes, regardless of any pre-settlement position taken by the cedent").

New Jersey Court Addresses Late Notice Under Retrocessional Contracts

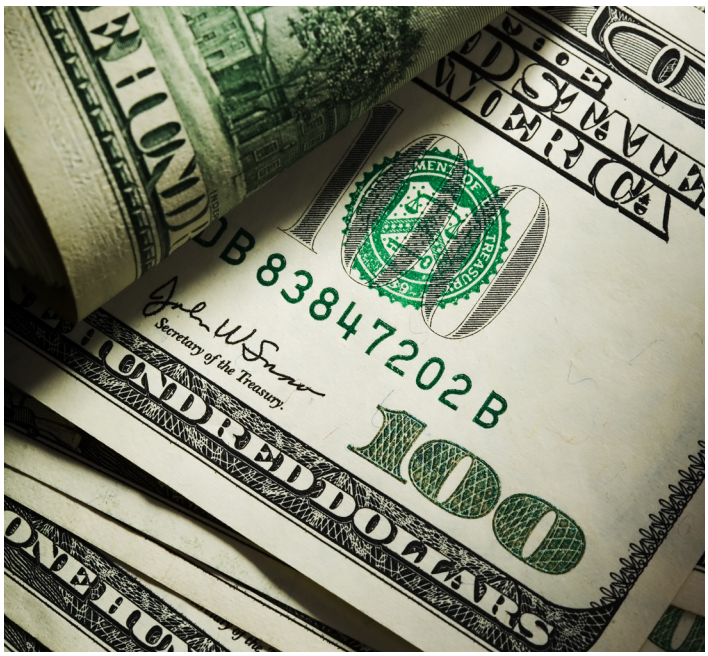
A New Jersey district court rejected a retrocessionaire's late notice defense, finding that the notice provision did not create a condition precedent to coverage. *Munich Reinsurance America, Inc. v. American National Ins. Co.*, 2012 WL 4475589 (D.N.J. Sept. 28, 2012). The court also rejected the retrocessionaire's interpretation of an "ultimate net loss" provision, but reserved judgment as to the retrocessionaire's rescission claim.

The dispute arose out of a retrocessional agreement between Munich and ANICO relating to Munich's reinsurance of a workers' compensation program insured, in turn, by Everest. Under the Munich-Everest agreement, Munich had no liability for any claim less than $250,000 but was responsible for the layer between $250,000 and $750,000. Under the excess-of-loss retrocessional agreement between Munich and ANICO, ANICO's liability attached at the $500,000 level.

ANICO argued that it was entitled to deny payment on certain claims that Munich submitted in an untimely manner. The central question was whether the notice provision made immediate notice a condition precedent to payment, in which case untimely notice would result in the forfeiture of coverage. The court concluded that policy language requiring Munich to report claims "immediately, regardless of any question of liability [ ] or coverage" did not create a condition precedent notice requirement. In so ruling, the court relied, in part, on another clause within the notice provision stating that Munich's failure to timely advise ANICO of loss "shall not be held to prejudice [Munich]'s rights." Although the court declined to adopt a bright-line rule requiring specific "condition precedent" verbiage, it held that absent "condition precedent" wording (or a similarly "clear statement [ ] of intent"), it would interpret the notice provision as "an ordinary contractual covenant" rather than a condition precedent to coverage.

Because the notice provision did not create a condition precedent to coverage, the court held that a denial of coverage on the basis of untimely notice required a showing of prejudice. ANICO argued that Munich's untimely notice "changed the mix of total reserve or loss information" relied upon by ANICO and affected ANICO's commutation decisions. The court found these assertions insufficient to substantiate a finding of prejudice, and granted Munich's summary judgment motion on the late notice defense.

The court also resolved the parties' dispute over the meaning of the term "ultimate net loss." The retrocessional contract provided that "[ANICO] shall not be liable for any loss hereunder until [Munich's] ultimate net loss, each loss occurrence exceeds $500,000. [ANICO] shall then be liable hereunder for the amount of ultimate net loss in excess of $500,000 ..." Munich argued that once Munich and Everest collectively paid $500,000, ANICO was required to pay (the so-called "ground up" basis). In contrast, ANICO argued that Munich alone was required to pay $500,000 before ANICO was obligated on its policy (the so-called "net retained" basis). The court sided with Munich, finding that "ultimate net loss" included payments by both Munich and Everest, and did not require $500,000 in payments by Munich alone.



Finally, the court addressed but did not resolve ANICO's rescission claim based on Munich's failure to disclose internal risk calculations. The court noted that resolution of this claim turned on several issues, including whether Munich's internal analysis would have materially affected ANICO's underwriting process and whether Munich had a common law or contractual obligation to provide the analyses. The court also reserved judgment as to whether ANICO had waived its right to rescission by failing to seek rescission within a reasonable period of time.

PROPERTY INSURANCE ALERT:

New York's Highest Court Rules That Earth Movement Exclusion Applies to "Man Made" Causes

Reversing an appellate court decision, the New York Court of Appeals held that an earth movement exclusion in a property policy applied unambiguously to damage arising from "man made" activity. *Bentoria Holdings, Inc. v. Travelers Indem. Co.*, 2012 WL 5256119 (N.Y. Oct. 25, 2012). The court explained that because the exclusion specifically stated that it applied to earth movement "whether naturally occurring or due to man made or other artificial causes," it barred coverage for damage caused by the excavation of adjacent property. In so ruling, the court distinguished *Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co.*, 12 N.Y.3d 302 (2009), in which the court held that an earth movement exclusion was ambiguous as to excavation-related damages. The exclusion at issue in *Pioneer* lacked the clarifying language set forth in *Bentoria Holdings*.

CLIMATE CHANGE ALERT:

Ninth Circuit Affirms Dismissal of Global Warming Nuisance Suit

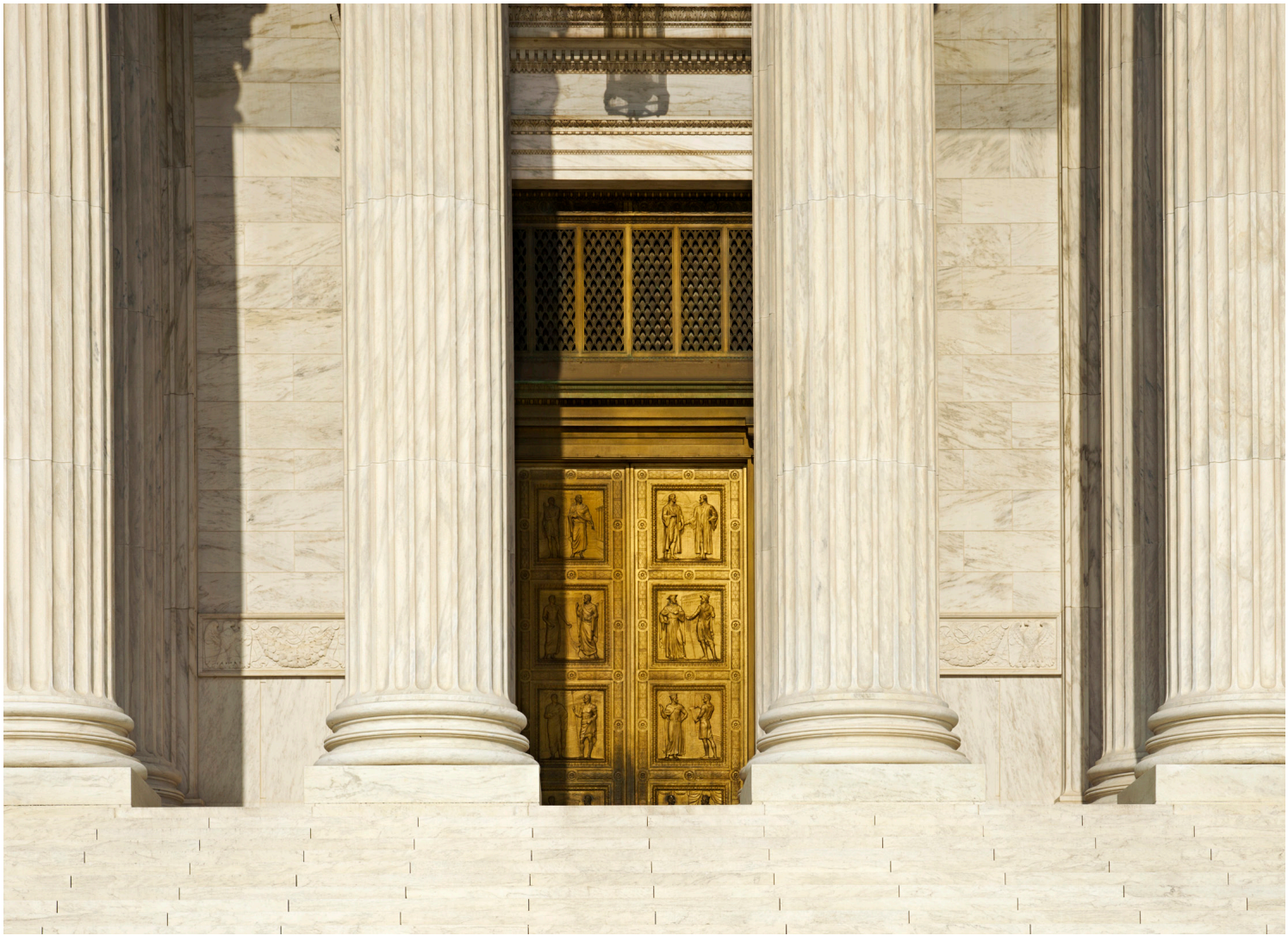
The Ninth Circuit affirmed a California district court's dismissal of a public nuisance suit seeking damages on the ground that greenhouse gases emitted by energy, oil and utility companies caused global warming and destroyed plaintiffs' land. *Kivalina v. ExxonMobil Corp.*, 2012 WL 4215921 (9th Cir. Sept. 21, 2012). The court reasoned that federal statutory law, including the Clean Air Act, displaced federal common law in this context and thus precluded plaintiffs' nuisance claims. In reaching its decision, the court relied primarily on *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011), in which the United States Supreme Court dismissed similar global warming claims on the basis that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement" of greenhouse gas emissions. (For a full discussion of *American Electric Power*, click here). The Ninth Circuit reasoned that *American Electric Power* applied squarely to *Kivalina*, even though plaintiffs sought money damages and the *American Electric Power* plaintiffs sought only injunctive relief. The court explained that "the type of remedy asserted is not relevant to the applicability of the doctrine of displacement." These rulings, taken together, appear to foreclose the use of federal common law as the basis for climate change nuisance suits.

Notably, the insurance coverage action that arose from the *Kivalina* suit was dismissed earlier this year. The Virginia Supreme Court ruled that a general liability insurer did not owe defense or indemnity for Kivalina's global warming-related claims. *AES Corp. v. Steadfast Ins. Co.*, 283 Va. 609, 725 S.E.2d 532 (2012). The court reasoned that because Kivalina's complaint alleged damages which were "the natural and probable consequence[ ] of AES's intentional emissions," there was no accidental "occurrence" for insurance coverage purposes. *See* October 2011 and May 2012 Alerts.

DEFENSE ALERT:

Fifth Circuit Affirms That Reservation of Rights Does Not Create Conflict of Interest for Purposes of Selecting Defense Counsel

Our January 2012 Alert discussed a Texas district court opinion ruling that there was no conflict of interest between a professional liability insurer and the law firm it insured, and thus that the insurance company was entitled to select counsel to represent the law firm in an underlying malpractice suit. *Coats, Rose, Yale, Ryman & Lee, P.C. v. Navigators Specialty Ins. Co.*, 830 F. Supp.2d 216 (N.D. Tex. 2011). Last month, the Fifth Circuit affirmed the decision. *Coats, Rose, Yale, Ryman & Lee, P.C. v. Navigators Specialty Ins. Co.*, 2012 WL 4858194 (5th Cir. Oct. 15, 2012). The Fifth Circuit agreed with the district court that because the insurer and policyholder's interests were aligned, the reservation of rights did not create an actual conflict of interest sufficient to divest the insurer of its contractual right to select counsel. Under Texas law, there must be an actual (rather than potential) conflict of interest in order to override an insurer's right to select counsel—a standard that requires more than a mere reservation of rights.



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