SIMPSON THACHER

INSURANCE LAW ALERT

JANUARY 2013

This Alert discusses three recent decisions relating to whether administrative agency actions trigger defense and indemnity obligations under general liability policies. We also report on a variety of rulings relating to late notice, bad faith claims, and application of the pollution exclusion to drywall-related claims, among others. Please "click through" to view articles of interest. Best wishes to you in the New Year.

- ***Eleventh Circuit Joins Growing Number of Courts Enforcing Pollution Exclusion to Bar Coverage for Defective Drywall Claims***

  The Eleventh Circuit ruled that pollution exclusions in six insurance policies excluded coverage for damages associated with the supply and installation of defective drywall. *Granite State Ins. Co. v. Am. Bldg. Materials, Inc.*, 2013 WL 28430 (11th Cir. Jan. 3, 2013). *Click here for full article*

- ***Wisconsin Appellate Court Rules That Late Notice Precludes Excess Insurance Coverage***

  A Wisconsin appellate court ruled that policyholders forfeited coverage under nine Lloyd's excess policies by failing to provide timely notice and by breaching the cooperation clauses of the policies. *Ansul, Inc. v. Employers Ins. Co. of Wausau*, 2012 WL 590741 (Wis. Ct. App. Nov. 27, 2012). *Click here for full article*

- ***Three Courts Address Whether Administrative Agency Actions Trigger Obligations Under General Liability Policies***

  The Alabama Supreme Court and appellate courts in Arizona and Indiana recently weighed in on whether various administrative agency actions against a policyholder give rise to an insurer's defense and/or indemnity obligations. *Travelers Cas. & Sur. Co. v. Alabama Gas Corp.*, 2012 WL 6720790 (Ala. Dec. 28, 2012); *Nucor Corp. v. Employers Ins. Co. of Wausau*, 2012 WL 5893485 (Ariz. Ct. App. Nov. 23, 2012); *Thomson, Inc. v. Continental Cas. Co.*, 2012 WL 6054825 (Ind. Ct. App. Dec. 6, 2012). *Click here for full article*

- ***Second Circuit Rules That Excess Insurer May Owe Indemnity for Environmental Property Damage Outside Policy Periods***

  The Second Circuit ruled that notwithstanding New York's endorsement of pro rata allocation, language in two excess policies may lead to coverage for property damage that occurred outside the policy periods. *Olin Corp. v. Am. Home Assurance Co.*, 2012 WL 6602909 (2d Cir. Dec. 19, 2012). *Click here for full article*

- ***Providing Defense and Indemnity Does Not Foreclose Bad Faith Claims Against Insurer, Says California Court***

  A California district court denied an insurer's summary judgment motion seeking dismissal of bad faith claims, holding that an insurer can be held liable for bad faith notwithstanding its defense and indemnification of the policyholder. *Lehman Commercial Paper, Inc. v. Fidelity Nat'l Title Ins. Co.*, 2013 WL 26741 (C.D. Cal. Jan. 2, 2013).
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- ***Florida Appellate Court Reverses Dismissal of Bad Faith Claim Based on Insurer's Claims Handling***

  A Florida appellate court ruled that a failure-to-settle bad faith claim against an automobile insurer should not be dismissed on summary judgment. *Goheagan v. Am. Vehicle Ins. Co.*, 2012 WL 6027809 (Fla. Dist. Ct. App. Dec. 5, 2012).
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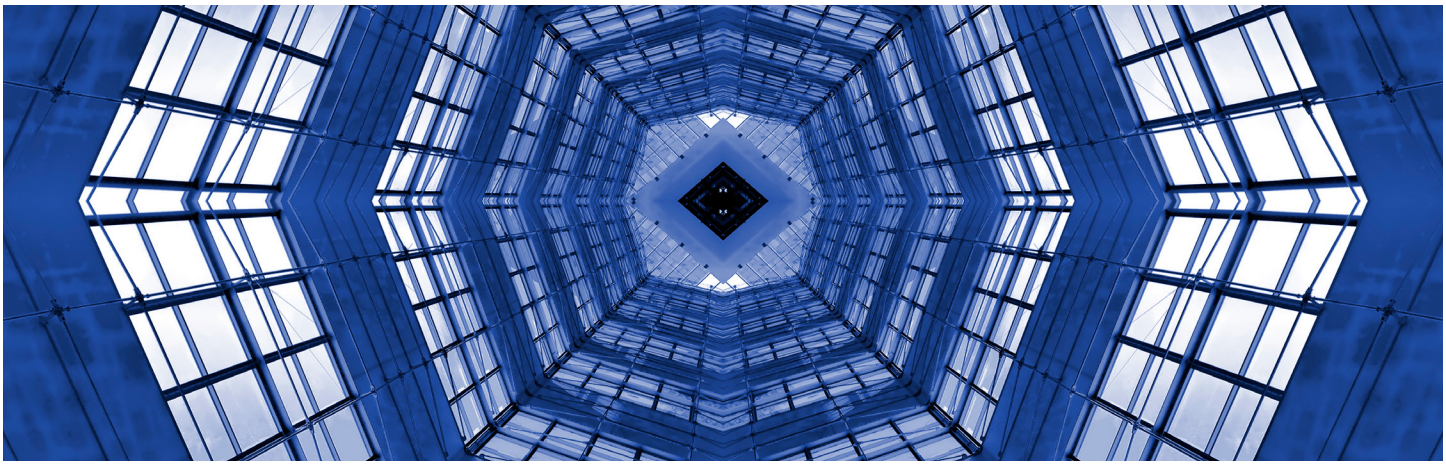
- ***California Supreme Court Poised to Rule on Transferability of Insurance Rights***

  The California Supreme Court agreed to review an appellate court decision holding 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*, 288 P.3d 1287 (Cal. 2012). *Click here for full article*

- ***Fifth Circuit Affirms That Suit Against Nutritional Supplements Manufacturer Does Not Allege "Bodily Injury"***

  The Fifth Circuit affirmed a Texas decision holding that an insurance company had no duty to defend claims of false advertising and deceptive practices against a drug manufacturer because the complaint did not allege "bodily injury" within the meaning of the insurance policy. *CSA Nutraceuticals GP, LLC v. Chubb Custom Ins. Co.*, 2013 WL 28399 (5th Cir. Jan. 2, 2013). *Click here for full article*



DRYWALL ALERT:

Eleventh Circuit Joins Growing Number of Courts Enforcing Pollution Exclusion to Bar Coverage for Defective Drywall Claims

Previous Alerts have documented the emerging trend of enforcing pollution exclusions to bar coverage for drywall-related claims, including a recent landmark ruling by the Virginia Supreme Court. *See* December 2012 Alert (discussing *Travco Ins. Co. v. Ward*, 2012 WL 5358705 (Va. Nov. 1, 2012)). This month, the Eleventh Circuit reached the same conclusion, ruling that pollution exclusions in six insurance policies excluded coverage for damages associated with the supply and installation of defective drywall. *Granite State Ins. Co. v. Am. Bldg. Materials, Inc.*, 2013 WL 28430 (11th Cir. Jan. 3, 2013).

Numerous class action suits filed against American Building alleged that defective drywall supplied by the company emitted sulfide gases, resulting in bodily injury and property damage. American Building's insurers filed a declaratory judgment action seeking a ruling that they had no obligation to defend or indemnify the claims on the basis of the policies' pollution exclusions. A Florida district court, applying Massachusetts law, agreed with the insurers and held that the exclusions barred coverage for the claims. Both parties appealed. American Building contested the district court's coverage ruling, and the insurers argued that the district court should have applied Florida law, under which pollution exclusions have been broadly enforced in myriad contexts, including cases stemming from the installation of defective drywall.

The Eleventh Circuit declined to decide the choice of law question, instead finding that under both Florida and Massachusetts law, the drywall-related damages were excluded by the policies. The court noted that under Florida law, pollution exclusions are enforced as written, even in non-traditional environmental contamination contexts. Although Massachusetts law takes a different approach to the interpretation of pollution exclusions, limiting them to harm caused by what an "ordinary" insured would consider pollution in light of applicable policy language, the court concluded that under Massachusetts law as well, damage caused by defective drywall fell within the scope of the pollution exclusions. In so ruling, the court noted that the sulfuric emissions from the drywall would be understood to constitute "pollution" by a reasonable insured. In addition, the court distinguished cases in which Massachusetts courts have declined to apply the pollution exclusion to harm caused in the course of "everyday activities gone slightly, but not surprisingly, awry," explaining that the drywall-related harms are substantively different from the small-scale "mishaps" at issue in those cases.

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Late Notice Alert:

Wisconsin Appellate Court Rules That Late Notice Precludes Excess Insurance Coverage

A Wisconsin appellate court ruled that Ansul, Inc. and Tyco International, Inc. forfeited coverage under nine Lloyd's excess policies by failing to provide timely notice and by breaching the cooperation clauses of the policies. *Ansul, Inc. v. Employers Ins. Co. of Wausau*, 2012 WL 590741 (Wis. Ct. App. Nov. 27, 2012).

Beginning in the 1950s and continuing for nearly three decades, Ansul's business operations caused environmental property damage. State agencies became aware of the contamination in the early 1970s and ordered remediation in 1981. By 1990, the Environmental Protection Agency intervened and required additional remediation efforts. During this time, Ansul spent approximately $11 million on cleanup efforts and established a $5 million reserve for on-site environmental problems. In 1997, Ansul filed a declaratory judgment action against Lloyd's seeking coverage under the excess policies. The lawsuit was the first notice of Ansul's environmental claims that Lloyd's received. A Wisconsin circuit court granted Lloyd's motion for summary judgment, finding that Ansul breached the notice and cooperation provisions of the excess policies. The appellate court affirmed.

The notice dispute centered on an excess policy with a $16 million attachment point. The policy's notice provision required Ansul to notify Lloyd's "as soon as practicable" after knowledge that liability was likely to implicate coverage. Ansul argued that a factual dispute existed as to when it could have reasonably concluded that damages were likely to reach $16 million. The court disagreed, finding that by 1991—when Ansul had spent in excess of $11 million and set aside an additional $5 million reserve—it should reasonably have known that its liability was likely to reach $16 million. Therefore, the court concluded, the six-year delay in notifying Lloyd's was unreasonable as a matter of law. The court also held that Lloyd's was prejudiced by the delay. Under Wisconsin law, where, as here, notice is given more than one year after the time required by the policy, there is a rebuttable presumption of prejudice and the policyholder bears the burden of proving a lack of prejudice. The court held that Ansul failed to meet this burden given the significant passage of time before Lloyd's was notified and the resultant loss of documents and unavailability of witnesses.

The court also held that Ansul's breach of the policies' cooperation clauses provided an independent basis for denying coverage. The cooperation clauses required Ansul to provide Lloyd's an opportunity to associate in the investigation and defense of claims. The court concluded that "[b]y providing notice in the form of a lawsuit, Ansul immediately set itself at odds with Lloyd's" and thus breached the cooperation clause. The court further determined that Lloyd's suffered prejudice as a result of the breach because it lost the opportunity to investigate Ansul's liability outside of the adversary process.

Coverage Alert:

Three Courts Address Whether Administrative Agency Actions Trigger Obligations Under General Liability Policies

There is a substantial body of case law relating to whether various administrative agency actions against a policyholder give rise to an insurer's defense and/or indemnity obligations. Decisions are mixed, with rulings turning largely on three factors: (1) applicable policy language, (2) the nature of the agency's directives against the policyholder, and (3) public policy concerns. The Alabama Supreme Court and appellate courts in Arizona and Indiana recently weighed in on the issue, reaching different conclusions as to the insurer's defense versus indemnity obligations.

Answering a question certified by an Alabama federal district court, the Alabama Supreme Court recently held that a Potentially Responsible Party (PRP) letter from the Environmental Protection Agency constitutes a suit within the meaning of a general liability policy. *Travelers Cas. & Sur. Co. v. Alabama Gas Corp.*, 2012 WL 6720790 (Ala. Dec. 28, 2012). When Alabama Gas Corporation was identified as a PRP in connection with environmental contamination at a manufacturing plant site, it turned to Travelers, its general liability insurer, for defense and indemnity. Under the policy, Travelers was required to defend Alabama Gas in "any suit against the insured." Travelers argued that it had no duty to defend because no "suit" had been filed. Alabama Gas filed a declaratory judgment action against Travelers seeking a ruling regarding its rights under the policy. Both parties moved for summary judgment as to the meaning of the undefined term "suit" in the policy. Finding this issue of law unresolved in Alabama, the district court certified the following question to the Alabama Supreme Court: "Under Alabama law, is a 'Potentially Responsible Party' ('PRP') letter from the Environmental Protection Agency ('EPA'), in accordance with the Comprehensive

Environmental Response Compensation and Liability Act ('CERCLA') provisions, sufficient to satisfy the 'suit' requirement under a liability policy of insurance?"

The Alabama Supreme Court answered the question in the affirmative, citing to reasoning endorsed by courts in numerous other jurisdictions. In particular, the court agreed that the consequences of receiving a PRP letter are "substantially equivalent" to the commencement of a lawsuit because of the coercive power of the EPA to determine liability and impose penalties for failing to cooperate in the cleanup process. In addition, the court emphasized the public policy interest in interpreting the term "suit" to encompass PRP letters: "Limiting an insurer's duty to defend to an actual court proceeding … would merely encourage PRPs to decline 'voluntary' involvement in site cleanups, waiting instead for an actual lawsuit to be brought in order to receive insurance coverage. This would have the effect of substantially protracting the cleanup of contaminated sites."

An Arizona appellate court reached the same conclusion in *Nucor Corp. v. Employers Ins. Co. of Wausau*, 2012 WL 5893485 (Ariz. Ct. App. Nov. 23, 2012). Nucor, an electronics manufacturer, was identified as a PRP in connection with environmental contamination and ultimately directed by state agencies to take remedial action. An Arizona trial court held that Wausau had a duty to defend the administrative proceeding and the appellate court affirmed. Like *Alabama Gas Corp.*, the central issue here was interpretation of the undefined term "suit" in the provision requiring Wausau to

"defend any suit against the insured." The court reasoned that because the administrative proceeding imposed significant burdens on Nucor and could result in the imposition of liability, it was the functional equivalent of a suit for duty-to-defend purposes. Although the decisions in *Alabama Gas* and *Nucor Corp.* comport with rulings in numerous jurisdictions, some courts have interpreted the term "suit" strictly, concluding that a PRP letter is not a "suit" that triggers an insurer's defense obligations. *See, e.g., Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 959 P.2d 265 (Cal. 1988); *Employers Ins. Co. of Wausau v. Ehlco Liquidating Trust*, 186 Ill.2d 127 (1999).

Ruling on a similar issue, an Indiana appellate court held that under California law, damages covered under an umbrella policy were limited to sums imposed in court-based litigation and did not encompass costs arising from administrative proceedings. *Thomson, Inc. v. Continental Cas. Co.*, 2012 WL 6054825 (Ind. Ct. App. Dec. 6, 2012). The policyholder filed suit seeking indemnification from Continental for expenses paid to remediate contamination in compliance with local environmental authority directives. The policy issued by Continental provided indemnification for "ultimate net loss in excess of the insured's retained limit which the insured shall become obligated to pay as damages …." Continental argued that the phrase "obligated to pay as damages" operated to limit coverage to court-rendered damages and did not encompass administrative response costs. The court agreed, holding that under California law, nearly identical policy language has been interpreted to mean only "money ordered by a court." *See CDM Investors v. Travelers Cas. & Sur. Co.*, 139 Cal. App. 4th 1251 (2006). When faced with different policy language, however, California courts have required indemnification for costs incurred in responding to administrative agency orders. *See Powerine Oil Co. v. Superior Court*, 118 P.3d 589 (Cal. 2005) (policy providing coverage for "damages, direct or consequential and expenses," is not limited to money ordered by a court).

Policy Period Alert:

Second Circuit Rules That Excess Insurer May Owe Indemnity for Environmental Property Damage Outside Policy Periods

Reversing a New York district court opinion, the Second Circuit ruled that notwithstanding New York's endorsement of pro rata allocation, language in two excess policies may lead to coverage for property damage that occurred outside the policy periods. *Olin Corp. v. Am. Home Assurance Co.*, 2012 WL 6602909 (2d Cir. Dec. 19, 2012).

The coverage dispute arose out of Olin's long-term environmental contamination at a California manufacturing site. Olin maintained an insurance program consisting of general liability policies and layered excess policies. American Home issued two excess policies, each of which provided a three-year period of coverage with a $30.3 million attachment point. The excess policies followed form to underlying Lloyd's policies. The Lloyd's policies contained a "Condition C" provision, which stated that "in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy, Underwriters will continue to protect the Assured for Liability …." Olin argued that Condition C required American Home to indemnify Olin not only for damage occurring during the six-year period of coverage, but also for continuing damage in subsequent years, such that the policies' attachment points would be met. The district court rejected this argument, finding that pursuant to the pro rata allocation scheme in this case (attributing $3.3 million to each year of property damage between 1957 and 1987) the $30.3 million attachment points of American Home's three-year policies were not met. Thus, the court granted American Home's motion for summary judgment. The Second Circuit reversed.

The Second Circuit held that Condition C provided continuing coverage beyond the end of American

Home's policy periods if the following conditions were met: (1) personal injury or property damage, (2) arising out of a covered occurrence, and (3) continuing at the time of policy termination. Finding all three requirements met here, the court concluded that American Home could be obligated to indemnify Olin up to the limits of its policies for damage that occurred during and after the termination of each policy until 1987, thereby exceeding the policies' attachment points. The court noted, however, that a "prior insurance" clause in the Coverage C provision operated to limit coverage to only one (not both) of American Home's excess policies. The Second Circuit remanded the matter for further proceedings, noting the possibility that the policies' attachment points might not be met for other reasons.

Significantly, the Second Circuit decision does not disturb well-established New York law holding that in the absence of contractual language to the contrary (or the availability of evidence allowing for more specific assignment of liability to particular years of coverage) liability for damages arising out of continuous property damage should be allocated pro rata based on the "time on the risk." However, the ruling serves as an important reminder that where a policy includes specific language that deviates from New York's default pro rata rule, such language will be enforced as written.

Bad Faith Alerts:

Providing Defense and Indemnity Does Not Foreclose Bad Faith Claims Against Insurer, Says California Court

A California district court denied an insurer's summary judgment motion seeking dismissal of bad faith claims, holding that an insurer can be held liable for bad faith notwithstanding its defense and indemnification of the policyholder. *Lehman Commercial Paper, Inc. v. Fidelity Nat'l Title Ins. Co.*, 2013 WL 26741 (C.D. Cal. Jan. 2, 2013).

The dispute arose out of title insurance policies issued by Fidelity to Lehman in connection with certain property purchases. During the course of the purchase transactions, various involuntary bankruptcy petitions, liens and lawsuits were filed against the putative purchasers. In response to the lien claims, Fidelity retained counsel to defend Lehman and to prosecute claims on Lehman's behalf under a reservation of rights. In addition, Fidelity entered into a funding agreement with Lehman under which it agreed to settle Lehman's claims. Pursuant to its defense and indemnification of Lehman, Fidelity spent approximately $2.2 million. Notwithstanding this undertaking, Lehman asserted bad faith claims against Fidelity, alleging, among other things, that Fidelity asserted meritless reservations of rights and acted unreasonably in the course of investigation and claims handling. Fidelity moved to dismiss the claims, arguing that because it provided Lehman with "full policy benefits," the bad faith claims failed as a matter of law. The court disagreed.

Applying California law, the court held that an insurer's fulfillment of policy obligations does not, as a matter of law, shield an insurer from bad faith liability. The court explained that bad faith may be premised on insurer misconduct "apart from performance of its contract obligation," including facts related to the timing of payments, the manner of claims handling

or an unreasonable refusal to determine coverage. However, the court noted that the burden of proving such misconduct would ultimately fall on Lehman.

Fidelity reflects California's liberal stance on insurer bad faith claims. Although bad faith claims typically require a breach of the insurance policy (and many jurisdictions have rejected bad faith claims absent a predicate breach of contract claim), the *Fidelity* court noted that under California law, a bad faith claim need not always be predicated upon a breach of the insurance policy.

Florida Appellate Court Reverses Dismissal of Bad Faith Claim Based on Insurer's Claims Handling

Reversing a prior ruling, a Florida appellate court ruled that a failure-to-settle bad faith claim against an automobile insurer should not be dismissed on summary judgment. *Goheagan v. Am. Vehicle Ins. Co.*, 2012 WL 6027809 (Fla. Dist. Ct. App. Dec. 5, 2012). The dispute arose out of a fatal motor vehicle accident caused by an intoxicated driver. Upon notice of the accident, the insurance company of the intoxicated driver made several efforts to initiate settlement negotiations with the injured (and subsequently deceased) party, but was unsuccessful. Ultimately, the decedent's representative brought a wrongful death suit against the intoxicated driver and rejected the insurer's attempt to tender policy limits. The wrongful death suit resulted in a $2.8 million judgment. Following judgment, the decedent's representative brought a bad faith claim against the insurance company based on its failure to immediately tender policy limits upon notice of the claim. The trial court granted the insurer's summary judgment motion, reasoning that there could be no bad faith because the decedent had been in a coma during the relevant time period and "therefore there was no one to whom to make an offer." The appellate court reversed.

Under Florida law, an insurer has an affirmative duty to initiate settlement negotiations where "liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely." The court reasoned that here, the insurer's duty to offer settlement was not negated by the unavailability of the underlying claimant and/or uncertainty as to the identity of her representative. The court stated: "Any delay in making an offer under the circumstances of this case even where there was no assurance that the claim could be settled could be viewed by a fact finder as evidence of bad faith." Accordingly, the court reversed the summary judgment ruling and remanded the matter for further proceedings.

The viability of a bad faith claim based on the timing of an insurer's settlement offer depends on the particular facts presented and applicable jurisdictional law. As discussed in our November 2012 Alert, the Ninth Circuit recently retreated from a previous ruling requiring insurers to work proactively toward a settlement when liability is clear, even absent a settlement demand from underlying claimants. *See Yan Fang Du v. Allstate Ins. Co.*, 681 F.3d 1118 (9th Cir. 2012). In an amended opinion issued in connection with a denial of a petition for rehearing, the Ninth Circuit sidestepped the legal question of whether a duty to settle can be breached absent a settlement demand from a claimant and instead resolved the dispute on the basis that the facts presented did not support a finding of bad faith. *See Yan Fang Du v. Allstate Ins. Co.*, 697 F.3d 753 (9th Cir. 2012).

Successor Liability Alert:

California Supreme Court Poised to Rule on Transferability of Insurance Rights

Our September 2012 Alert discussed *Fluor Corp. v. Superior Court*, 208 Cal. App. 4th 1506 (2012), a California appellate court decision holding 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. In *Fluor*, the court relied on *Henkel Corp. v. Hartford Accident & Indem. Co.*, 62 P.3d 69 (Cal. 2003), and rejected Fluor's argument that insurance coverage could be transferred pursuant to a century-old state statute. Last month, the California Supreme Court granted Flour's petition for review of the appellate court decision, opening the door for a potential change in state law on this issue. *Fluor Corp. v. Superior Court*, 288 P.3d 1287 (Cal. 2012). To the extent that the California Supreme Court reverses course on the transferability question, the ruling is likely to have significant underwriting implications for insurers. As noted in our January 2012 Alert, other jurisdictions have issued mixed rulings as to whether and under what circumstances insurance coverage may be transferred without insurer consent.

Bodily Injury Alert:

Fifth Circuit Affirms That Suit Against Nutritional Supplements Manufacturer Does Not Allege "Bodily Injury"

Our March 2012 Alert discussed a Texas district court decision holding that an insurance company had no duty to defend claims of false advertising and deceptive practices against a drug manufacturer because the complaint did not allege "bodily injury" within the meaning of the insurance policy. *CSA Nutraceuticals GP, LLC v. Chubb Custom Ins. Co.*, No. 3:10-CV-02155-F (N.D. Tex. Jan. 30, 2012). This month, the Fifth Circuit affirmed the ruling, reinforcing the principle that allegations of economic harm, without more, do not constitute "bodily injury" for the purposes of insurance coverage. *CSA Nutraceuticals GP, LLC v. Chubb Custom Ins. Co.*, 2013 WL 28399 (5th Cir. Jan. 2, 2013).

In the underlying class action, plaintiffs alleged that CSA engaged in false and misleading advertising and business practices in order to induce plaintiffs to purchase a diet supplement, and that as a result, plaintiffs suffered economic loss. Plaintiffs sought monetary damages, restitution and disgorgement of CSA's "wrongfully earned profits." Chubb argued, and the Texas district court agreed, that such allegations fell outside the scope of "bodily injury" because the crux of the complaint was that plaintiffs were deceived into purchasing CSA's products and thus financially harmed—not that plaintiffs suffered bodily harm as a result of the products. In affirming, the Fifth Circuit additionally noted that in evaluating the insurer's duty to defend, it was irrelevant that the statutes upon which the class action plaintiffs relied provided relief for bodily injury. Where, as here, the allegations in the complaint are not based on bodily injury, there is no duty to defend.

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