SIMPSON THACHER

INSURANCE LAW ALERT

FEBRUARY 2014

This Alert discusses recent decisions relating to the consequences of an insurer's breach of the duty to defend, an insurer's right to recoup defense costs following a no coverage ruling, and the scope of coverage for government investigations. In addition, we report on rulings addressing subrogation, self-insured retentions and choice of law. Finally, we discuss a notable ruling limiting a bankrupt entity's estimated liability for asbestos-related claims. Please "click through" to view articles of interest.

- ***Vacating Prior Decision, New York Court of Appeals Rules That Wrongful Refusal to Defend Does Not Result in Coverage Defenses Waiver***

  Vacating a previous ruling, the New York Court of Appeals held that an insurer that breaches its defense obligations is not barred from subsequently relying on policy exclusions to deny coverage. *K2 Investment Grp., LLC v. American Guarantee & Liability Ins. Co.*, 2014 WL 590662 (N.Y. Feb. 18, 2014). *Click here for full article*

- ***New York Court Denies Request to Recoup Defense Costs, Citing Failure to Reserve the Right to Reimbursement***

  A New York federal district court denied an insurer's request to recoup defense costs, citing the absence of an explicit reservation to recoup such costs in the reservation of rights letter. *Federal Ins. Co. v. Marlyn Nutraceuticals, Inc.*, 2013 WL 6796162 (E.D.N.Y. Dec. 19, 2013). *Click here for full article*

- ***Fourth Circuit Allows Policyholder To Seek "Aggravation and Inconvenience" Damages From Insurer***

  The Fourth Circuit ruled that a policyholder may be entitled to recover damages for aggravation and inconvenience based on an insurer's wrongful refusal to defend. *Graham v. National Union Fire Ins. Co.*, 2014 WL 350147 (4th Cir. Feb. 3, 2014). *Click here for full article*

- ***New York Appellate Court Rules That Investigative Measures Constitute a "Claim" Triggering Coverage Obligations***

  A New York appellate court held that an insurer owed coverage for federal and local investigative actions instituted against a university in connection with sexual abuse claims. *Syracuse Univ. v. National Union Fire Ins. Co.*, 976 N.Y.S.2d 921 (4th Dep't 2013). *Click here for full article*

- ***Insurer Need Not Indemnify Settlement for Underlying Claims That Were Not Viable, Says Eighth Circuit***

  The Eighth Circuit ruled that an insurer was not obligated to indemnify a settlement because the underlying claims against the policyholder were barred by state law and thus not within the scope of covered "loss" under the policy. *Chicago Ins. Co. v. Archdiocese of St. Louis*, 740 F.3d 1197 (8th Cir. 2014). ***Click here for full article***

- ***Florida Supreme Court Rules That Third-Party Payments Satisfy SIR and That Subrogation Provision Does Not Abrogate "Made Whole" Doctrine***

  The Florida Supreme Court ruled that a policyholder was entitled to use third-party payments to satisfy a self-insured retention and that a subrogation policy provision did not override the common law "made whole" doctrine under which a policyholder's reimbursement rights are prioritized over those of the insurer. *Intervest Construction of Jax, Inc. v. General Fidelity Ins. Co.*, 2014 WL 463309 (Fla. Feb. 6, 2014). ***Click here for full article***

- ***North Carolina Bankruptcy Judge Caps Garlock's Asbestos Claims at $125 Million***

  A North Carolina bankruptcy court ruled that the estimate for present and future mesothelioma claims against Garlock Sealing Technologies LLC totals $125 million, finding that the company's products resulted in relatively low exposure to asbestos to a limited number of claimants. *In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014). ***Click here for full article***

- ***Tort Victim May Not Bring Direct Action Against Bankrupt Policyholder's Insurer, Says Sixth Circuit***

  The Sixth Circuit ruled that Tennessee law does not permit a tort victim to sue an alleged tortfeasor's insurer directly, even where the action against the tortfeasor is subject to an automatic stay in bankruptcy proceedings. *Mauriello v. Great American E and S Ins. Co.*, 2014 WL 321921 (6th Cir. Jan. 30, 2014). ***Click here for full article***

- ***Second Circuit Rules That New Jersey Law Governs Insurance Dispute Arising Out of New York Accident***

  The Second Circuit ruled that New Jersey law should be applied to the interpretation of two insurance policies notwithstanding the fact that the accident giving rise to the coverage dispute took place in New York. *Certain Underwriters at Lloyds of London v. Illinois National Ins. Co.*, 2014 WL 504038 (2d Cir. Feb. 10, 2014). ***Click here for full article***

- ***STB News Alerts:***

  Click here for information on Simpson Thacher's recent insurance-related honors.

Duty to Defend Alert:

Vacating Prior Decision, New York Court of Appeals Rules That Wrongful Refusal to Defend Does Not Result in Coverage Defenses Waiver

Our July/August 2013 Alert discussed a New York Court of Appeals decision holding that an insurer that breaches its defense obligations may not subsequently rely on policy exclusions to deny coverage. *K2 Investment Grp., LLC v. American Guarantee & Liability Ins. Co.*, 21 N.Y.3d 384 (2013). In an unusual development, the Court of Appeals vacated its prior holding upon rehearing of the matter. *K2 Investment Grp., LLC v. American Guarantee & Liability Ins. Co.*, 2014 WL 590662 (N.Y. Feb. 18, 2014).

The dispute arose from legal malpractice claims brought against the policyholder. American Guarantee refused to defend and a default judgment was thereafter entered against the policyholder. The underlying claimants, as assignees of the policyholder's rights, sued American Guarantee for breach of contract. American Guarantee moved for summary judgment, arguing that two policy exclusions barred coverage. The claimants cross-moved, arguing that American Guarantee breached its duty to defend and was therefore bound, up to policy limits, to pay the default judgment. A New York trial court agreed and ruled in favor of the claimants. An intermediate appellate court and the Court of Appeals both affirmed.

On rehearing, the New York Court of Appeals vacated its prior ruling, finding that its original ruling could not be reconciled with *Servidone Const. Corp. v. Security Ins. Co. of Hartford*, 64 N.Y.2d 419 (1985), which held that an insurer that breaches its duty to defend is not automatically liable to indemnify an underlying settlement if coverage is disputed. The court stated that "to decide this case we must either overrule *Servidone* or follow it. We choose to follow it." Additionally, the court recognized that *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350 (2004), upon which it had relied in its original decision, did not overrule *Servidone* and in any event, was factually inapposite. Having decided that American Guarantee was entitled to rely on policy exclusions to deny coverage notwithstanding its "wrongful" refusal to defend, the court remanded the matter for a factual determination of whether the exclusions applied.

As the court noted, decisions in other jurisdictions are split as to whether an insurer may contest indemnity obligations following a wrongful refusal to defend, with the majority following the New York rule set forth in *Servidone*.

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Defense Costs Alert:

New York Court Denies Request to Recoup Defense Costs, Citing Failure to Reserve the Right to Reimbursement

A New York federal district court denied an insurer's request to recoup defense costs, citing the absence of an explicit reservation to recoup such costs in the reservation of rights letter. *Federal Ins. Co. v. Marlyn Nutraceuticals, Inc.*, 2013 WL 6796162 (E.D.N.Y. Dec. 19, 2013).

Federal Insurance agreed to defend Marlyn Nutraceuticals in an underlying action pursuant to a reservation of rights. The reservation letter preserved Federal's right to withdraw its defense based on several potentially applicable policy exclusions, but did not mention recoupment of defense costs in the event of a no coverage finding. Thereafter, Federal brought a suit seeking a declaration of no coverage and recoupment of attorneys' fees incurred in defending the action.

The court determined that Federal had no duty to defend or indemnify because all of the claims against Marlyn Nutraceuticals were outside the scope of coverage. However, the court denied Federal's attempt to recoup defense costs. The court noted that "courts that have granted an insurance company reimbursement of defense costs have typically done so pursuant to an explicit reservation of such a right" and that Federal's reservation did not include any such statement. In addition, the court noted that Federal had the "right and duty" to defend the suit even if it was "false, fraudulent or groundless," which continued until it was established that there was no possibility of coverage. Because it was not clear until the close of discovery in the underlying action that there was no duty to defend, the court held that Federal was required to provide a defense and thus its "claim for recoupment cannot stand."

Federal Insurance does not foreclose the possibility of recoupment of defense costs. Rather, under New York law, it appears that a significant factor in the recoupment analysis is whether the insurer expressly reserved the right to recoup defense costs. In another recent recoupment decision, a New York court ruled that an insurer was entitled to recover defense costs upon a finding it had no duty to defend or indemnify, in part because the insurer had reserved the right to recoupment. *See Certain Underwriters at Lloyd's London v. Lacher & Lovell-Taylor*, 975 N.Y.S.2d 870 (1st Dep't 2013) (discussed in December 2013 Alert).

Damages Alert:

Fourth Circuit Allows Policyholder To Seek "Aggravation and Inconvenience" Damages from Insurer

The Fourth Circuit ruled that a policyholder may be entitled to recover damages for aggravation and inconvenience based on an insurer's wrongful refusal to defend. *Graham v. National Union Fire Ins. Co.*, 2014 WL 350147 (4th Cir. Feb. 3, 2014).

Under West Virginia law, when an insurer breaches its duty to defend, a policyholder may recover direct damages (such as attorneys' fees incurred in the underlying suit), as well as consequential

damages (such as fees expended in enforcing the policy against the insurer). In *Graham*, the court addressed whether a policyholder is also entitled to pursue consequential damages for the aggravation and inconvenience sustained in connection with defending itself in underlying litigation. The court answered this question in the affirmative, reasoning that there was "no logical reason to authorize an award for one item of consequential damages—

attorney fees in the enforcement litigation—while simultaneously denying recovery for aggravation and inconvenience, which are merely other items in the same category." The court rejected the notion that damages available for a breach of a third-party liability policy should be more limited than those available in the first-party context, stating that regardless of the "characterization of the insurance as first-party or third party," consequential damages are "part and parcel of the remedies obtainable in a bad-faith action against an insurer." The court remanded the matter for evidentiary findings, noting that the policyholder bears the burden of establishing such damages by a preponderance of the evidence.

Ruling on a related issue, the court held that the policyholder was not entitled to prejudgment interest on the attorneys' fees incurred in the underlying suit. Although West Virginia statutory law authorizes prejudgment interest for "special or liquidated damages," *see* W. Va. Code § 56-6-31(a), the court concluded that legal fees were outside the scope of this statutory provision. In particular, the court held that the fees were incurred on an hourly basis and were not liquidated until the insurer had stipulated to the precise amount due, which did not occur until after entry of judgment.

Coverage Alerts:

New York Appellate Court Rules That Investigative Measures Constitute a "Claim" Triggering Coverage Obligations

Previous Alerts have discussed cases that have considered whether various investigative actions constitute a "claim" under D&O and other policies. *See* May and October 2013 Alerts. Decisions in this context

turn primarily on applicable policy language and the particular nature of the investigative measures. In a recent instructive decision, a New York appellate court held that an insurer owed coverage for federal and local investigative actions instituted against a university in connection with sexual abuse claims. *Syracuse Univ. v. National Union Fire Ins. Co.*, 976 N.Y.S.2d 921 (4th Dep't 2013).

The dispute arose from a university's receipt of subpoenas from local and federal prosecutors requiring the production of records, documents and electronic equipment in the wake of abuse allegations against a basketball coach. The university sought coverage for the costs of complying with the investigation, which the insurer denied. In turn, the university sued, seeking a declaration of coverage. A New York trial court granted the university's summary judgment motion.

The insurance policy defined "claim" as "(1) A written demand for monetary, non-monetary or injunctive relief; or (2) A civil, criminal, administrative, regulatory or arbitration proceeding for monetary or non-monetary relief . . . ." The trial court concluded that the subpoenas constituted a "claim" because they demanded non-monetary relief (*i.e.*, the production of documents and testimony). The trial court further found that a grand jury investigation is a "criminal proceeding for monetary or non-monetary relief" because it is an "integral part of a criminal proceeding." In so ruling, the trial court rejected the notion that a policyholder must prove that it is the named target of an investigation in order to access coverage. While recognizing that the investigation at issue was aimed primarily at the coach rather than the insured university, the trial court noted that the university's liability necessarily depended on the predicate liability of the coach and the duty to defend arises when even the potential for liability exists. The appellate court affirmed the trial court decision by summary order. A federal district court in New York reached the same conclusion in *MBIA, Inc. v. Federal Ins. Co.*, 652 F.3d 152 (2d Cir. 2011), holding that governmental investigative subpoenas constituted a covered "claim" under a directors and officers policy.

Insurer Need Not Indemnify Settlement for Underlying Claims That Were Not Viable, Says Eighth Circuit

The Eighth Circuit ruled that an insurer was not obligated to indemnify a settlement because the underlying claims against the policyholder were barred by state law and thus not within the scope of covered "loss" under the policy. *Chicago Ins. Co. v. Archdiocese of St. Louis*, 740 F.3d 1197 (8th Cir. 2014).

The father of a child allegedly molested by a priest sued the Archdiocese of St. Louis. A Missouri state trial court dismissed all but three claims. Two of the remaining claims alleged intentional conduct and a third alleged wrongful death based on the

abused child's suicide. After settling the matter, the Archdiocese sought reimbursement from its insurers. Chicago Insurance Company ("CIC"), an excess insurer, refused to fund the settlement and sought a declaration that it had no coverage obligations. A Missouri federal district granted CIC's motion for summary judgment. The Eighth Circuit affirmed.

CIC's policy provided indemnification for "loss," defined as "the sums paid as damages in the settlement of a claim or in satisfaction of a judgment for which the insured is legally liable." The district court held that the Archdiocese could not be "legally liable" for the wrongful death claim because Missouri law does not recognize negligence-based actions against religious organizations such as the one at issue. The district court also held that CIC owed no coverage for the remaining claims because they alleged intentional conduct. On appeal, the Archdiocese argued that the district court erred by requiring "actual liability" in the underlying suit in order to trigger coverage under CIC's policy. The Archdiocese argued that an insurer must indemnify a reasonable settlement made in the face *potential* liability. The Eighth Circuit did not decide whether Missouri law requires actual or potential liability in this context, and instead ruled that the Archdiocese could not meet either standard because Missouri law does not recognize the negligence claim.

SIR/Subrogation Alert:

Florida Supreme Court Rules That Third-Party Payments Satisfy SIR and That Subrogation Provision Does Not Abrogate "Made Whole" Doctrine

Answering two questions certified by the Eleventh Circuit, the Florida Supreme Court ruled that (1) a policyholder was entitled to use third-party payments to satisfy a self-insured retention; and (2) a transfer of rights (*i.e.*, subrogation) provision in a general liability policy did not override the common law "made whole" doctrine under which a policyholder's reimbursement rights are prioritized over those of the insurer. *Intervest Construction of Jax, Inc. v. General Fidelity Ins. Co.*, 2014 WL 463309 (Fla. Feb. 6, 2014).

ICI, a construction company, was insured by General Fidelity. Custom Cutting, a sub-contractor, was insured by North Pointe. When a homeowner fell and sustained injuries, she sued ICI, who in turn sought indemnification from Custom Cutting pursuant to the sub-contract. Mediation resulted in a $1.6 million settlement. North Pointe agreed to pay ICI $1 million to settle ICI's indemnification claim against Custom Cutting. ICI would then pay that $1 million to the homeowner. The instant dispute arose as to whether ICI or General Fidelity was responsible for the remaining $600,000.

A Florida federal district court ruled that ICI was obligated to fund the remainder of the settlement. The court explained that ICI had not satisfied the $1 million SIR in its policy with General Fidelity and that North Pointe's payment did not reduce the SIR because it originated from Custom Cutting, not ICI. The district court reasoned that the SIR provision, which used the phrases "payments … by you" and "only … payments made by the insured" unambiguously required the SIR to be paid by the insured, rather than a third party. In

addition, the district court ruled that even assuming ICI had paid the $1 million out of pocket and that General Fidelity was required to pay the additional $600,000, the transfer of rights (subrogation) provision would allow General Fidelity to recover its payment back from ICI. On appeal, the Eleventh Circuit concluded that there was no controlling Florida law on either issue and certified the following questions to the Florida Supreme Court:

> Does the General Fidelity policy allow the insured to apply indemnification payments received from a third-party towards satisfaction of its $1 million self-insured retention?
>
> Assuming that funds received through an indemnification clause can be used to offset the self-insured retention, does the transfer of rights provision found in the General Fidelity policy grant superior rights to be made whole to the insured or to the insurer?

The Florida Supreme Court answered "yes" to the first question and held that SIR language requiring payment "by you" or "by the insured" did not require payments to originate from the insured's own funds. The court contrasted policy language discussed in other cases, which required payment from the insured's "own account." With respect to the second question, the court ruled that the transfer of rights clause, which required the insured to transfer any right of recovery to General Fidelity, did not abrogate the "made whole" doctrine, under which the insured's right to be made whole is prioritized over the insurer's right to recovery. The court reasoned that although the provision grants General Fidelity subrogation rights, it "gives no guidance as to the priority to recover when the indemnity amount is insufficient to 'make whole' both parties." The court ruled that absent an explicit contractual provision that abrogates the "made whole" doctrine, an insured has priority over the insurer to be made whole.

Asbestos Alert:

North Carolina Bankruptcy Judge Caps Garlock's Asbestos Claims at $125 Million

In a decision that garnered a great deal of press coverage, a North Carolina bankruptcy court ruled that the estimate for present and future mesothelioma claims against Garlock Sealing Technologies LLC totals $125 million, finding that the company's products resulted in "relatively low exposure to asbestos to a limited population." The ruling rejected the claimants' contention that Garlock's liability approaches $1.3 billion. *In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014).

Garlock, a former producer of asbestos-containing materials, filed for bankruptcy in 2010. As discussed in our January and April 2011 Alerts, discovery disputes between Garlock and the asbestos claimants have been contentious and extensive. In July 2013, the bankruptcy court held a hearing to determine a reasonable estimate of Garlock's liability for present and future mesothelioma claims. The court concluded that the estimates of Garlock's aggregate liability which were based on its historic settlement values were unreliable because those estimates were "infected

with the impropriety of some law firms and inflated by the cost of defense." More specifically, the court noted extensive discovery abuse by claimants' counsel and a widespread pattern of misstatements in court-filed documents, the withholding of exposure evidence, and the unreliability of certain expert reports. The court held that Garlock's exposure should be determined from a "legal liability" approach, taking into consideration "causation, limited exposure, and the contribution of exposure to other products," and ignoring historic settlement values. Utilizing those factors as a framework, the court determined that $125 million was sufficient to satisfy Garlock's liability for "legitimate present and future mesothelioma claims."

Direct Action Alert:

Tort Victim May Not Bring Direct Action Against Bankrupt Policyholder's Insurer, Says Sixth Circuit

The Sixth Circuit ruled that Tennessee law does not permit a tort victim to sue an alleged tortfeasor's insurer directly, even where the action against the tortfeasor is subject to an automatic stay in bankruptcy proceedings. *Mauriello v. Great American E and S Ins. Co.*, 2014 WL 321921 (6th Cir. Jan. 30, 2014).

After purchasing property from two entities, Diane Mauriello discovered certain inadequacies in the property and sued the sellers for fraud. Before the lawsuit was resolved, however, the sellers filed for bankruptcy, triggering an automatic stay of the suit. Mauriello requested relief from the stay, which the bankruptcy court granted in part. The bankruptcy court allowed her to proceed subject to "available insurance." Thereafter, Mauriello voluntarily dismissed the fraud action, and filed suit against Great American, the sellers' insurer. Mauriello argued that she was an intended third-party beneficiary to the insurance contracts and thus entitled to indemnification. A Tennessee federal district court rejected this contention and granted Great American's summary judgment motion. The Sixth Circuit affirmed.

Tennessee law does not permit direct actions by tort victims against the tortfeasor's insurer. Furthermore, even if a direct action was permissible under certain circumstances, a precondition to such action would generally be a judgment against the policyholder. The court declined to carve out an exception to these principles for cases involving a bankrupt tortfeasor.

Choice of Law Alert:

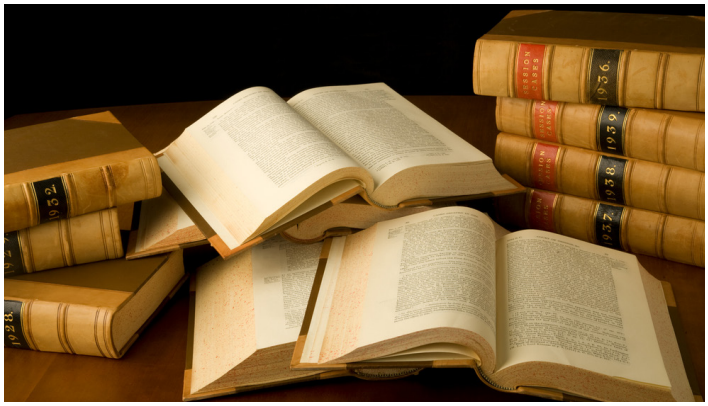
Second Circuit Rules That New Jersey Law Governs Insurance Dispute Arising out of New York Accident

The Second Circuit ruled that New Jersey law should be applied to the interpretation of two insurance policies notwithstanding the fact that the accident giving rise to the coverage dispute took place in New York. *Certain Underwriters at Lloyds of London v. Illinois National Ins. Co.*, 2014 WL 504038 (2d Cir. Feb. 10, 2014).

A construction accident in New York injured several individuals. One of the injured parties, a truck driver who had been delivering materials to the construction site, sued several entities including the trucking company that employed him. The trucking company sought coverage from the Insurance Company of the State of Pennsylvania ("ICSOP"), its automobile insurer, and Continental, its umbrella carrier. In the ensuing coverage dispute, the court addressed whether New York or New Jersey law governed the policies. Choice of law was outcome-determinative because under New York law, exclusions in the policies would negate coverage whereas those exclusions were void under New Jersey law.

New York courts apply a "center of gravity" approach to choice of law disputes which considers a "spectrum of significant contracts—rather than a single possibly fortuitous event." The center of gravity test allows for consideration of numerous factors, including the place of contract negotiation and performance, the location of the subject matter, and the domicile of contracting parties. Applying these principles, the court concluded that New Jersey law governed interpretation of ICSCOP's and Continental's policies. The court rejected ICSOP's argument that New York law should govern because the accident giving rise to the lawsuit occurred there. The court noted that the site of the accident may be a more significant factor in a tort suit, as opposed to a breach of contract claim, as was the case here. In addition, the court found no strong governmental interests favoring New York law on the facts of this case.

Notably, the New York federal district court presiding over the matter applied New York law to several other insurance coverage disputes that arose out of the same accident. *Certain Underwriters at Lloyds of London v. Illinois National Ins. Co.*, No. 09 Civ. 4418 (S.D.N.Y. Mar. 3, 2011). It appears that the choice of law issue was not raised by the parties with respect to those other policies.



STB News Alerts:

Simpson Thacher was named "Insurance Group of the Year" by Law 360. In a February 3, 2014 announcement, the publication highlighted the Firm's breadth of practices and cited numerous victories achieved for the Firm's insurance clients, including the reversal of a $95 million judgment against an insurer in an environmental contamination coverage dispute. The publication also praised the Firm's success in litigation relating to completed operations claims, late notice and reinsurance recovery.

Simpson Thacher was awarded the National Insurance Practice of the Year Award at the 2014 Benchmark Litigation Awards dinner on January 30, 2014. The honor recognizes the Firm's longstanding leadership in insurance and reinsurance law.

Simpson Thacher has been an international leader in the practice of insurance and reinsurance law for more than a quarter of a century. Our insurance litigation team practices worldwide.

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