Simpson Thacher

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In This Issue

Reversing Lower Court, Texas Supreme Court Rules That Excess Policy Does Not Provide Coverage For Defense Costs

The Texas Supreme Court ruled that a follow-form excess policy did not include coverage for the policyholder's defense costs, notwithstanding that the underlying policy did provide such coverage. *Ohio Casualty Ins. Co. v. Patterson-UTI Energy, Inc.*, 2024 Tex. LEXIS 1123 (Tex. Dec. 20, 2024). (Click here for full article)

"Simpson Thacher is an excellent firm - the lawyers are knowledgeable and experienced."

– *Chambers New York* 2024 (quoting a client)

Citing "Reasonable Expectations" Of Policyholders, North Carolina Supreme Court Rules That Restaurants' Pandemic-Related Business Losses Are Covered Under Commercial Property Policies

The North Carolina Supreme Court ruled that property policies covered the policyholders' alleged business losses during the COVID-19 pandemic, finding that a "reasonable policyholder" could expect "direct physical loss" to include government orders that affected the use of physical property, and construing such ambiguity in favor of coverage. *North State Deli, LLC v. Cincinnati Ins. Co.*, 2024 N.C. LEXIS 970 (N.C. Dec. 13, 2024). (Click here for full article)

Delaware Court Rules That Bump Up Exclusion In D&O Policy Does Not Bar Coverage For Settlement Of Underlying Securities Claims

A Delaware state court ruled that a bump up exclusion in a D&O policy did not bar coverage for an underlying settlement because the settlement did not represent compensation for an inadequate deal price. *Harman International Industries, Inc. v. Illinois National Insurance Co.*, 2025 Del. Super. LEXIS 3 (Del. Superior Ct. Jan. 3, 2025). (Click here for full article)

Citing Policyholder's Intentional Conduct, Arkansas Appellate Court Rules That Underlying Land Dispute Does Not Allege Any "Occurrences"

Reversing a trial court decision, an intermediate appellate court in Arkansas ruled that a general liability insurer had no duty to defend an underlying lawsuit based on the absence of claims alleging a covered "occurrence." *American Ins. Co. v. Red Apple Enterprises Ltd.*, 2025 Ark. App. LEXIS 22 (Ark. App. Jan. 15, 2025). (Click here for full article)

Michigan Court Finds "Occurrence" Definition Ambiguous In Context Of School Shooting Coverage Case

A Michigan court ruled that the term "occurrence" in a liability policy was ambiguous and therefore construed it in favor of the policyholder, finding that each injury-causing shot in a school shooting constituted a separate occurrence. *Oxford Community Schools v. MASB-SEG Property/Casualty Pool, Inc.*, No. 24-204988 (Mich Cir. Ct. Oct. 30, 2024) (Transcript). (Click here for full article)

Kentucky Supreme Court Addresses Effect Of Conflicting "Other Insurance" Clauses And Overturns State Precedent

The Kentucky Supreme Court ruled that excess clauses in two insurance policies were mutually repugnant and that losses should be apportioned equally between the two insurers. *Motorists Mutual Ins. Co. v. First Specialty Ins. Co.*, 2024 Ky. LEXIS 394 (Ky. Dec. 19, 2024). (Click here for full article)

Reversing Lower Court, Texas Supreme Court Rules That Excess Policy Does Not Provide Coverage For Defense Costs

HOLDING

The Texas Supreme Court ruled that a follow-form excess policy did not include coverage for the policyholder's defense costs, notwithstanding that the underlying policy did provide such coverage. *Ohio Casualty Ins. Co. v. Patterson-UTI Energy, Inc.*, 2024 Tex. LEXIS 1123 (Tex. Dec. 20, 2024).

BACKGROUND

Patterson, an oil and gas equipment provider, was named as a defendant in several suits following a drilling rig accident. The suits were ultimately settled, and Ohio Casualty, an excess insurer, funded portions of the settlements after lower-level policies had been exhausted. However, Ohio Casualty refused to indemnify Patterson for any defense costs.

In ensuing litigation, Patterson alleged that Ohio Casualty breached the insurance policy. A trial court granted Patterson's summary judgment motion, ruling that defense costs were covered by Ohio Casualty's policy because it did not expressly exclude such costs and because the underlying primary policy did encompass defense costs. An intermediate appellate court affirmed.

DECISION

The Texas Supreme Court reversed, ruling that Ohio Casualty policy's statement of coverage unambiguously indicated that defense costs were not covered, notwithstanding that it followed form to the underlying policy. The Ohio Casualty policy covered "loss," defined as "those sums actually paid in the settlement or satisfaction of a claim which [Patterson is] legally obligated to pay as damages after making proper deductions for all recoveries and salvage." While it was undisputed that Patterson "actually paid" defense costs and was "legally obligated" to do so, the court emphasized that defense costs are not "paid in the settlement or satisfaction of a claim . . . as damages." In so ruling, the court noted the well-established principle that absent a specific contractual definition to the contrary, a party's attorney's fees "are not, and have never been, damages."

The court rejected Patterson's assertion that the follow-form nature of Ohio Casualty's excess policy warrants a finding of coverage for defense costs because the underlying policy expressly included defense costs in its coverage provisions. The court stated:

> Patterson attributes far too much to the excess policy's "follow-form" status . . . . According to Patterson, the excess policy is bound by the underlying policy's coverage choice unless the excess policy *repudiates* that choice rather than simply providing a different kind of coverage. This argument's essence amounts to the approach we emphatically reject: starting with the underlying rather than the excess policy.

The court explained that while a follow-form excess policy is generally subject to the same terms and conditions of the underlying policy except where otherwise modified, a court must carefully examine the terms of the excess policy itself in determining the scope of coverage. It is "the excess policy's text [that] governs the dispute," so analysis must begin with the excess policy and then turn to consider adoptions or modifications of the underlying policy. Here, the underlying policy defined "ultimate net loss" to include defense costs, whereas Ohio Casualty's excess policy defined "loss" in a manner that did not encompass such costs.

COMMENTS

The Texas Supreme Court also rejected the contention that exclusions in Ohio Casualty's policy that referred specifically to attorney's fees indicated an intention to include defense costs in the coverage provisions. Patterson argued that the exclusionary language would be "surplusage" if the policy did not cover those fees to begin with. The court explained that even if the exclusions appeared "repetitive or otherwise unnecessary," it would not alter its conclusion as to coverage. The court stated: "the excess policy's specific references to attorney's fees in the asbestos and pollution exclusions were understandable redundancies designed to eliminate any conceivable doubt—not surplusage that would alter our interpretation of the rest of the policy."

Citing "Reasonable Expectations" Of Policyholders, North Carolina Supreme Court Rules That Restaurants' Pandemic-Related Business Losses Are Covered Under Commercial Property Policies

HOLDING

The North Carolina Supreme Court ruled that property policies covered the policyholders' alleged business losses during the COVID-19 pandemic, finding that a "reasonable policyholder" could expect "direct physical loss" to include government orders that affected the use of physical property, and construing such ambiguity in favor of coverage. *North State Deli, LLC v. Cincinnati Ins. Co.*, 2024 N.C. LEXIS 970 (N.C. Dec. 13, 2024).

BACKGROUND

Several bars and restaurants in North Carolina sought coverage for business losses incurred during the period of government shut-down and restrictive orders. The commercial all-risk property policies defined "Loss" as "accidental physical loss or accidental physical damage," but did not define the terms "physical loss," "physical damage" or "accidental." The policies did not contain exclusions related to viruses or contamination.

The specific provision under which the policyholders sought coverage was a supplemental Business Income (And Extra Expense) Coverage Form. That provision applied to the loss of business income due to the "suspension" of "operations" during the "period of restoration" caused by "direct 'loss' to property." In turn, the policy defined "period of restoration" to end on the earlier of three dates: (1) the date when the property is "repaired, rebuilt or replaced"; (2) the date when the business is resumed at a new permanent location; or (3) 12 consecutive months after the date of "loss."

A trial court granted the policyholders' summary judgment motion, finding that the ordinary meaning of "loss" includes the loss of possession, distinct from physical damage. An intermediate appellate court reversed, ruling that a loss of use of or access to property does not constitute direct physical loss of or damage to property.

DECISION

The North Carolina Supreme Court reversed, ruling that a reasonable policyholder could expect "direct physical loss" to include the loss of use of and access to physical property due to government orders. Relying on standard dictionary definitions, the court reasoned that a loss must "result in the material deprivation, dispossession, or destruction of property." The policyholders argued that the government orders resulted in such material deprivation because they directly affected the functions of and access to the property, including whether and under what conditions business operations could continue. In contrast, Cincinnati

contended that a loss of use of property is not a direct physical loss and that business property did not experience any physical change.

The court concluded that both arguments were reasonable. In particular, the court noted the "common-sense expectation that insurance should protect from threats to property that make it unusable for the purpose for which it is insured." The court also explained that the terms "physical loss" and "physical damage" must have distinct meanings in order to effectuate both terms, and that "physical loss" could reasonably be interpreted more broadly than damage, to include "impairment of use or function, complete or partial." Deeming this a "manifestly ambiguous situation," the court resolved the ambiguity in favor of coverage.

Cincinnati also argued that the "period of restoration" provision, which refers to the repair, rebuilding, or replacement of property, indicated an intention to require physical or structural alteration to property. Rejecting this assertion, the court noted that this provision provided two other end date options for the coverage period, implying that the "repair, rebuild or replace" option does not alone define the contours of coverage.

Finally, the court emphasized that the policies contained numerous exclusions, none of which specified viruses, and that at least one restaurant specifically sought coverage for virus-related losses. The court stated: "Knowledge of the risk of viruses, together with knowledge that other policies exclude virus risks while this one does not, underscores that a policyholder would reasonably understand the absence of such an exclusion as an affirmative grant of coverage."

COMMENTS

The decision runs counter to the overwhelming majority of decisions which have denied coverage for pandemic-related business losses. Notably, many of those decisions expressly rejected the arguments adopted by the North Carolina Supreme Court here. More specifically, virtually all courts have concluded that a loss of use of property does not satisfy the "direct physical loss or damage" requirement and that the "period of restoration" provision supports that conclusion. Further, many courts have expressly rejected policyholder arguments that the absence of virus exclusions in applicable policies constitutes evidence of an intent to cover such losses where the operative provisions do not encompass such coverage.

Delaware Court Rules That Bump Up Exclusion In D&O Policy Does Not Bar Coverage For Settlement Of Underlying Securities Claims

HOLDING

A Delaware state court ruled that a bump up exclusion in a D&O policy did not bar coverage for an underlying settlement because the settlement did not represent compensation for an inadequate deal price. *Harman International Industries, Inc. v. Illinois National Insurance Co.*, 2025 Del. Super. LEXIS 3 (Del. Superior Ct. Jan. 3, 2025).

BACKGROUND

In 2016, Harman and Samsung Electronics announced a merger agreement. In 2017, a subsidiary of Samsung was created for the transaction and then merged with and into Harman through a reverse triangular merger. Ultimately, both companies survived with Harman as a wholly owned subsidiary of Samsung. Outstanding Harman stock was cancelled and converted into a right to receive cash, subject to certain exceptions.

Following this transaction, a class action complaint was filed against Harman and others alleging violations of Sections 14(a) and 20 of the Securities and Exchange Act of 1934. The suit alleged that Harman made false and misleading statements in order to secure shareholder approval for the transaction for which plaintiffs sought compensatory and/or rescissory damages. Among other things, the complaint alleged that the plaintiffs suffered losses reflecting "the difference between the price Harman shareholders received and Harman's true value at the time of the Acquisition," with the total loss amount to be determined at trial.

In 2017, AIG, Harman's primary D&O insurer, agreed to reimburse Harman for its defense costs but reserved its rights as to indemnification. In 2021, AIG denied coverage based on a bump up exclusion. In 2022, the underlying suit settled for $28 million.

Harman sued AIG and two excess insurers, alleging breach of contract and seeking a declaration of coverage. The parties cross-moved for summary judgment and the court ruled in Harman's favor.

DECISION

The bump up exclusion provides:

> In the event of a Claim alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or assets of an entity is inadequate, Loss with respect to such Claim shall not include any amount of any judgment or settlement representing the amount by which such price or consideration is effectively increased; provided, however, that this paragraph shall not apply to Defense Costs or to any Non-Indemnifiable Loss in connection therewith.

The court explained that for the exclusion to apply, AIG must establish that (1) the underlying transaction was clearly and unambiguously an acquisition of all or substantially all an entity's assets or ownership; (2) the underlying settlement is related only to the allegation of inadequate consideration; and (3) the underlying settlement represents an effective increase in consideration.

As to the first requirement, the court concluded that the reverse triangular merger was an acquisition for the purposes of the exclusion. The court noted that while the technical

definitions of "merger" and "acquisition" may differ, the practical effect of the transaction at issue was Samsung's acquisition of all or substantially all of the ownership interest of Harman. The court deemed it irrelevant that the transaction was labeled a "Merger Agreement," emphasizing that it satisfied all the characteristics of an acquisition, including that Harman retained a separate legal existence after the transaction and that only Harman shareholders voted on the agreement, among other things.

However, the court ruled that neither of the remaining requirements for the exclusion to apply were satisfied. As to the second requirement, the court explained that for an underlying settlement to represent the amount by which the transaction price is effectively increased, an underlying claim must allege inadequate consideration in the first place. Here, the underlying action alleged violations of Sections 14(a) and 20 of the Exchange Act—neither of which provide for consideration of an inadequate deal price as a remedy (and both of which encompass broader allegations than inadequate consideration). The court deemed it irrelevant that the complaint requested inadequate consideration, emphasizing that "the court in the underlying action must also be authorized to remedy the inadequate deal price under the claims raised."

Additionally, as to the third requirement, the court held that the settlement did not in fact represent an effective increase in consideration. According to the factual record, Harman expressly denied liability or wrongdoing, and the settlement was based "solely on the conclusion that further conduct of the litigation would be protracted and expensive." And the amount of the settlement ($28 million) was squarely in the middle of the litigation cost estimate ($25-$30 million). The court noted that if the settlement was intended to represent compensation for an inadequate deal price, there would be some evidence that the settlement amount was "in some way commensurate" with the difference between the shares' acquisition price and their true value, which was not the case.

In addition to the substantive rulings, the court also addressed the issues of waiver and estoppel. Harman alleged that AIG was precluded from denying coverage based on the five-year delay before raising the bump up exclusion as a basis for its coverage denial. Rejecting this assertion, the court stated: "This Court doesn't recognize coverage via estoppel" because equitable doctrines cannot be used to bring risks within a policy's coverage where the policy's terms expressly provide otherwise.

COMMENTS

This holding partially aligns with another recent Delaware trial court decision discussed in our September 2023 Alert, *Viacom Inc. v. U.S. Specialty Ins. Co.*, 2023 Del. Super. LEXIS 728 (Del. Superior Ct. Aug. 10, 2023), in which the court granted a policyholder's motion for summary judgment. There, the court ruled in favor of coverage, finding that a bump-up exclusion was ambiguous with respect to the undefined term "acquisition." However, the Fourth Circuit reached a different conclusion in *Towers Watson & Co. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 67 F.4th 648 (4th Cir. 2023). It reasoned that the "ordinary and accepted meaning" of "acquisition" contemplates the gaining of possession or control over something and encompassed a reverse triangular merger.

Citing Policyholder's Intentional Conduct, Arkansas Appellate Court Rules That Underlying Land Dispute Does Not Allege Any "Occurrences"

HOLDING

Reversing a trial court decision, an intermediate appellate court in Arkansas ruled that a general liability insurer had no duty to defend an underlying lawsuit based on the absence of claims alleging a covered "occurrence." *American Ins. Co. v. Red Apple Enterprises Ltd.*, 2025 Ark. App. LEXIS 22 (Ark. App. Jan. 15, 2025).

BACKGROUND

Red Apple, a land developer, was sued by a competitor for alleged misconduct in connection with the development of a parcel of land. The suit alleged numerous theories of recovery, including fraud, intentional interference with business expectancy, breach of contract, negligence and nuisance. American Insurance Company ("AIC") initially agreed to defend under a reservation of rights, but after three tort claims were dismissed, AIC notified Red Apple that it was terminating its defense based on the absence of any remaining claims that could be covered by the policy.

Thereafter, Red Apple sued AIC, seeking damages for the defense costs it incurred after AIC withdrew its defense. A trial court granted Red Apple's motion for partial summary judgment, ruling that AIC owed a defense for several remaining claims in the suit, including negligence, intentional interference, malicious prosecution, damage to business reputation, nuisance, and fraud. The court awarded Red Apple compensatory damages, penalties, and pre- and post- judgment interest.

DECISION

The appellate court reversed, ruling that the trial court erred in holding that AIC owed a duty to defend Red Apple in the underlying suit. The appellate court reasoned that the suit did not allege property damage caused by an "occurrence" and that intentional acts exclusions barred coverage. In so ruling, the court emphasized the intentional nature of the acts alleged against Red Apple, including fraudulent representations, deception, and manipulation. Such conduct could not constitute an "occurrence," defined by the policy as an "accident."

With respect to the nuisance claim, the court reasoned that the conduct alleged in the underlying complaint, which related to Red Apple's use of a parcel of land in violation of local restrictions, was knowing and/or deliberate and thus could not be attributed to an occurrence. Similarly, all the remaining claims stemmed from allegations of fraudulent misrepresentation or other intentional conduct.

Additionally, the court held that coverage was not available under the "personal and advertising injury" section of the policy, which covered injury arising out of several enumerated offenses. The trial court had found that allegations relating to malicious prosecution and damage to business reputation were potentially covered under this provision. The appellate court disagreed. First, the appellate court held that the malicious prosecution claim arose prior to the policy's inception date. Second, the appellate court held that the damage to reputation claim did not fall within any enumerated offense in the personal and advertising coverage section.

Finally, the court noted that coverage would be barred in any event by policy exclusions relating to damages "expected or intended from the standpoint of the insured," for "injury

caused by an insured's knowing violation of another's rights," and "for injury caused by an insured's publication of knowingly false material."

COMMENTS

The decision reinforces the well-established principle that for purposes of determining an insurer's duty to defend, the nature of the factual allegations in the underlying suit are determinative, rather than the labels of the claims asserted. Here, the appellate court emphasized that negligence claims do not necessarily trigger the duty to defend where the gravamen of the complaint is intentional conduct.

Michigan Court Finds "Occurrence" Definition Ambiguous In Context Of School Shooting Coverage Case

HOLDING

A Michigan court ruled that the term "occurrence" in a liability policy was ambiguous and therefore construed it in favor of the policyholder, finding that each injury-causing shot in a school shooting constituted a separate occurrence. *Oxford Community Schools v. MASB-SEG Property/Casualty Pool, Inc.*, No. 24-204988 (Mich Cir. Ct. Oct. 30, 2024) (Transcript).

BACKGROUND

The coverage dispute arose out of a mass shooting at a Michigan high school that killed four students and injured seven others. The decedents' families sued the school district, which sought coverage under a general liability policy. While the insurer agreed to defend and indemnify the school district, the parties disputed the number of occurrences that arose out of the incident. The school district argued that there were 11 occurrences based on the number of individuals shot, whereas the insurer argued that the gunman's conduct constituted a single occurrence.

DECISION

In an oral ruling, the court deemed the term "occurrence"—defined by the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions"—ambiguous. The court concluded that at a minimum, the school district's interpretation of each shot constituting a separate occurrence was reasonable. The court therefore construed the ambiguity in favor of the school district, finding multiple occurrences under the policy.

During oral argument, counsel for the school district noted that separate criminal charges were brought against the shooter for each victim and that each victim was injured by a separate shot.

COMMENTS

The number-of-occurrence determination often has significant implications for the amount of potential insurance recovery. For example, in this case, a single-occurrence finding would have limited the school district's recovery to $5 million ($1 million under a primary policy and $4 million under an excess policy). However, the court's multiple-occurrence ruling may allow the school district to recover $55 million under the primary policy since the policy did not contain an aggregate limit.

The matter is currently pending on appeal. We will keep you posted on any developments in this case.

Kentucky Supreme Court Addresses Effect Of Conflicting "Other Insurance" Clauses And Overturns State Precedent

HOLDING

The Kentucky Supreme Court ruled that excess clauses in two insurance policies were mutually repugnant and that losses should be apportioned equally between the two insurers. *Motorists Mutual Ins. Co. v. First Specialty Ins. Co.*, 2024 Ky. LEXIS 394 (Ky. Dec. 19, 2024).

BACKGROUND

The dispute arose from an automobile accident that resulted in the death of a child. The car was driven by an employee of Alltrade while driving at an apartment complex owned by Whispering Brook Acquisitions. Whispering Brook had retained Alltrade to perform work on site and the parties had entered into a service agreement that required Whispering Brook to indemnify and hold harmless Alltrade for all liability related to property management.

Alltrade was insured under a commercial liability policy issued by Motorists while Whispering Brook was insured under a commercial liability policy issued by First Specialty. Both policies contained "other insurance" clauses. Motorists's "other insurance" clause provided, in relevant part, "[f]or any covered 'auto' you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance." First Specialty's clause stated that "[t]his insurance is excess over: [a]ny other insurance, whether primary, excess, contingent or any other basis."

When the decedent's family sued Alltrade and Whispering Brook, Motorists intervened to determine the priority of coverage between the two insurers. A trial court held that the two "other insurance" provisions were mutually repugnant excess clauses and therefore that the insurers were required to contribute equally to the underlying liability. An intermediate appellate court reversed, ruling that First Specialty's provision was a nonstandard escape clause under *Empire Fire & Marine Insurance Co. v. Haddix*, 927 S.W.2d 843 (Ky. App. 1996). The appellate court therefore held that Motorists was required to provide primary coverage and First Specialty's policy was excess to the Motorists policy.

DECISION

The Kentucky Supreme Court reversed. The court explained that the test for mutual repugnancy is whether the two clauses are "indistinguishable in meaning and intent." Finding that the "other insurance" provisions here met this standard, the court emphasized that both clauses seek to accomplish the exact same thing—to limit coverage in light of other available insurance by making its own coverage excess to other valid and collectible insurance. The court rejected First Specialty's designation of its "other insurance" clause as a nonstandard escape clause, noting that it did not deny coverage altogether when other insurance covered the same risk.

Having determined the two clauses mutually repugnant, the court ruled that the loss should be apportioned equally between the two insurers. The court acknowledged that in other cases, courts have apportioned losses on a pro rata basis in light of particular circumstances, but held that equal shares was warranted here based on the co-primary status of the two insurers for both policyholders as well as the identical limits of liability.

COMMENTS

The Kentucky Supreme Court expressly overruled *Haddix*, in which a Kentucky appellate court ruled that the phrase "whether primary, excess, contingent, or any other basis" in an "other insurance" provision renders it a nonstandard escape clause. Instead, the Kentucky Supreme Court held that courts must examine the specific language of each "other insurance" clause at issue in order to determine priority, and that even absent identical language, two clauses may be deemed mutually repugnant if their intent and meaning are the same.

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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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