Simpson Thacher

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A California district court granted a policyholder's motion to compel the production of reinsurance-related materials, finding that the documents were relevant to breach of contract and bad faith claims. *Jackson Family Wines, Inc. v. Zurich Am. Ins. Co.*, 2024 U.S. Dist. LEXIS 119383 (N.D. Cal. July 8, 2024). (Click here for full article)

California Court Rules That Insurers Have No Duty To Defend Opioid Suits Based On Lack Of Alleged "Occurrence"

HOLDING

A California district court ruled that underlying opioid-related suits did not allege a covered "occurrence" and therefore that insurers had no duty to defend. *AIU Ins. Co. v. McKesson Corp.*, 2024 U.S. Dist. LEXIS 134565 (N.D. Cal. July 30, 2024).

BACKGROUND

McKesson, a distributor of prescription drugs, was named as a defendant in underlying suits brought by government entities for its alleged role in contributing to the opioid crisis. The suits alleged that McKesson intentionally flooded the market with opioids, contravening various industry safeguards and ignoring or concealing risks associated with the use of opioid medications. McKesson's insurers sought a declaration of no coverage, arguing, among other things, that the underlying claims did not allege an "occurrence."

Ruling on McKesson's motion for summary judgment, the court held that the underlying allegations did not give rise to an "occurrence" and therefore that the insurers had no duty to defend the suits.

DECISION

As the court noted (and as reported in our January 2024 Alert), the Ninth Circuit granted insurers' partial summary judgment motion, finding no duty to defend three Exemplar Opioid Lawsuits under two policies issued to McKesson in effect from 2008-2009 and 2015-2016. *AIU Ins. Co. v. McKesson Corp.*, 2024 U.S. App. LEXIS 1806 (9th Cir. Jan. 26, 2024). The Ninth Circuit reasoned that the conduct was not "accidental" and thus did not constitute an occurrence as defined by the policy because the allegations in the lawsuit involved exclusively intentional conduct and did not involve unexpected or unforeseen injuries.

In the present case, McKesson argued that notwithstanding the Ninth Circuit's ruling, the suits alleged at least a potentially covered occurrence as that term is defined under policies issued between 1999-2004. McKesson reasoned that a slight difference in policy language during this time period warranted a different conclusion as to the occurrence issue. In particular, the 1999-2004 policies included the phrase "damage neither expected nor intended from the standpoint of the insured," whereas the policies in the Ninth Circuit decision did not include the phrase "from the standpoint of the insured" in the occurrence definition, but instead included that phrase in a policy exclusion that barred coverage for damage "expected or intended from the standpoint of the insured." Rejecting

this argument, the court held that the differing placement of that verbiage was irrelevant, and that all policies required accidental conduct or damage that was neither expected nor intended from the standpoint of the insured in order to trigger an insurer's defense obligations. Further, the court emphasized that under California law, deliberate conduct is not deemed accidental simply because the insured did not intend the damage that resulted from the deliberate conduct.

The court also rejected McKesson's assertion that even if the definition of "occurrence" in the 1999-2004 policies "is as the Ninth Circuit stated," the suits allege a potentially covered occurrence based on "diversion" of the opioid products distributed by McKesson. McKesson argued that the diversion of opioids by "'underhanded' physicians and pharmacists who were writing and filling illegitimate prescriptions was the particular unforeseen, intervening cause of the alleged injuries from 1999-2004." Deeming this argument unpersuasive, the court noted that the Ninth Circuit had already rejected that contention, noting that diversion of McKesson's "oversupply of opioids" was the "inevitable and entirely foreseeable result" of its alleged actions and practices, including its alleged failure to maintain effective controls and failure to report or halt suspicious orders.

New York Appellate Court Reverses Dismissal Of Suit Alleging PFA Groundwater Contamination

HOLDING

A New York appellate court ruled that a trial court erred in dismissing a PFA-related contamination suit based on standing, finding that the petitioner's allegations of pollution and injury were not conclusively refuted. *Seneca Lake Guardian v. New York State Dept. of Envtl. Conservation*, 2024 N.Y. App. Div. LEXIS 3899 (3d Dep't July 18, 2024).

BACKGROUND

County Line applied for a permit from the Department of Environmental Conservation ("DEC") to operate a waste and recyclables processing facility. In its application, County Line noted that operation of the proposed facility would produce leachate and disclosed its need to transport the leachate to an offsite treatment facility. It identified Ithaca Area Wastewater Treatment Facility as the offsite facility that would receive the leachate for treatment and disposal. After the DEC issued a permit, Seneca Lake Guardian ("SLG"), a nonprofit environmental conservation organization, sought to annul the permit. The DEC and County Line each moved to dismiss, asserting that SLG lacked standing.

A New York trial court granted both motions, finding that SLG's allegations of harm were "too speculative to confer standing" and no different than harm incurred by the public at large. The appellate court reversed.

DECISION

An organization can establish organizational standing "by asserting a claim on behalf of its members, provided that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members." Additionally, the organization must demonstrate that at least one of its members may suffer an injury in fact—"actual harm" separate and apart from the public at large—and that such injury falls within the "zone of interests" of the government regulations at issue.

Accepting SLG's allegations as true for the purposes of the motion to dismiss, the appellate court concluded that SLG met this standard. The parties did not dispute that the alleged injury fell within the zone of interest of the New York state regulations pertaining to waste management. Further, the respondents did not challenge that SLG's claims were representative or that its organizational purpose was to preserve and protect the health of the local Finger Lakes environment. The only issue in dispute was whether SLG adequately pleaded that at least one of its members would suffer an injury-in-fact different from that suffered by the public at large.

Finding that SLG did plead such harm, the appellate court noted that SLG alleged that its members would be harmed by the leachate produced by County Line, which would be treated by the Ithaca treatment facility and then dumped into Cayuga Lake. According to SLG, the type of solid waste that County Line would handle would create leachate that contains PFA substances, which have been linked to adverse health outcomes. SLG additionally alleged that because the PFAs cannot be fully filtered out of leachate, PFAs would enter the lake and cause its members harm. SLG specifically identified a member whose potable drinking water is only filtered through the ground in "beach wells" on Cayuga Lake and would be unsafe to drink if County Line were to transport its waste in the method outlined in its DEC application. The appellate court emphasized that neither County Line nor DEC provided evidence rebutting these allegations. As such, the court concluded that SLG's allegations were sufficient to establish non-speculative injury-in-fact to an individual member distinct from harm to the public at large and therefore had standing to challenge the permit.

COMMENTS

As litigation stemming from PFA-related contamination or exposure to PFA-containing materials continues to proliferate, so too will policyholders' claims for defense and indemnity of such claims. Coverage litigation in this context will turn primarily on applicable policy language, including pollution exclusions, as well as particular jurisdictional law. At least two courts have dismissed policyholder suits, finding that pollution exclusions barred coverage for such claims, while a few other courts have ruled that, based on the particular allegations in the complaint as compared to policy language, the insurers were obligated to defend the suits.

Reversing Trial Court, New Jersey Appellate Court Rules That Exclusion in D&O Policy Precludes Coverage For Underlying Settlement

HOLDING

A New Jersey appellate court ruled that a trial court erred in failing to apply an "operation of capacity" exclusion to claims arising out of an executive's wrongful acts taken in connection with both an insured and uninsured entity. *Mist Pharmaceuticals, LLC v. Berkley Ins. Co.*, 2024 N.J. Super LEXIS 57 (N.J. Super. Ct. App. Div. July 9, 2024).

BACKGROUND

A suit was brought against Mist Pharmaceuticals, Joseph Krivulka, Akrimax Pharmaceuticals and other entities. The complaint alleged that Krivulka, who served on the board of both Akrimax and Mist, engaged in a scheme of self-dealing and fraud. In particular, the complaint alleged that Krivulka improperly assigned various entities that he controlled or was invested in, including Mist, to serve as middlemen between Akrimax and other drug companies for personal gain.

Mist was insured under a D&O policy issued by Berkley. The policy contained an exclusion that barred coverage for claims "based upon, arising out of, directly or indirectly resulting from or in consequence of . . . any Wrongful Act of an Insured Person serving in their capacity as director, officer, trustee, employee, member or governor of any other entity other than an Insured Entity." When Mist sought coverage for the suit, Berkley issued a reservation of rights, citing the exclusion and also asserting that the underlying claim arose prior to the policy period. In response, Mist filed a declaratory judgment action seeking a ruling as to coverage.

The trial court granted Mist's motion for partial summary judgment, finding that the claim was within the policy period and that Berkley had a duty to defend. Thereafter, Mist sought consent to settle and indemnification from Berkley. Berkley refused, citing insufficient information from Mist as to the reasonableness of the proposed settlement. A Delaware court ultimately approved a $12 million global settlement and assigned 25% liability to Mist.

Following that ruling, a New Jersey trial court issued several findings as to coverage, including that the settlement was reasonable and that Berkley's refusal to contribute to the settlement was a breach of its duty to indemnify. The trial court did not consider the operation of capacity exclusion.

DECISION

The appellate court reversed, ruling that the trial court improperly applied *Fireman's Fund Ins. Co. v. Security Ins. Co. of Hartford*, 367 A.2d 864 (N.J. 1976) in finding that Berkley was obligated to indemnify the settlement. In *Fireman's Fund*, the New Jersey Supreme Court held that an insurer had unreasonably withheld its consent to settle and was therefore liable for indemnification of the settlement. The appellate court explained that unlike *Fireman's Fund*, Berkley's basis for withholding consent was reasonable because the global settlement represented the interests of multiple entities not insured under the policy and because Berkley timely cited the exclusion as a defense to coverage.

Turning to the exclusion, the appellate court concluded that it squarely applied given that Krivulka was acting in his capacity as both a director of Akrimax and majority shareholder of Mist in the alleged wrongdoing. The court stated: "[t]he loss claimed by Mist against Berkley's D&O policy arose from and could not have occurred but for Krivulka's conduct in his capacity as a director of Akrimax." The court applied a "but for" analysis, noting that it was not required to "unpack the percentage of Krivulka's conduct" attributable to his role in each entity. Rather, the phrase "arising out of" in the exclusion is applied broadly, to include conduct that is "in any way connected" and does not require a causal relationship. Having determined that the exclusion barred coverage for the underlying claims, the appellate court ruled that Berkley's refusal to consent to the settlement was not unreasonable.

COMMENTS

This case presented a matter of first impression under New Jersey law. Therefore, in ruling on the operation of capacity exclusion, the court relied on the reasoning set forth in decisions in other jurisdictions. As the court noted, the Eleventh Circuit (applying Georgia law) as well as courts in New York and Pennsylvania applied similar exclusions to analogous factual scenarios.

Louisiana Appellate Court Rules That Insurer Had No Duty To Indemnify Because Insured Was Not "Legally Obligated To Pay" Damages

HOLDING

Reversing a trial court decision, a Louisiana appellate court ruled that an insured was not "legally obligated to pay" damages and was therefore not entitled to coverage under a liability policy. *Hodge v. Louisiana Farm Bureau Mutual Ins. Co.*, No. 55,656 (La. App. Ct. June 26, 2024).

BACKGROUND

The coverage dispute arose out of an accident in which an employee of Billy Ray Hodge negligently drove one of Hodge's tractors into an irrigation system located on property owned by Sherman Shaw. At the time of the accident, Hodge was leasing that property from Shaw pursuant to a verbal agreement and was using the irrigation system located on that property, but there was no agreement with respect to a lease of the irrigation system itself.

After the accident, Shaw did not file a claim with his property insurer, nor did he assert a claim against Hodge. However, Hodge contacted Farm Bureau, his own liability insurer, who sent an adjuster to assess the damage. Hodge claims that in response to assurances by the Farm Bureau adjuster, Hodge replaced the irrigation system. When Farm Bureau later

denied coverage, Hodge sued, alleging detrimental reliance and breach of the duty of good faith. Farm Bureau asserted several affirmative defenses, including a policy exclusion for property that is "rented, occupied, and/or loaned" to Hodge or within his "care, custody, or control."

A trial court denied Farm Bureau's summary judgment motion, finding that issues of fact existed as to whether Hodge leased the irrigation system in connection with his lease of the land, or had custody or control over it. Following a bench trial, the court ruled the exclusion did not apply and that Hodge was entitled to coverage for the cost of replacing the system.

DECISION

Applying a manifest error standard of review, the appellate court reversed, ruling that coverage was unavailable because Hodge was never "legally obligated to pay" the cost of replacing the system, as required by the liability policy. Rather, the court explained, Hodge "decided on his own that he was 100 percent at fault." As such, Farm Bureau had no obligation to fund Hodge for his expenditure.

The court further held that the policy exclusion provided an independent basis for Farm Bureau's coverage denial. The court explained that Hodge was the only person that operated the irrigation system, and was solely responsible for maintaining and upgrading it. The court concluded that those facts squarely implicated an exclusion that applied to physical possession and control over property.

Finally, the court ruled that the theory of detrimental reliance did not apply. While Hodge allegedly relied on a statement by the adjuster prior to placing the order for the new system, the record indicated that he was on notice within several days that Farm Bureau was asserting coverage defenses, and did not cancel the order.

COMMENTS

The decision highlights an important distinction between first-party property insurance, which covers losses sustained by the insured, and third-party liability insurance, which typically requires underlying liability (*i.e.*, "legally obligated to pay as damages") owed by the insured to a third-party claimant. For third-party liability coverage to be implicated, the insured must generally establish liability by virtue of an underlying judgment or settlement agreement, neither of which were present here.

Texas Court Rules That Umbrella Insurer Had No Duty To Defend Underlying Claims Pursuant To "Drop Down" Provision

HOLDING

A Texas district court ruled that an umbrella insurer had no duty to defend claims pursuant to a "drop down" provision that applied only when claims were "not covered" by underlying insurance. *ACE American Ins. Co. v. Murco Wall Products, Inc.*, 2024 U.S. Dist. LEXIS 111368 (N.D. Tex. June 24, 2024).

BACKGROUND

Murco Wall Products was named as a defendant in asbestos-related bodily injury suits. When the limits of Murco's primary policies were exhausted, Murco sought coverage under excess policies, including an umbrella policy issued by Travelers. The policy provided two types of coverage: excess coverage (Section I) and drop-down coverage (Section II). The excess coverage provided indemnity once the underlying policy limits had been exhausted, whereas the drop down coverage required Travelers to defend Murco in suits arising from risks "not covered" by the underlying policy. The parties agreed that Travelers owed excess coverage under Section I, but Travelers denied drop-down coverage under Section II, arguing that the asbestos claims were covered by the underlying primary policy. The court agreed and granted Travelers' summary judgment motion.

DECISION

The court ruled that the phrase "not covered" under the drop-down provision of Section II was unambiguous and applied only to risks outside the scope of coverage under the primary policy; it did not encompass scenarios in which the claims against the insured were covered by the underlying policy and which exhausted the limits of those primary policies. The court rejected Murco's assertion that once the primary policy limits were exhausted, it "no longer covered" the asbestos claims, so as to trigger Section II of the Travelers policy. As the court noted, such an interpretation not only contradicts the plain language of the provision ("not covered by the underlying insurance"), but also would "erode the difference between excess coverage (Section I) and drop-down coverage (Section II), which insure different risks."

COMMENTS

An umbrella insurer's obligations to "drop down" and assume the duty to defend (or indemnify) turn primarily on applicable policy language. In addition to policy language, courts have also emphasized the inherent distinction between primary and excess coverage, as reflected by different premiums and contractual duties, when ruling on the obligations of an excess insurer.

Maryland Supreme Court Finds Subrogation Waiver Ambiguous As To Whether It Precluded Insurer's Subrogation Claim

HOLDING

The Maryland Supreme Court ruled that a subrogation waiver was ambiguous as to whether it precluded a subrogation claim by a tenant's insurer against subcontractors who were allegedly negligent in the construction of a warehouse. *Lithoko Contracting, LLC v. XL Ins. Am., Inc.*, 2024 Md. LEXIS 256 (Md. July 15, 2024).

BACKGROUND

Amazon contracted with non-party Duke Baltimore to serve as general contractor for the construction of a warehouse (the "Development Agreement"). The Development Agreement required Duke to hire subcontractors to assist with the project and further required that all subcontractor agreements include certain provisions, including a subrogation waiver. Duke entered into agreements with four subcontractors, and in accordance with the aforementioned requirement, each subcontractor contract included an "Attachment 1," which contained the requirements set forth in the Development Agreement, including a subrogation waiver. Each subcontractor agreement also included numerous other subrogation waivers, none of which mentioned Amazon specifically.

When the warehouse incurred damage, Amazon turned to its insurer, XL, for coverage. XL made payments exceeding $50 million and then brought a subrogation action against the subcontractors. The action alleged that the subcontractors' negligence was the cause of the loss. In turn, the subcontractors argued that the waivers of subrogation in the Development Agreement and the subcontractor agreements barred the claims.

A trial court agreed with the subcontractors and granted their motion for summary judgment. An intermediate appellate court reversed, ruling that the subrogation waiver in the Development Agreement was binding only on Amazon and Duke, and did not confer any rights on the subcontractors. The appellate court also held that the subrogation waivers in the subcontracts were not binding on Amazon (and therefore not binding on XL as Amazon's subrogee) because Amazon was not a party to those agreements. The Maryland Supreme Court reversed and remanded the matter for further development.

DECISION

Under the doctrine of subrogation, an insurer that has compensated its insured for a loss stands in the shoes of that insured and may seek recovery from a third-party. However, the insurer's rights are no greater than those of the insured, and if an insured has waived subrogation via contract or other means, its insurer generally may not assert a subrogation claim.

The Maryland Supreme Court addressed the three possible mechanisms which could preclude XL from asserting subrogation claims against the subcontractors: (1) the subrogation waiver in the Development Agreement; (2) the contractual requirement in the Development Agreement that all subcontracts include subrogation waivers; or (3) the subrogation waiver that was included in each of the agreements between Duke and the subcontractors.

The court ruled that the first element did not preclude Amazon from bringing the subrogation action, reasoning that the subcontractors were neither parties to nor third-party beneficiaries of the subrogation waiver in the Development Agreement. As to the second element, the court ruled that a contractual requirement that mandates inclusion

of subrogation waivers in all subcontracts does not operate as a "project-wide waiver of subrogation" without regard to the particular terms of those required waivers.

Turning to the language of the subrogation waivers in the subcontracts, the court deemed them ambiguous. The court noted, among other things, that the waivers did not identify Amazon or indeed any particular party and that the overall contract contained unclear and potentially conflicting language as to whether the parties intended to include Amazon as a party bound by the subrogation waiver.

The court therefore remanded the matter for consideration of extrinsic evidence relating to whether the parties intended that Amazon waive subrogation rights against the subcontractors.

COMMENTS

The court declined to rule, as a matter of public policy, that a project-wide waiver of subrogation exists whenever a construction contract, such as the Development Agreement in this case, requires all subcontracts to include a subrogation waiver. In rejecting this argument, the court acknowledged the benefits of subrogation waivers in construction-related litigation, but emphasized that contracting parties are free to "contract as they wish." The court stated: "While the Court may decline to enforce contract provisions on the grounds that they are against public policy . . . the Court will not rewrite the contracts of these parties to impose a project-wide waiver of subrogation."

California Court Grants Policyholder's Motion To Compel Production Of Reinsurance Documents

HOLDING

A California district court granted a policyholder's motion to compel the production of reinsurance-related materials, finding that the documents were relevant to breach of contract and bad faith claims. *Jackson Family Wines, Inc. v. Zurich Am. Ins. Co.*, 2024 U.S. Dist. LEXIS 119383 (N.D. Cal. July 8, 2024).

BACKGROUND

Jackson Family Wines ("JFW"), a vineyard and winery operator, sought coverage under insurance policies issued by Zurich for property damage it allegedly suffered as a result of wildfires. According to the complaint, Zurich deliberately delayed the claim in order to avoid payment under the policies. During discovery, JFW requested production of "communications between Zurich and any reinsurer relating to JFW's four fire claims." When Zurich refused to produce the material, JFW filed a motion to compel, which the court granted.

DECISION

In granting JFW's motion to compel, the court rejected Zurich's argument that the materials need not be produced because they were not relevant to the suit. The court agreed with JFW that communications between Zurich and its reinsurer(s) could be probative of Zurich's state of mind with respect to the wildfire claims, including "Zurich's assessment of its obligations on the claims and valuation of the losses, the adequacy of its investigation, and 'whether Zurich acted contrary to its own assessment to minimize its payments.'" In particular, the court explained that Zurich's state of mind was relevant to the bad faith claim and its request for punitive damages, which requires a showing of fraud or malice. Additionally, the court held that the communications were relevant to the parties' coverage

dispute, noting that the materials might reveal whether Zurich agreed with JFW's interpretation of the policies.

The court also rejected Zurich's contention that the motion to compel should be denied because the requested communications contained "confidential financial and other information." The court noted that a protective order was already in place and was sufficient to address any confidentiality concerns.

COMMENTS

The discoverability of reinsurance materials is within the sound discretion of a trial court. Such materials may be more likely to be deemed relevant in the context of bad faith claims, where the insurer's state of mind is at issue. However, as the court noted, a ruling on discoverability is distinct from a ruling on admissibility at trial; under Federal Rule of Procedure 26(b)(1), material need not be admissible as evidence in order to be discoverable.

Simpson Thacher

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.

Andrew T. Frankel
+1-212-455-3073
afrankel@stblaw.com

Bryce L. Friedman
+1-212-455-2235
bfriedman@stblaw.com

Michael J. Garvey
+1-212-455-7358
mgarvey@stblaw.com

Chet A. Kronenberg
+1-310-407-7557
ckronenberg@stblaw.com

Laura Lin
+1-650-251-5160
laura.lin@stblaw.com

Lynn K. Neuner
+1-212-455-2696
lneuner@stblaw.com

Joshua Polster
+1-212-455-2266
joshua.polster@stblaw.com

Tyler B. Robinson
+44-(0)20-7275-6118
trobinson@stblaw.com

Alan C. Turner
+1-212-455-2472
aturner@stblaw.com

George S. Wang
+1-212-455-2228
gwang@stblaw.com

Summer Craig
+1-212-455-3881
scraig@stblaw.com

Matthew C. Penny
+1-212-455-2152
matthew.penny@stblaw.com

Sarah E. Phillips
+1-212-455-2891
sarah.phillips@stblaw.com

Abigail W. Williams
+1-202-636-5569
abigail.williams@stblaw.com

This edition of the Insurance Law Alert was prepared by Bryce L. Friedman / +1-212-455-2235 bfriedman@stblaw.com, Joshua Polster / +1-212-455-2266 joshua.polster@stblaw.com and Karen Cestari / kcestari@stblaw.com.

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

Brussels
Square de Meeus 1, Floor 7
B-1000 Brussels
Belgium
+32-472-99-42-26

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower A
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000