Simpson Thacher

Insurance Law Alert

April 2016

In This Issue

Colorado Supreme Court Declines to Extend Notice-Prejudice Rule to Voluntary Payments Violation

The Colorado Supreme Court ruled that an insurer need not establish prejudice in order to deny coverage based on a policyholder's violation of a voluntary payments provision. *Travelers Prop. Cas. Co. of Am. v. Stresscon Corp.*, 2016 WL 1639565 (Colo. Apr. 25, 2016). (Click here for full article)

Alaska Supreme Court Prohibits Enforcement of Defense Cost Reimbursement Provision

The Alaska Supreme Court ruled that state statutory law prohibits enforcement of a policy provision entitling an insurer to reimbursement of defense costs, even where the insurer specifically reserved the right to seek reimbursement and it was later determined that there was no coverage. *Attorneys Liability Protection Society, Inc. v. Ingaldson Fitzgerald, P.C.*, 2016 WL 1171299 (Alaska Mar. 25, 2016). (Click here for full article)

California Appellate Court Rules That Defending Insurer Is Entitled to Equitable Contribution of Defense Costs from Non-Defending Insurer

A California appellate court ruled that two successive insurers that shared indemnity costs on a pro rata basis must also share defense costs and that the defending insurer was entitled to equitable contribution from the non-defending insurer. *Certain Underwriters at Lloyds, London v. Arch Specialty Ins. Co.*, 2016 WL 1436362 (Cal. Ct. App. Apr. 11, 2016). (Click here for full article)

Fourth Circuit Rules That Insurer Must Defend Class Action Suit Alleging Online Breach of Medical Records

The Fourth Circuit ruled that an insurer was required to defend a class action suit based on the policyholder's release of class members' confidential medical records. *Travelers Indem. Co. of Am. v. Portal Healthcare Solutions, L.L.C.*, 2016 WL 1399517 (4th Cir. Apr. 11, 2016). (Click here for full article)

Georgia Supreme Court Rules That Pollution Exclusion Applies to Lead Paint Claims

Addressing an issue of first impression under Georgia law, the Georgia Supreme Court ruled that a pollution exclusion bars coverage for injuries arising out of the ingestion or inhalation of lead-based paint. *Georgia Farm Bureau Mutual Ins. Co. v. Smith*, 2016 WL 1085397 (Ga. Mar. 21, 2016). (Click here for full article)

New York Court Endorses Pro Rata Allocation of Asbestos Losses, With Policyholder Responsible for Orphan Shares

A New York federal district court ruled that under New York and Georgia law, losses from progressive asbestos injuries must be allocated among insurers on a pro rata basis and that the policyholder was responsible for "orphan shares" created by the insolvency of one insurer. *Liberty Mutual Ins. Co. v. The Fairbanks Co.*, 2016 WL 1169511 (S.D.N.Y. Mar. 22, 2016). (Click here for full article)

New York Appellate Court Rules That Insurer Did Not Waive Coverage Denial Based on Policy Exclusion

A New York appellate court rejected a policyholder's argument that an insurer waived its right to rely on a policy exclusion to deny coverage because it failed to identify that specific provision in its disclaimer letter. *Provencal, LLC v. Tower Ins. Co. of N.Y.*, 2016 WL 1354865 (N.Y. App. Div. 2d Dep't Apr. 6, 2016). (Click here for full article)

South Carolina Court Rules That Policy Benefits Cannot Be Assigned Without Insurer Consent

A South Carolina court rejected a successor entity's attempt to obtain insurance coverage issued to a predecessor company, finding that the insurer did not consent to the assignment and that limited exceptions to the consent requirement did not apply. *PCS Nitrogen, Inc. v. Continental Casualty Co.*, C.A. No. 11-CP-10-387 (S.C. Ct. Common Pleas Mar. 23, 2016). (Click here for full article)

Two Courts Reject General Liability Coverage for TCPA Claims

A Colorado federal district court and an Ohio appellate court denied coverage for claims alleging violations of the Telephone Consumer Protection Act. *Ace American Ins. Co. v. Dish Network, LLC*, 2016 WL 1182744 (D. Colo. Mar. 28, 2016); *Acuity, A Mutual Ins. Co. v. The Siding and Insulation Co.*, 2016 WL 1276471 (Ohio Ct. App. Mar. 31, 2016). (Click here for full article)

Pennsylvania Court Rules That Two Lawsuits Do Not Allege Interrelated Wrongful Acts

A Pennsylvania federal district court ruled that conduct alleged in two separate complaints against the insured was not sufficiently interrelated so as to bar coverage pursuant to an interrelated wrongful acts exclusion. *Connect America Holdings, LLC v. Arch Ins. Co.*, 2016 WL 1254073 (E.D. Pa. Mar. 31, 2016). (Click here for full article)

South Carolina Appellate Court Grants Insurers' Motion to Compel Arbitration

A South Carolina appellate court granted defendant insurers' motion to compel arbitration against non-signatories to the arbitration agreement. *Wilson v. Willis*, 2016 WL 806063 (S.C. Ct. App. Mar. 2, 2016). (Click here for full article)

Florida Appellate Court Strictly Enforces Insured vs. Insured Exclusion

A Florida appellate court ruled that an insured vs. insured exclusion barred coverage regardless of the capacity in which the former director brought suit. *Durant v. James*, 2016 WL 1295100 (Fla. Dist. Ct. App. Apr. 4, 2016). (Click here for full article)

Voluntary Payments Alert:

Colorado Supreme Court Declines to Extend Notice-Prejudice Rule to Voluntary Payments Violation

The Colorado Supreme Court ruled that an insurer need not establish prejudice in order to deny coverage based on a policyholder's violation of a voluntary payments provision. *Travelers Prop. Cas. Co. of Am. v. Stresscon Corp.*, 2016 WL 1639565 (Colo. Apr. 25, 2016).

Stresscon, a subcontractor, sought coverage from Travelers for an underlying claim arising out of a construction accident. Travelers issued a reservation of rights. Thereafter, Stresscon settled the underlying claim without consulting Travelers. Among numerous issues in dispute was whether Travelers was obligated to pay for the settlement given Stresscon's violation of the policy's voluntary payments provision. A Colorado trial court applied a notice-prejudice rule, finding that in order to deny coverage, Travelers must establish that it was prejudiced by Stresscon's violation of the voluntary payments provision. An appellate court affirmed. *See* October 2013 Alert. The Colorado Supreme Court reversed, ruling that the notice-prejudice rule that governs late notice defenses does not extend to a breach of a voluntary payment provision.

In refusing to impose a prejudice requirement in this context, the Colorado Supreme Court reasoned that a voluntary payments provision is not a "mere technicality," but rather "a fundamental term defining the limits or extent of coverage." The court cited *Craft v. Philadelphia Ins. Co.*, 2015 WL 658785 (Colo. Feb. 17, 2015) (discussed in our February 2015 Alert), in which the court ruled that the notice-prejudice rule does not apply to violations of date-certain notice requirements in claims-made policies. The court stated, "[l]ike the notice of claim requirement of the claims-made policy at issue in *Craft*, the no-voluntary payments clause of the contract at issue here goes to the scope of the policy's coverage." Therefore, "applying a notice-prejudice rule to excuse an insured's noncompliance with such a contractual provision would essentially rewrite the insurance contract itself and effectively create coverage where none previously existed."

Because the trial court denied Travelers' motion for directed verdict solely on the basis of the notice-prejudice rule, and because it was undisputed that Stresscon voluntarily settled the underlying claim without Travelers' consent, the court reversed the jury verdict in favor of Stresscon and remanded the case with directions to issue a directed verdict in Travelers' favor.

Defense Cost Alerts:

Alaska Supreme Court Prohibits Enforcement of Defense Cost Reimbursement Provision

Answering questions certified by the Ninth Circuit, the Alaska Supreme Court ruled that state statutory law prohibits enforcement of a policy provision entitling an insurer to reimbursement of defense costs, even where (1) the insurer specifically reserved the right to seek reimbursement; (2) the insured accepted the defense subject to the reservation of rights; and (3) it was later determined that there was no coverage. *Attorneys Liability Protection Society, Inc. v. Ingaldson Fitzgerald, P.C.*, 2016 WL 1171299 (Alaska Mar. 25, 2016).

Alaska statutory law provides that in furnishing a policyholder with independent counsel, an insurer "shall be responsible" for the fees and costs associated with potentially covered claims. AS 21.96.100(d). Although the statute does not specifically address whether an insurer can later seek reimbursement of defense costs, the court interpreted the statute to prohibit such reimbursement. The court reasoned that the statute focuses on the "mandatory requirement that insurers pay for the cost of independent counsel," using terms such as "shall" and "obligation." The court therefore concluded that the statute "clearly allocates to the insurer the responsibility to pay" defense costs and that "[a]ny effort by the insurer to shift such expenses to an insured would violate the allocation that the statute requires and would therefore be invalid." The court held that the prohibition against reimbursement applies not only in cases where it is subsequently determined that a policy exclusion bars coverage, but also to cases where it is determined that there was

"no possibility of coverage" in the first place. The court stated that "even if it were later determined that there was no possibility of coverage, that denial has no retroactive effect on the duty to defend." In so ruling, the court expressly distinguished California statutory and common law in this context, which allows for reimbursement of defense costs.

California Appellate Court Rules That Defending Insurer Is Entitled to Equitable Contribution of Defense Costs from Non-Defending Insurer

A California appellate court ruled that two successive insurers that shared indemnity costs on a pro rata basis must also share defense costs, and that the defending insurer was therefore entitled to equitable contribution from the non-defending insurer. *Certain Underwriters at Lloyds, London v. Arch Specialty Ins. Co.*, 2016 WL 1436362 (Cal. Ct. App. Apr. 11, 2016).

Underwriters and Arch insured Framecon under successive primary policies. When Framecon was sued in construction defect litigation, it sought a defense from both insurers. Underwriters agreed to defend under a reservation of rights, but Arch refused to defend, citing an "other insurance" provision that stated that if another insurer was providing a defense, Arch's policy would be "excess" with regard to defense costs, even if coverage were found to apply. The underlying claims against Framecon were ultimately settled. Arch and Underwriters provided indemnification on a pro rata, "time on the risk" basis. Thereafter, Underwriters sought equitable contribution from Arch for the defense costs incurred in the underlying litigation. Both parties moved for summary judgment. A trial court ruled in favor of Arch, concluding that the "other insurance" clause was valid and enforceable with respect to Arch's defense obligations. The appellate court reversed.

The appellate court ruled that Underwriters was entitled to equitable contribution of defense costs from Arch because both insurers were "on the risk" during the operative time frame. The court held that Arch's "other insurance" provision was an unenforceable "escape clause" that violated public policy. The court explained that:

> Arch's policy made Arch liable for defense costs, but then purported to extinguish that obligation when other insurance afforded a defense . . . . [E]nforcing Arch's clause would result in imposing on Underwriters the burden of shouldering a portion of defense costs attributable to claims arising from a time when Arch was the *only* insurer.

In addition, the court ruled that Arch could not circumvent this result by placing the "other insurance" provision in the "coverage" section of the policy as well as the "limitations" section, noting that location is not determinative in this context.

Data Breach Alert:

Fourth Circuit Rules That Insurer Must Defend Class Action Suit Alleging Online Breach of Medical Records

The Fourth Circuit ruled that an insurer was required to defend a class action suit based on the policyholder's release of class members' confidential medical records. *Travelers Indem. Co. of Am. v. Portal Healthcare Solutions, L.L.C.*, 2016 WL 1399517 (4th Cir. Apr. 11, 2016).

Portal was sued in a class action complaint alleging negligence, breach of warranty and breach of contract, among other things, based on the accidental release of confidential medical records online. Portal sought coverage under policies that covered damages because of injury arising from "the electronic publication of material that . . . gives unreasonable publicity to a person's private life."

Travelers sought a declaration that it had no duty to defend on the ground that there had been no "publication." In particular, Travelers argued that there was no publication because (1) Portal did not intend to expose the materials to the public, and (2) no third party was alleged to have viewed the information. A Virginia district court rejected both arguments, ruling that Travelers was obligated to defend the suit. *Travelers Indem. Co. of Am. v. Portal Healthcare Solutions, L.L.C.*, 35 F. Supp.3d 765 (E.D. Va. 2014). The

district court reasoned that publication does not hinge on intent or third-party access. The court stated that "[p]ublication occurs when information is 'placed before the public,' not when a member of the public reads the information placed before it." In so ruling, the court distinguished *Recall Total Info. Mgmt. Inc. v. Fed. Ins. Co.*, 83 A.3d 664 (Conn. App. Ct. 2014), *aff'd*, 2015 WL 2371957 (Conn. May 26, 2015) (discussed in May 2015 Alert), in which the court found no publication where confidential records had fallen out of the back of a van and were never recovered. The court explained that "[t]his case is distinguishable because, here, the information was posted on the internet and thus, was given not just to a single thief but to anyone with a computer and internet access." The Fourth Circuit affirmed for the reasons set forth in the district court's opinion.

Pollution Exclusion Alert:

Georgia Supreme Court Rules That Pollution Exclusion Applies to Lead Paint Claims

Addressing an issue of first impression under Georgia law, the Georgia Supreme Court ruled that a pollution exclusion bars coverage for injuries arising out of the ingestion or inhalation of lead-based paint. *Georgia Farm Bureau Mutual Ins. Co. v. Smith*, 2016 WL 1085397 (Ga. Mar. 21, 2016).

Georgia Farm Bureau filed a declaratory judgment action seeking a ruling that it had no duty to defend or indemnify claims alleging lead paint-related injuries. A Georgia trial court granted the insurer's summary judgment motion, finding that the pollution exclusion barred coverage. An appellate court reversed, noting the conflict among jurisdictions on this issue and concluding that the term "pollutant" was ambiguous as to whether it encompassed lead or lead-based paint. *Smith v. Georgia Farm Bureau Mutual Ins. Co.*, 2015 WL 1432625 (Ga. Ct. App. Mar. 30, 2015) (discussed in our May 2015 Alert). The Georgia Supreme Court reversed, ruling that lead paint is a pollutant under the policy. The court explained that Georgia law does not limit pollution exclusions to traditional environmental pollution and that pollution exclusions are enforced "without requiring that the pollutant at issue be explicitly named in the policy."

Allocation Alert:

New York Court Endorses Pro Rata Allocation of Asbestos Losses, With Policyholder Responsible for Orphan Shares

Applying New York and Georgia law, a New York federal district court ruled that losses from progressive asbestos injuries must be allocated among insurers on a pro rata basis. The court further held that the policyholder was responsible for "orphan shares" created by the insolvency of one insurer. *Liberty Mutual Ins. Co. v. The Fairbanks Co.*, 2016 WL 1169511 (S.D.N.Y. Mar. 22, 2016).

Fairbanks, a valve manufacturer, was named as a defendant in numerous asbestos-related injury suits. Fairbanks' insurers paid its defense and indemnity costs. When one insurer became insolvent, Fairbanks argued that the solvent insurers had to assume the costs previously borne by the now-insolvent insurer (the "orphan shares"). Fairbanks further contended that each insurer was liable on a joint and several, or "all sums" basis, up to policy limits. In contrast, the insurers argued that Fairbanks was responsible for payment of the orphan shares and that indemnification costs should be allocated among insurers on a pro rata basis. The court agreed with the insurers, ruling that under both New York law (which governed some policies) and Georgia law (which governed others), pro rata allocation was appropriate.

The court held that New York precedent supports a pro rata approach to allocating progressive injury claims, recognizing that New York courts have consistently rejected an all sums approach as inconsistent with policy language requiring injuries to occur "during the policy period." The court also dismissed Fairbanks' argument that non-cumulation provisions in certain policies were inconsistent with pro rata allocation. Although one court applying New York law has applied an all sums approach, *see Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76 (Del. Ch. Ct. 2009) (discussed in December 2009 Alert), the court commented that the

decision had "limited persuasive value" given the weight of authority against it and the fact the Delaware Supreme Court certified the issue for review by the New York Court of Appeals, which heard argument in March 2016. The court reached the same conclusion under Georgia law. Although Georgia appellate courts have not expressly addressed allocation for progressive injuries, the court held that "well established principles of contract interpretation support applying a pro rata approach."

The court also ruled that under both New York and Georgia law, Fairbanks was responsible for the orphan share payments. The court explained that when one insurer becomes unable to pay, "there is logic in having the risk [of] such defalcation fall on the insured, which purchased the defaulting insurer's policy, rather than on another insurer which was a stranger to the selection process." The court rejected Fairbanks' argument that a Georgia insolvency statute required solvent insurers to cover the costs of an insolvent insurer. The court held that the statute applied only where there is an overlap in coverage between a solvent and insolvent insurer. Here, Liberty Mutual and the insolvent carrier were never on the risk at the same time.

Waiver Alert:

New York Appellate Court Rules That Insurer Did Not Waive Coverage Denial Based on Policy Exclusion

A New York appellate court rejected a policyholder's argument that an insurer waived its right to rely on a policy exclusion to deny coverage because it failed to identify that specific provision in its disclaimer letter. *Provencal, LLC v. Tower Ins. Co. of N.Y.*, 2016 WL 1354865 (N.Y. App. Div. 2d Dep't Apr. 6, 2016).

The policyholder sought coverage for water-related damage under a commercial property policy. The insurer disclaimed coverage, identifying a particular exclusion relating to underground water. In ensuing litigation, the insurer argued, among other things, that the damage was excluded by a flood and surface water exclusion. The court agreed and ruled in the insurer's favor. On appeal, the policyholder conceded that the flood and surface water exclusion applied, but argued that the insurer had waived its right to disclaim coverage on that basis because it was not specifically mentioned in the disclaimer.

The court explained that New York Ins. Law § 3420, which imposes strict disclaimer requirements, does not apply here because the statute is limited to death or bodily injury claims, and does not encompass property damage claims. Therefore, common law principles of waiver applied. Under New York precedent, common law waiver requires a showing of prejudice resulting from the insurer's conduct. The court held that the policyholder failed to establish prejudice and that the insurer was therefore not estopped from relying on the flood and surface water exclusion in denying coverage.

Assignment Alert:

South Carolina Court Rules That Policy Benefits Cannot Be Assigned Without Insurer Consent

A South Carolina court rejected a successor entity's attempt to obtain insurance coverage issued to a predecessor company, finding that the insurer did not consent to the assignment and that limited exceptions to the consent requirement did not apply. *PCS Nitrogen, Inc. v. Continental Casualty Co.*, C.A. No. 11-CP-10-387 (S.C. Ct. Common Pleas Mar. 23, 2016).

PCS Nitrogen sought coverage for environmental contamination claims under liability policies issued to Columbia Nitrogen Corporation ("CNC"). Insurers had issued primary and umbrella policies to CNC, which expressly provided that "[a]ssignment of interest under this policy shall not bind [the insurer] until its consent is endorsed hereon." Through a series of acquisitions, asset purchases and mergers, PCS Nitrogen became the "successor-by-merger" to some (but not all) of the original assets and liabilities of CNC. PCS Nitrogen argued that it received a valid assignment of CNC's policies as part of one of the corporate transactions which purported to transfer CNC's insurance rights and benefits. PCS Nitrogen further argued that insurer consent was not required

because under South Carolina law, anti-assignment clauses do not apply to post-loss assignments. The court disagreed and ruled in favor of the insurers.

The court ruled that CNC's insurance policies were never assigned to PCS Nitrogen. In so ruling, the court noted that the transaction documents purported only to transfer "benefits and proceeds" rather than the policies themselves, and that in any event, any such transfer was contingent on insurer consent. The court rejected PCS Nitrogen's post-loss assignment argument, explaining that South Carolina strictly limits assignments without consent to cases where a chose in action (*i.e.*, a current obligation to pay a sum of money) exists. The court held that a chose in action did not exist here because there had been no judgment or settlement against CNC. Finally, the court also rejected the argument that PCS Nitrogen was entitled to CNC's insurance rights as a corporate successor, finding no factual support for that assertion.

TCPA Alert:

Two Courts Reject General Liability Coverage for TCPA Claims

A Colorado federal district court and an Ohio appellate court denied coverage for claims alleging violations of the Telephone Consumer Protection Act ("TCPA").

In *Ace American Ins. Co. v. Dish Network, LLC*, 2016 WL 1182744 (D. Colo. Mar. 28, 2016), a Colorado federal district court ruled that an insurer had no duty to defend or indemnify claims that DISH Network violated the TCPA.

The United States and several states sued DISH, alleging that it violated the TCPA and related state laws by making solicitation calls to phone numbers on the Do Not Call Registry. Plaintiffs sought statutory damages, civil penalties and an injunction preventing future TCPA violations. Ace filed a declaratory judgment action, seeking a ruling that it had no duty to defend or indemnify the claims. The court agreed and granted Ace's summary judgment motion.

The court ruled that general and excess liability policies did not provide coverage because the underlying claims did not seek "damages." The underlying complaint sought statutory damages under the TCPA ($500 for each violation), as well as treble damages and civil penalties. The court held that these forms of relief are financial penalties that are punitive in nature rather than compensatory or remedial. The court therefore ruled that the statutory damages were excluded from insurance coverage under Colorado law. The Supreme Courts of Illinois and Missouri reached the opposite conclusion, ruling that TCPA damages were not uninsurable punitive damages. *See Standard Mutual Ins. Co. v. Lay*, 989 N.E.2d 591 (Ill. 2013) (discussed in June 2013 Alert); *Columbia Casualty Co. v. HIAR Holding, L.L.C.*, 411 S.W.3d 258 (Mo. 2013) (discussed in September 2013 Alert).

The court also ruled that coverage under a Personal and Advertising Injury provision was barred by a Broadcasting and Telecasting Exclusion. The court noted that although TCPA claims might fall within the scope of Personal and Advertising Injury as an "invasion of seclusion" claim, coverage was nonetheless barred by an exclusion for insureds in the business of "advertising, broadcasting, publishing or telecasting." In so ruling, the court rejected DISH's argument that the exclusion was ambiguous and/or should be construed to apply only to businesses that produce content.

An Ohio appellate court also rejected coverage for TCPA claims, ruling that an insurer had no duty to indemnify a class action settlement arising out of fax blasting claims. *Acuity, A Mutual Ins. Co. v. The Siding and Insulation Co.*, 2016 WL 1276471 (Ohio Ct. App. Mar. 31, 2016).

Acuity had paid nearly $2 million toward an underlying settlement pursuant to a Personal and Advertising Injury provision. However, the policyholder sought an additional $2 million under a Property Damage provision, which covered property damage caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." The court agreed with Acuity that sending unsolicited faxes does not constitute an "occurrence" and is precluded by the intentional acts exclusion. The court explained that even if a policyholder does not intend to violate the TCPA, it does intend to send the faxes, with knowledge that sending them would use the recipients' paper, toner,

and time. The court stated, "[u]nder Ohio law, an intent to cause harm will be inferred when 'the insured's intentional act and the harm caused are intrinsically tied so that the act has necessarily resulted in the harm.'"

Claims-Made Alert:

Pennsylvania Court Rules That Two Lawsuits Do Not Allege Interrelated Wrongful Acts

Last month, we reported on decisions upholding the denial of claims-made coverage based on policy provisions that bar coverage for acts "interrelated" to wrongful acts allegedly committed prior to the policy period. *See* March 2016 Alert. This month, a Pennsylvania federal district court reached the opposite conclusion, finding that conduct alleged in two separate complaints against the insured was not sufficiently interrelated so as to bar coverage pursuant to an interrelated wrongful acts exclusion. *Connect America Holdings, LLC v. Arch Ins. Co.*, 2016 WL 1254073 (E.D. Pa. Mar. 31, 2016).

Life Alert and Connect are competitors in the market for medical alert response systems. In 2009, Life Alert sued Connect alleging trademark infringement and unfair competition. The action was settled and an injunction was issued enjoining Connect from using Life Alert's trademarks. In 2013, Life Alert brought another suit against Connect. This time, Life Alert named several other defendants who were not included in the first action. The complaint alleged unfair competition, trademark infringement and false advertising, among others. The parties settled the 2013 action and Connect sought coverage from Arch under a claims-made policy. Arch denied coverage on several bases, including an interrelated claims provision which precluded coverage for claims arising out of wrongful acts that are related to wrongful acts that occurred before the policy's inception date. In ensuing litigation, a Pennsylvania federal district court granted Connect's motion for summary judgment on the interrelated claims provision issue, ruling that the two lawsuits were not based on interrelated wrongful acts.

The policy defined Interrelated Wrongful Acts as "Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of causally connected facts, circumstances, situations, events, transactions or causes." The court held that the term "common nexus" was ambiguous and should be construed to require a "link between the acts." The court acknowledged that the 2009 and 2013 complaints shared numerous similarities: they alleged many of the same causes of action; they both claimed that Connect deliberately caused confusion and deception among customers; and they both involved some of the same trademarks. However, the court noted that Connect's alleged scheme and conduct were different in each action. Whereas the 2009 complaint focused on Connect's website and internet activities, the 2013 complaint centered on a telemarketing scheme. In addition, the 2013 action included a new false advertising claim and allegations relating to a trademark that was not yet in existence in 2009. Finally, the court noted that in the 2013 action, Life Alert did not seek an injunction and did not allege that Connect had violated the 2009 injunction. Based on these factors, the court concluded that there was no "common nexus" between the two actions.

Arbitration Alert:

South Carolina Appellate Court Grants Insurers' Motion to Compel Arbitration

A South Carolina appellate court granted defendant insurers' motion to compel arbitration against non-signatories to the arbitration agreement. *Wilson v. Willis*, 2016 WL 806063 (S.C. Ct. App. Mar. 2, 2016).

Several lawsuits alleging fraud and unfair trade practices were brought by policyholders and competing insurance agents against two insurance agents and their agency. Plaintiffs also named several insurers as defendants, arguing that they were liable under *respondeat superior* for failing to investigate or supervise the agents. The insurers moved to compel arbitration and dismiss the suits, relying on an arbitration provision in the agency agreement they had executed with the agency. A trial court denied the insurers' motion to compel, noting that the agency had not signed the agency agreement and that the

plaintiffs were not parties to the agreement. The appellate court reversed.

First, the court ruled that South Carolina law does not require both parties to sign an agreement for it to be enforceable. Therefore, although the agency never signed the agency agreement, the court deemed it valid and enforceable based on the course of conduct (*i.e.*, that the agency sold insurance policies on behalf of the insurers pursuant to the agency agreement). The court rejected a statute of frauds argument, noting that performance of the agency agreement was possible within a year because either party could terminate at will within ninety days' notice.

Second, the court held that the arbitration provision was sufficiently broad so as to encompass plaintiffs' tort claims. The provision required arbitration of any dispute that "arises in connection with the interpretation of this Agreement. . . ." The court reasoned that the tort claims were "premised on rights and duties that would not exist but for" the agency agreement, and were thus "inextricably linked" to the agreement.

Third, the court ruled that compelling arbitration against non-signatories (the plaintiff policyholders and agencies) was appropriate. The court held that the non-signatories were equitably estopped from arguing that their status as non-signatories preluded enforcement of the arbitration provision because their complaints sought to benefit from the enforcement of other provisions in the agency agreement. Although the plaintiffs did not expressly rely on any provisions in the agency agreement, the court held that the plaintiffs received a "direct benefit" from that agreement because their claims were based on duties that arose from that contract.

Fourth, the court held that the insurers did not waive the right to compel arbitration. Although the insurers did not assert arbitration as a defense in their answers, they did not delay in moving to compel arbitration (actions had been pending for six to eleven months when the motion to compel was filed). In addition, limited discovery had occurred before to the motion to compel. The court therefore concluded that the plaintiffs were not prejudiced by the motion to compel.

Finally, the court rejected the argument that the agreement to arbitrate (governed by the Federal Arbitration Act) was reverse-preempted by state statutory law which exempts "any insured or beneficiary under any insurance policy from arbitration." The court explained that the South Carolina statute did not apply because the operative contract was an agency agreement rather than an insurance policy.

Directors and Officers Alert:

Florida Appellate Court Strictly Enforces Insured vs. Insured Exclusion

Previous Alerts have reported on decisions that address the parameters of an insured vs. insured exclusion, which bars coverage for claims made against an insured company or officer by an "Insured Person," typically defined as "any past, present or future director, trustee, officer, employee or honorary or advisory director or trustee of the Company." *See* January 2015 Alert, October and April 2014 Alerts. A majority of courts have deemed insured vs. insured exclusions unambiguous and enforceable as written. In a recent decision, a Florida appellate court joined this trend, finding that the exclusion barred coverage regardless of the capacity in which the former director brought suit. *Durant v. James*, 2016 WL 1295100 (Fla. Dist. Ct. App. Apr. 4, 2016).

Durant, a former director/shareholder, brought suit against James, the President and CEO of the insured company. Although each party met the definition of "Insured Person" in the exclusion, Durant argued that the exclusion did not apply because he was not suing James in his official capacity as former director, but rather in a personal capacity, in connection with a money judgment obtained in a personal civil action relating to overvalued stock. The court rejected this argument, stating that "the capacity in which the claimant sued the other officer or director in the first instance ha[s] no bearing on the bar on coverage under a D&O policy's insured versus insured exclusion."

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.

David J. Woll
+1-212-455-3136
dwoll@stblaw.com

Mary Beth Forshaw
+1-212-455-2846
mforshaw@stblaw.com

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

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

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

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

Michael D. Kibler
+1-310-407-7515
mkibler@stblaw.com

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

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

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

Deborah L. Stein
+1-310-407-7525
dstein@stblaw.com

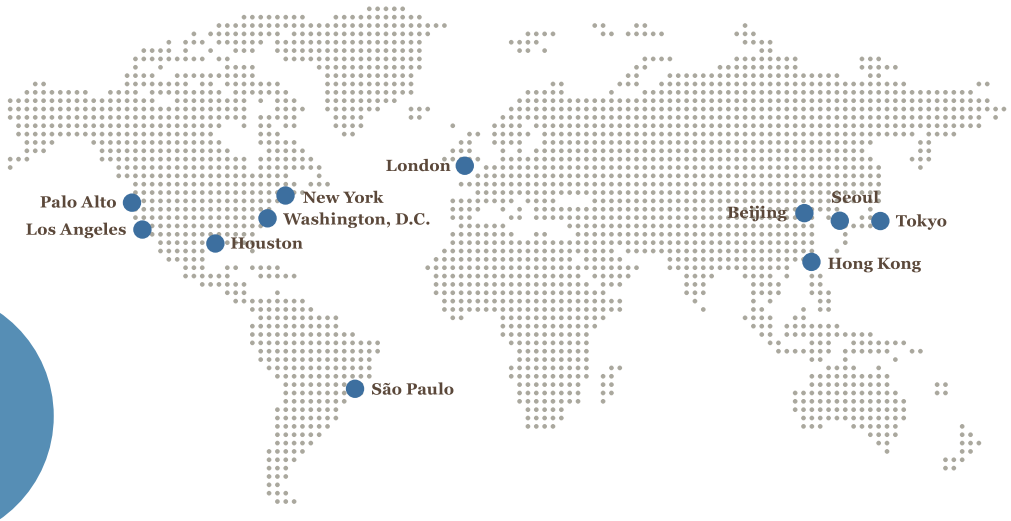
Craig S. Waldman
+1-212-455-2881
cwaldman@stblaw.com

Susannah S. Geltman
+1-212-455-2762
sgeltman@stblaw.com

Elisa Alcabes
+1-212-455-3133
ealcabes@stblaw.com

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

This edition of the Insurance Law Alert was prepared by Mary Beth Forshaw mforshaw@stblaw.com /+1-212-455-2846 and Bryce L. Friedman bfriedman@stblaw.com /+1-212-455-2235 with contributions by Karen Cestari kcestari@stblaw.com.



Simpson Thacher Worldwide

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

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

ASIA

Beijing
3901 China World Tower
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

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
+82-2-6030-3800

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