Insurance Coverage Law Update: The Recent Cases You Need to Know

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Topics We Will Cover Include:

- Differences between Occurrence and Claims Made Policies
- Effect of Delay in Giving Notice of an Insurance Claim
- Reservation of Rights Letters
- Insurers' Duty to Defend and Duty to Indemnify
- Insurers' Payment of Defense Costs and Requests for Reimbursement of Defense Costs
- All Sums and Pro Rata Allocation of Liability Among Insurers
- Exclusions in CGL Policies for Professional Services, Impaired Property and Pollution
- Insurance Agent's Representation that a Claim is Covered
- Data Breach Claims Under Traditional and Cyber Policies
- Coverage for Additional Insureds
- What Constitutes Covered Property Damage

Need to Know: Late Notice of Claim

- *Developing Trend*: More state courts are allowing liability insurers to deny coverage under claims-made policies based on the policyholder's late notice of a claim without showing prejudice.

- *Example: Templo Fuente De Vida Corp. v. National Union Fire Ins. Co.*, 129 A.3d 1069 (N.J. 2016)

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Insurance Primer: Liability Policies

- Coverage under an occurrence policy attaches when a peril insured occurs during that policy period even though a third-party claim against the policyholder may not arise until years later.

- Coverage under a “claims-made” policy is triggered by a third-party making of a claim against the policyholder during that policy period without regard to when the insured peril occurred.

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Purpose of Notice of Claim Provisions

- Gives the insurer the opportunity to timely investigate the third-party claim and preserve evidence
- Allows the insurer to control or participate in negotiations with the third party claimant
- Assists the insurer in setting reserves for the claim

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Prejudice Requirement

- A majority of states require the insurer to show prejudice to deny coverage based on a policyholder's late notice of a claim under occurrence policies.

- *Century Sur. Co. v. Jim Hipner, LLC*, 2016 Wyo. LEXIS 89 (Wy. Aug. 17, 2016) – adopted notice-prejudice rule (occurrence policy); held that insurer cannot "contract around" rule

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Templo Fuente De Vida Corp. v. National Union Fire Ins. Co., 129 A.3d 1069 (N.J. 2016)

- Policyholder provided insurer notice of a third party complaint under a "claims made and reported" D&O liability policy more than 6 months after service of complaint

- Policy required policyholder to give the insurer written notice of a claim "as soon as practicable" as a condition precedent to coverage

- Court held that longstanding precedent in New Jersey requiring a showing of prejudice under occurrence policies did not apply to sophisticated parties under claims-made policies with clear and unambiguous terms

How Late Is Too Late?

- *Hamilton Properties v. American Ins. Co*., 643 Fed. Appx. 437 (5th Cir. April 14, 2016) (Texas) – notice 19 months after hail damage occurred was too late as a matter of law

- *Travelers Indemnity Co. v. Forrest County*, 2016 WL 3680864 (S.D. Miss. July 7, 2016) – 20 months not too long as a matter of law

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Need to Know: Duties to Defend and Indemnify, Payment of Defense Costs and Reservations of Rights

Different Duties with Different Standards

- *Hartford Cas. Ins. Co. v. DP Eng'g, L.L.C.*, 2016 U.S. App. LEXIS 11951, 827 F.3d 423 (5th Cir. 2016) (Texas) – held that even though insurer had no duty to defend because underlying actions fell within professional services exclusion, facts as developed could show liability was not associated with professional services and thus insurer may still have duty to indemnify

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Insurance Primer:
Payment of Defense Costs; Effect of Reservation of Rights

- Policy may require insurer to pay Defense Costs directly to counsel selected to defend policyholder or reimburse the policyholder for those costs

- "Burning Limits" policies

- Potential Conflict of Interest When Insurer Reserves Rights; *Moeller* Rule in Mississippi

Meaning of "Obligation to Pay"

- *Federal Ins. Co. v. Singing River Health Sys.*, 2015 U.S. Dist. LEXIS 134814 (S.D. Miss. Oct. 2, 2015) – court held that because insurer reserved rights, insurer, not policyholder, was "obligated to pay" costs of independent defense counsel under *Moeller* so those costs did not erode limits of "burning limits" policy

Insurer Requests for Reimbursement of Defense Costs If Claim Not Covered

- Does the policy language or state law obligate the policyholder to reimburse the insurer for Defense Costs if the claim is ultimately not covered?

- *Centex Homes v. St. Paul Fire & Marine Ins. Co*., 187 Cal. Rptr. 3d 542 (Ca. Ct. App. 2015) – discusses insurer's request for reimbursement of defense costs if claim proves to be outside scope of coverage and potential conflict of interest

Need to Know: Allocation of Liability Among Multiple Insurers on Same Risk

- "Long-tail" claims against policyholder often involve exposure to injury-causing harm over multiple policy periods triggering allocation disputes among insurers.
- "All Sums" method allows policyholder to recover up to limits of liability under any policy in effect during periods when damage occurred
- "Pro Rata" method limits an insurer's liability to its pro rata share of the total loss incurred during that policy period

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Matter of Viking Pump, Inc., 27 N.Y.3d 244 (N.Y. 2016)

- New York's highest court clarified that *the policy language controls* whether the all sums or pro rata method of allocation is appropriate (rather than a "blanket rule" adopting one or the other).

- "All Sums" method applied to determine excess insurers' liability for asbestos injuries because "noncumulation" clause and "continuing coverage" clause in the followed primary policy was inconsistent with the pro rata method.

EMJ Corp. v. Hudson Specialty Ins. Co., 2016 U.S. App. LEXIS 115046 (5th Cir. Aug. 16, 2016) (Mississippi)

- Fifth Circuit held that two excess insurers were responsible for a portion of a policyholder's settlement to an injured inspector in proportion to their policy limits
- Decision turned on "other insurance" clauses in both policies
- "Other Insurance" clauses attempt to define how liability should be allocated when multiple policies apply
- Under Mississippi law, the presence of "other insurance" clauses in both excess policies in effect canceled one another out and required a pro rata allocation.

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Insurance Primer: Horizontal vs. Vertical Exhaustion of Concurrent Coverage

- Horizontal Exhaustion: Policyholder must exhaust all triggered primary and umbrella layers before tapping into excess policies

- Vertical Exhaustion: Policyholder can access excess policies once the immediately underlying policies' limits are exhausted, even if other lower-level policies during different policy periods remain unexhausted

- Viking Pump court held that vertical exhaustion applied because excess policies were triggered by exhaustion of the specific underlying policies in that policy year

Need to Know: Insurance agent's representation of coverage cannot create coverage

Martin v. Shelter Mut. Ins. Co., 2016 WL 3648288 (S.D. Miss. July 1, 2016) - federal court rejected a policyholder's argument that a homeowner's insurer was estopped from denying coverage for water damage because the insurance agent represented that the damage was covered

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Need to Know: Coverage for Data Breach under Liability and Cyber policies

- *Ellicott City Cable, LLC v. Axis Ins. Co*., 2016 U.S. Dist. LEXIS 95819 (D. Md. July 22, 2016)

- Policyholder was sued for alleged piracy of satellite television programming. Insurer argued the programming qualified as "data" and fell within data breach exclusion in multimedia liability policy

- Court held that the undefined term "data" was ambiguous as used in a data breach exclusion and construed it in favor of the policyholder

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P.F. Chang's China Bistro Inc. v. Federal Ins. Co., 2016 U.S. Dist. LEXIS 70749 (D. Az. May 31, 2016)

- A services agreement between P.F. Chang's and its third party credit card services provider required P.F. Chang's to reimburse the services provider for certain charges related to a data breach. P.F. Chang's sought coverage under its cyber policy for these costs.

- Court held that the "contractual liability" exclusion in the policy defeated coverage. The court observed that P.F. Chang's is a sophisticated party and could have bargained for coverage of those costs.

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Recall Total Info. Mgmt., Inc. v. Fed. Ins. Co., 2015 WL 2371957 (Conn. May 26, 2015)

Policyholder made a claim under the "personal and advertising injury" coverage of its CGL policy for damages caused by loss of a customer's computer tapes containing employees' personal information (the tapes fell out of a vendor's van). The court held there was no "publication" because there was no evidence anyone had accessed the information.

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Travelers v. Portal Healthcare Solutions, 2016 U.S. App. LEXIS 6554 (4th Cir. April 11, 2016)

- Fourth Circuit upheld the district court's decision under Virginia law that Travelers had a duty to defend Portal Healthcare in a putative class action because the availability of the hospital's medical records online due to a data breach qualified as "publication". The court observed that this was so because "any member of the public with an internet connection could have viewed the plaintiffs' private medical records …"

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Need to Know: Named Insureds and Additional Insureds

- Insurance company underwrites policy and establishes premium based on claims history and risk posed by Named Insured

- Additional Insureds identified by name have same rights as Named Insured

- ACCORD Certificates of Liability Insurance (“COI”) do not grant coverage and are unreliable

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Insurance Primer: Additional Insured – Types of Endorsements

- Designated Person or Organization (CG 20 26)
- Owners Lessees, or Contractors – Scheduled Person or Organization (CG 20 10)
- Owners, Lessees or Contractors – Automatic Status When Required in Written Construction Agreement With You (CG 20 33)
- Owners, Lessees or Contractors – Automatic Status When Required in Written Construction Agreement (CG 20 38)

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Meaning of Automatic Status When Required in Written Construction Agreement

- *Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co*., 2016 N.Y. App. Div. LEXIS 5930 (Sept. 15, 2016)

- Plaintiff construction managers argued they were intended to be included as an additional insured under the prime contractor's CGL policy

- Court held that only those who have a direct written contract with the named insured have coverage under this endorsement

Need to Know: What qualifies as "property damage" under a liability policy?

- *Keeley v. Travelers Home and Marine Ins. Co*., 2016 U.S. Dist. LEXIS 80798 (W.D. Wash. June 21, 2016)

- Court held that loss of use of apartment due to excessive noise caused by flooring qualified as "property damage." However, there was no "occurrence" because "the harm resulting from the floor's installation was not truly an 'unexpected, independent, and unforeseen happening.'"

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- *Wisconsin Pharmacal Co. v. Nebraska Cultures of Cal., Inc.*, 876 N.W.2d 72 (Wis. 2016) – Wisconsin Supreme Court split 3-2 regarding meaning of "Property Damage" under a CGL Policy where a whole shipment of probiotic supplements had to be destroyed because the policyholder had supplied the supplement maker with the wrong ingredient. The majority held the insurer had no duty to defend or indemnify the policyholder because there was no "property damage" and even if there were, the "impaired property" exclusion would apply.

- *United States Metals, Inc. v. Liberty Mut. Group, Inc*., 2015 Tex. LEXIS 1081 (Texas Dec. 4, 2015) – Texas Supreme Court held that diesel units were not "physically injured" merely by the installation of the policyholder's faulty flanges

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Pollution Exclusions: What is "Pollution"?

- *Evanston Ins. Co. v. J&J Cable Construction, LLC*, 2016 WL 5346079 (M.D. Ala. Sept. 22, 2016)

- Court addressed whether under Alabama law sewage qualifies as "pollution" under absolute pollution exclusion in CGL policy

- Court discussed Alabama precedent on pollution exclusions and concluded that a "reasonably prudent person" would not consider sewage from damaged sewer pipes to be pollution

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