WIGGIN AND DANA *A Newsletter from the Insurance Practice Group at Wiggin and Dana LLP*

INSURANCE NEWS

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We are pleased to share this latest issue of the Wiggin and Dana Insurance Practice Group Newsletter. We circulate this newsletter by e-mail periodically to bring to the attention of our colleagues in the insurance industry reports on recent developments, cases and legislative/regulatory actions of interest, and happenings at Wiggin and Dana. We welcome your comments and questions.

TIMOTHY A. DIEMAND
JOSEPH G. GRASSO
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IN THIS ISSUE

WE WISH OUR COLLEAGUES, CLIENTS AND FRIENDS ALL THE BEST FOR THE HOLIDAY SEASON, AND A HAPPY AND HEALTHY NEW YEAR.

The Common Interest Doctrine – A Recent Expansion in the Second Circuit?

By Joseph Grasso and Michael Thompson

Schaeffler Holding, LLP v. United States, No. 14-1965, 2015 WL 6874979 (2d Cir. 2015)

Generally speaking, the "common interest doctrine" is an "exception to the general rule that voluntary disclosure of confidential, privileged material to a third party waives any applicable privilege." *Sokol v. Wyeth, Inc.*, No. 07 Civ. 8442, 20008 WL 316662 at *5 (S.D.N.Y. 2008). It serves to "protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 284 F.R.D. 132, 139 (S.D.N.Y. 2012)(quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).

The common interest doctrine often plays an important role in the relationship between insurers (cedents) and reinsurers. For instance, when a dispute arises between a policyholder or third party and an insurer, a litigant may seek discovery relating to the existence and scope of the insurer's reinsurance coverage, including documents exchanged in the normal course of business between the cedent and its reinsurers. Some of these documents may include privileged materials. Often policyholders argue that insurers waive their right to assert privilege on any document disclosed to reinsurers. Insurers and reinsurers, on the other hand, will argue that they have a "common interest," which allows documents to maintain their privileged status thereby preventing disclosure to a third party, like the policyholder.

While there is little uniformity in how the "common interest doctrine" is applied by courts across the United States, and the analysis is greatly dependent on which state's law governs, most states require that a "common legal interest" rather than simply a "common commercial interest" be shared among the parties exchanging information for the doctrine to apply to avoid waiver of an applicable privilege. Recently, in *Schaeffler Holdling, LLP v. United States*, however, the Second Circuit (the Federal Appellate Court encompassing New York, Connecticut and Vermont) found that a "common legal interest" may be established where participants in a business relationship had a strong common interest in the outcome of a legal matter, even where one of the participants only had a financial interest in the legal outcome. The apparently expansive view taken by the Second Circuit in *Schaeffler* could prove beneficial to insurers and reinsurers seeking to protect the privilege status attached to certain documents exchanged among them.

In *Schaeffler*, the Schaeffler Group borrowed 11 billion euros from a Consortium of banks to make a tender offer to Continental AG. When more shareholders than expected accepted the tender offer, Shaeffler needed to restructure and refinance its acquisition debt in order to avoid financial collapse. In anticipation of an eventual tax audit by the IRS, Schaeffler hired Ernst & Young, an accounting firm, to produce a memo addressing the tax implications and possible liability related to the transactions. Schaeffler shared the memo with the Consortium, which was also relying on the restructuring and refinancing to avoid substantial losses on its initial loan to Schaeffler. The IRS ultimately commenced an audit, requesting disclosure of the E&Y memo. Schaeffler objected to producing the memo, arguing it was protected by the attorney/client privilege (pursuant to the "tax practitioner" extension of that privilege) and the work-product doctrine.

The District Court found in favor of the IRS ruling that there was no "common legal interest" between Schaeffler and the Consortium. It held that Schaeffler waived the attorney/client privilege when it shared the E&Y memo with the Consortium because the Consortium did not share any common legal interest with Schaeffler, only a commercial interest.

On appeal, the Second Circuit reversed, finding that the Consortium's interest in avoiding its own financial loss established a common legal interest with Schaeffler. In doing so, the Court did not undertake a choice of law analysis but relied on federal case law from various jurisdictions to consider the question of "whether the Consortium's common interest with [the Schaeffler Group] was of a sufficient legal character to prevent a waiver by the sharing of those communications." Initially, the Court made clear that parties may share a common legal interest "even if they are not parties in ongoing litigation." It then held that while there were both commercial and legal issues involved, Schaeffler and the Consortium shared a "common legal interest" in securing favorable tax treatment for Schaeffler's refinancing and restructuring. Schaeffler would have defaulted on the Consortium loan if it did not receive beneficial tax treatment and the Consortium would have suffered financially as well. In other words, it was "the interest in avoiding the losses that established a common legal interest" between Schaeffler and the Consortium and sharing the E&Y memo relating to the legal issues at stake in the transactions did not constitute a waiver of the attorney-client privilege.

In conclusion, the Court said, "[a] financial interest of a party, no matter how large, does not preclude a court from finding a legal interest shared with another party where the legal aspects materially affect the financial interests." The Court also found that the E&Y memo was protected from disclosure under the attorney work-product doctrine because it was prepared in anticipation of the audit and subsequent litigation, both of which were highly likely under the circumstances due to the size and amount of the transactions at issue.

Whether or not an insurer and its reinsurer share a "common interest" depends greatly on the facts at issue and the governing law. The question of how much access a reinsurer should have to materials, privileged and otherwise, is a constant source of discussion among parties to a reinsurance agreement. The *Schaeffler* decision may broaden the scope of the "common interest doctrine," at least under federal case law in the Second Circuit, to allow a common interest to be

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Additional Insureds and Vicarious Liability

By Michael Menapace and Sean Koehler

The Court of Special Appeals of Maryland recently addressed the scope of additional insured coverage on the context of vicarious liability. In *James G. Davis Const. Corp. v. Erie Ins. Exch.*, No. 802 Sept Term 2014, 2015, WL 6510538 (Md. Ct. Spec. App. Oct. 28, 2015), the court held that such coverage was not limited to allegations that the additional insured was vicariously liable for acts of the named insured; instead, additional insured coverage also extended to claims relating to the additional insured's own negligence.

The facts and procedural history of the case are as follows. James G. Davis Construction Corporation ("Davis"), as the general contractor on a home construction project, hired Tricon Construction, Inc. ("Tricon") as a subcontractor to provide drywall, insulation, and fireplace services. As part of the subcontract, Tricon was to indemnify Davis for all work performed on the project and insure Davis as an additional insured. After executing the subcontract agreement, Tricon provided to Davis a certificate of liability insurance and an additional insured endorsement, which provided that Tricon was issued a CGL policy by Erie Insurance Exchange ("Erie") (the "Policy"), and Davis was listed as an additional insured on the Policy. The additional insured endorsement attached to the certificate of liability provided:

A. Section II—Who is an insured is amended to include as an insured the person or organization shown in the Schedule [(i.e., Davis)], but only with respect to liability arising out of [Tricon's] ongoing operations performed for that insured.

B. With respect to the insurance afforded to these additional insureds, the following exclusion is added:

   2. Exclusions
      This insurance does not apply to "bodily injury" or "property damage" occurring after:

      1) All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed; or

      2) That portion of "[Tricon's] work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

James G. Davis Const. Corp., 2015 WL 6510538, at *2. However, the additional insured endorsement that was included in the Policy differed from the terms of the additional insured endorsement that was attached to the certificate of liability insurance in that the former included the following limitation on the inclusion of Davis as an additional insured: "[Davis is included as an additional insured,] but only with respect to liability for 'bodily injury,' 'property damage' or 'personal and advertising injury' caused, in whole or in part, by: 1. [Tricon's] acts or omissions; or 2. The acts or omissions of those acting on [Tricon's] behalf" in the performance of Tricon's ongoing operations as part of the home construction project. *Id.*

After the home construction project began, a scaffold built by Tricon collapsed while two employees of another subcontractor were on it to complete their work. Those employees sued Tricon and Davis for negligence, alleging that they were authorized to use the scaffold and were assured by Davis that it was safe and secure. Davis tendered its defense to Erie as an additional insured on the Tricon Policy. Erie denied coverage on the basis that the Policy did not cover Davis as an additional insured for Davis's own negligent acts. Davis sued Erie alleging that Erie breached its contract with Davis by failing to honor its duty to defend and indemnify Davis in the underlying tort litigation. The parties filed cross motions for summary judgment and the trial court found in favor of Erie on both motions, concluding that there was no genuine issue of material fact that Davis was a covered additional insured. The underlying complaint alleged that both Davis and Tricon acted as the "controlling employer at the construction site" and "had general supervisory authority over the construction site including the authority to correct safety violations," but failed to exercise reasonable care "in erecting, positioning, and maintaining the scaffolding." As a result, the court concluded, Erie did not have a duty to defend Davis in the tort litigation because the Policy only covered Davis for claims of vicarious liability arising out of Tricon's performance, not Davis's own negligence.

The Court of Special Appeals disagreed. As an initial matter, the Court found that Erie was only bound to the terms of the additional insured endorsement that was attached to the Policy, which limited Davis's coverage to liability "caused, in whole or in part, by Tricon's acts or omissions, or the acts or omissions of those acting on Tricon's behalf."

The Court then analyzed the Policy's scope of coverage, and found that the "liability . . . caused, in whole or in part, by" language used in the Policy, which was taken from the standard 2004 ISO additional insured endorsement (CG 20 10 07 04), related to proximate causation, not vicarious liability, and therefore in this case Erie had a duty to defend Davis "even if the allegations were not based solely on vicarious liability as long as Davis was alleged to be liable, in whole or in part, by the acts or omissions of Tricon." *James G. Davis Const. Corp.*, 2015 WL 6510538, at *8. Applying the scope of the 2004 ISO endorsement to the facts of the case, the Court concluded that because the underlying litigation alleged that Davis's negligence with respect to supervising safety relating to the scaffolding work was caused, in whole or in part, by Tricon's acts or omissions, and the plaintiffs sued Davis for liability arising out of scaffolding work that Tricon was performing for Davis, the claims against Davis were covered by the Policy's endorsements and triggered Erie's duty to defend Davis. Central to the Court's rationale was that the "liability"

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FROM
TheCOURTS

New Jersey's Highest Court Considers Whether Prejudice is Required for Late Notice Defense

Templo Fuente DeVida Corp., et al. v. National Union Fire Ins. Co. of Pittsburgh, PA,
Case No. 074572

This case, which is on appeal to the New Jersey Supreme Court, involves an insurer's denial of a claim based on late notice. The underlying claim was made by a faith-based corporation under a claims-made policy insuring its mortgage broker, for the mortgage broker's failure to obtain financing for a new facility to be constructed for the corporation. The policy required that the insurer be notified of claims "as soon as practicable," but for unknown reasons, the claim was not notified to the insurer until more than six months after the corporation made the claim against the mortgage broker, and after the policy period had ended.

The insurer prevailed on its late notice defense through summary judgment in the trial court, and that judgment was affirmed by the intermediate appellate court in New Jersey. Neither court required a demonstration of prejudice by the insurer. That issue is now under consideration by the New Jersey Supreme Court. The case was argued in mid-October, and a decision is pending.

Finding No "Property Damage," Federal Court in Florida Rules that Insurer Does Not Have to Defend/ Indemnify Claims Alleging Defective Work

Bradfield v. Mid-Continent Casualty Co.,
No. 5:13-CV-222, 2015 WL 6956543 (M.D. Fla. Nov. 10, 2015)

In 2012, the plaintiffs had sued Horgo Signature Homes Inc. and Winfree Homes Inc., the contractors who had built their home. The plaintiffs alleged poor workmanship, poor materials, and poor construction. The contractors, in turn, tendered the claim to their insurer Mid-Continent Casualty. Mid-Continent filed for summary judgment and the court held that Horgo Signature was not an additional insured under the policy Mid-Continent had issued to Winfree Homes. The court relied on the fact that there was no agreement between Horgo Signature and Winfree Homes. Moreover, the allegations against Horgo Signature concerned its own negligence, i.e. there were no claims of vicarious liability for Winfree Homes' negligence. As a result, Mid-Continent had no duty to defend or indemnify Horgo Signature. With regard to Winfree Homes, the court also found no coverage. The underlying suit alleged damages for the cost of repairing or replacing the alleged defective work of Winfree Homes. Under Florida law, defective work does not constitute property damage and, therefore, the policy's "business risk" exclusions precluded coverage. As an additional basis for finding no coverage, the court found that the insurer need not cover the settlement between the Plaintiffs and the contractors because it was the product of collusion and because the settlement did not allocate between covered and non-covered damages.

Federal Judge in Pennsylvania Orders Insurer to Produce Policy Information About Other Insureds

H.J. Heinz Co. v. Starr Surplus Lines Ins. Co.,
No. 15CV0631, 2015 WL 5781295 (W.D. Pa. Oct. 1, 2015).

In this case, the parties were arguing over the scope of discovery requests served by the plaintiff. The underlying insurance claim related to costs of recalling infant food sold in China that was found to have contained lead in excess of permitted limits. The issue before the court in this instance was Starr's attempts at rescinding the policy it had issued. The court found that information about other insureds was potentially relevant in this dispute due to Starr's position that

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Additional Insureds CONTINUED

in the "liability . . . caused, in whole or in part" language must refer to direct liability because vicarious liability is an all-or-nothing proposition, i.e., a party cannot be partially vicariously liable.

As with many other areas of insurance law, the issue of whether additional insured coverage applies only to vicarious liability varies with the specific policy language at issue and which particular state's courts have interpreted that language. Some jurisdictions, like Ohio, Washington D.C., Iowa, and Maryland, have interpreted the "arising out of" wording in additional insured endorsements to require coverage only for claims of vicarious liability. Oregon has a narrow interpretation imposed by statute. A majority of states, however, do not interpret additional insured coverage as being restricted to vicarious liability. New York, Connecticut and Pennsylvania are some prominent examples. Nevada has gone even further and has the rule that additional insured coverage is available even for the additional insured's sole negligence.

Insurers should consider whether they, or their named insureds, intend to cover additional insureds for allegations of their own negligence. If they do, premiums must obviously account for this potential exposure. If the intent is to cover only claims of vicarious liability, insurers should consider using language different than the 2004 ISO additional insured endorsement or should consider adding additional language to their current policy forms. For example, the policy forms could be amended to include a sentence that the additional insured coverage applies only to claims of vicarious liability and does not apply to claims alleging the loss was caused due to the additional insured's sole negligence.

NOTE: Michael Menapace and Wiggin and Dana lawyers Joe Grasso and Timothy A. Diemand are Co-editors of The Handbook on Additional Insureds, published by ABA Publishing (2012).

FROM
TheCOURTS CONTINUED

Heinz had omitted material information from its application. While the court acknowledged concerns about the privacy of third-parties, it determined that safeguards, such as redactions, could address those issues. The court considered the cost of producing this information and found that it was proportional to the amount in dispute (approximately $30 million). The court therefore ordered Starr to produce documents pertaining to product contamination policies it had sold to other insureds, including applications, loss histories, premiums, internal documents on setting premiums and decisions whether to issue policies.

Federal Court in Illinois Holds that an Exclusion for Unfair Trade Practices Does Not Preclude Coverage for Consumer Protection Suits

Big Bridge Holdings, Inc. v. Twin City Fire Ins. Co., No. 14-CV-8052, 2015 WL 5444703 (N.D. Ill. Sept. 15, 2015) (MM)

A subsidiary of Big Bridge Holdings had been sued in eight class action lawsuits for allegedly enrolling consumers in monthly membership programs and charging fees without their consent. These actions were alleged to be violations of various consumer protection laws. After initially providing a defense, Twin City denied coverage for any losses exceeding $1 million. Big Bridge filed this action on behalf of its subsidiary. The policy, which provided coverage to Directors, Officers, and the Entity, excluded coverage for losses in connection with any claim based upon or arising from "price fixing, restraint of trade, *unfair trade practices* or any violation of the Federal Trade Commission Act, Sherman Antitrust Act, or any similar law regulating antitrust, monopoly, price fixing, predatory pricing, or restraint of trade activities . . . ." (Emphasis added.) Twin City relied on the "unfair trade practices" language in its denial. Upon consideration of cross motions for summary judgment, the court ruled in favor of the insured. Twin City had argued that the phrase "unfair trade practices" encompasses both consumer protection and antitrust claims, similar to the Federal Trade Commission Act, which has both antitrust and consumer protection components. However, the phrase was not defined in the policy. Ultimately, the court rejected the insurer's interpretation because after considering the context of the provision in which that phrase appears, it reasoned that section of the exclusion in question focuses on antitrust claims and the "unfair trade practices" must be limited to that context. At a minimum, the court held, the phrase was ambiguous requiring the insurer to provide coverage.

NOTE: Insurers may wish to consider their intent when issuing policies with similar language and adjust the policy language to more clearly exclude consumer protection claims if that is their intent.

Ohio Court Holds Settlement Between Insured and Primary Carrier Should Not Alter Liability of Excess Carrier Allowing Excess Carrier to Recover From the Primary Carrier Under Equitable Contribution

IMG Worldwide, Inc. v. Westchester Fire Ins. Co., 2015 WL 6460091 at *1 (N.D. Ohio Oct. 26, 2015)

This October, the Northern District of Ohio denied a motion for reconsideration of an earlier ruling that held that the primary insurance carrier, Great Divide Insurance Company, had to indemnify excess liability insurer, Westchester Fire Insurance Company, for the cost of defending their mutual insured, plus pre-judgment interest, for a total of $9,157,284.66. IMG had a $1 million primary policy issued by Great Divide and an excess policy issued by Westchester. IMG settled an underlying suit against it for $5 million and had incurred approximately $8 million in defense costs up to that point. Great Divide paid IMG its $1 million policy limits and, with Great Divide's agreement, $250,000 of the defense costs. Westchester paid the balance of the underlying settlement and then IMG sought to recoup the remainder of its defense costs from Westchester. The court noted as a factual matter that the $8 million in defense costs had been incurred prior to the IMG/Great Divide agreement.

The trial court acknowledged the odd procedural posture of this dispute that resulted from a 6th Circuit Court of Appeals ruling that IMG could recover its defense costs from Westchester. But the trial court also held that Westchester's obligations could not be altered by the IMG/Great Divide agreement and that an "excess carrier should be placed in the same position it would have been in absent any settlement between the insured and the primary carrier." Thus, the IMG/Great Divide agreement under which those parties agreed Great Divide was responsible for only $250,000 of the defense costs was not binding on Westchester. To reconcile the 6th Circuit ruling and Westchester's obligation to provide a defense only after Great Divide had exhausted its limits, the trial court allowed Westchester to immediately recover from Great Divide the IMG defense costs IMG obtained from Westchester, which totaled over $9 million with interest.

California Court of Appeals Refuses to Enforce "Escape Clause" and Tolls Equitable Contribution Statute of Limitations

Underwriters of Interest Subscribing to Policy No. A15274001 v. ProBuilders Specialty Ins. Co., 241 Cal. App. 4th 721 (2015).

The California Court of Appeals recently held that an insurer may not use an "escape clause" to preclude another insurer from seeking equitable contribution for defense costs incurred to defend their mutual insured. Both insurers (Underwriters of Interest Subscribing to Policy Number A15274001 (Underwriters) and ProBuilders

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Specialty Insurance Company (ProBuilders)) insured Pacific Trades, a construction and development company, for different, but overlapping time periods. When Pacific Trades were sued in 2007, ProBuilders refused to defend, claiming that because Underwriters was representing Pacific Trades, their "other insurance" clause, commonly referred to by the courts as an "escape clause," applied, eliminating their duty to defend. The clause stated that ProBuilders had a duty to defend only if "no other insurance affording a defense against such suit is available to you," and since Underwriters was defending the suit, ProBuilders invoked the clause. After the suit settled for $1 million and ProBuilders contributed $270,000, Underwriters sued ProBuilders for equitable contribution for some of the costs of defending the suit. The trial court enforced ProBuilders' escape clause and granted its motion for summary judgment. In October, the California Court of Appeals reversed the trial court. It discouraged the use of escape clauses and noted that they are generally unenforceable when the insurer who paid the claim is seeking equitable contribution. The court noted that there were times when ProBuilders was the only insurer covering Pacific Trades, and therefore the clause should be disregarded so as not to impose the burden of shouldering what should be ProBuilders' defense costs on Underwriters.

The court also rejected ProBuilders' argument that the equitable contribution claim was time-barred. It held that although an action for equitable contribution can accrue when the noncontributing insurer first refuses to participate in the defense of a common insured, the two-year statute of limitations should be equitably tolled until the plaintiff insurer makes the last payment in the underlying suit for which it is seeking contribution.

Federal Appellate Court Finds Duty to Defend by E&O Insurer for Insured Broker Accused of Fraudulent Practices

In *Maxum Indem. Co. v. Drive W. Ins. Servs., Inc.*, No. 15-3199, 2015 WL 7292722 (6th Cir. Nov. 18, 2015), the defendant wholesale insurance broker Drive West Insurance Services, Inc. d/b/a Mulberry Insurance Services, Inc. ("Mulberry") obtained professional errors and omissions liability coverage from the plaintiff, Maxum Indemnity Corporation ("Maxum"), a wholesale insurance broker, after Mulberry had been accused of selling fraudulent insurance coverage. The professional errors and omissions coverage provided by Maxum excluded, among other things, claims arising from wrongful acts that Mulberry "had knowledge of or information related to, prior to the first inception date of the continuous claims-made coverage." *Id.* at *2. The coverage also provided that Maxum had no duty to defend Mulberry from suits seeking damages for wrongful acts to which the insurance did not apply. When NCAIG, Mulberry's partner organization, filed third party claims against Mulberry in relation to litigation involving the fictitious insurance it had issued, Maxum denied liability coverage on the basis that Mulberry had knowledge and information related to the fraudulent insurance before the coverage incepted. In reversing the District Court, the Sixth Circuit found that the language of the E&O policy did not unambiguously bar coverage for Mulberry, reasoning that under California law the exclusion covers only those claims that the insured, at inception, subjectively anticipated might result in claims. The court also found that Maxum had a duty to defend Mulberry and NCAIG, reasoning that the record did not show that Mulberry knew of claims prior to the inception date of the coverage, and under California law "the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot." *Id.* at *7.

New York Appellate Court Holds That Insurer's Delay in Disclaiming Coverage Resulted in Waiver of Estoppel

In *Endurance Am. Specialty Ins. Co. v. Utica First Ins. Co.*, 132 A.D.3d 434, 17 N.Y.S.3d 401 (N.Y. App. Div. 2015), the New York appellate court ruled that defendant Utica First Insurance Company ("Utica") was obligated to defend and indemnify the plaintiffs in the underlying action where Utica had waited to disclaim coverage to additional insured Adelphi Restoration Corp. ("Adelphi") until after it had received the contract that triggered the blanket additional insured endorsement, even though it knew fourteen months earlier that Adelphi's claim was barred by an exclusion for bodily injuries to employees. In this case, an employee of defendant CFC Contractor Group, Inc. ("CFC") brought a personal injury suit against Adelphi, among others, after he allegedly suffered injuries in the course of his work. Adelphi then commenced a third-party action against CFC, seeking additional insured coverage from Utica under an insurance policy that Utica had issued to CFC, and which contained an exclusion for bodily injuries sustained by employees and contractors of any insured (the "Employee Exclusion"). Utica disclaimed liability for coverage to defendant CFC and any other party on the basis of the Employee Exclusion by letter to CFC dated November 2011. Utica sent a copy of the letter to the third party administrator for Adelphi's insurer ("Rockville"), but did not provide notice to Adelphi at that time, and did not respond to subsequent inquiries that Rockville made on Adelphi's behalf. It wasn't until January 2013, when Utica received a copy of the contract that triggered Adelphi's coverage as an additional insured, that that Utica notified Adelphi that it was disclaiming liability for coverage to Adelphi. The court found that the November 2011 letter Utica sent to its named insured CFC, which was copied to Rockville, did not constitute notice to Adelphi, an additional insured, under Insurance

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Law § 3420(d)(2), and Utica's delay in disclaiming coverage until January 2013, after it had received the contract that triggered the blanket endorsement, violated Insurance Law § 3420(d), which "precludes an insurer from delaying issuance of a disclaimer on a ground that the insurer knows to be valid . . . while investigating other possible grounds for disclaiming." *Id.* at 436. The court explained that "given its statement that it would not indemnify 'our insured or any other party for any judgment awarded,' Utica must have known that the Employee Exclusion was effective not only as to CFC but also as to Adelphi, and therefore, Utica should have immediately disclaimed to Adelphi on that basis." *Id.* at 436.

New York Federal Court Limits Scope of Employer's Liability Exclusion

In *Hastings Dev., LLC v. Evanston Ins. Co.*, No. 14-CV-6203 ADS AKT, 2015 WL 6618634 (E.D.N.Y. Oct. 30, 2015), the defendant, Evanston Insurance Company ("Evanston"), issued a commercial general liability policy to the plaintiff, Hastings Development, LLC ("Hastings"), and three others (the "Named Insureds"). The policy included personal injury liability coverage to the Named Insureds subject to an exclusion for employer liability (the "Employer's Liability Exclusion"), which provided in part that: "[t]his insurance does not apply to any claim, suit, cost or expense arising out of bodily injury to: (1) an employee of the Named Insured arising out of and in the course of employment by any Insured, or while performing duties related to the conduct of the Insured's business . . . ." *Id.* at *2. After an employee of one of the Named Insureds ("UPI") brought suit against UPI, Hastings, and others for injuries he suffered while operating a mixing machine (the "Personal Injury Lawsuit"), Hastings requested indemnification from Evanston under the policy. Evanston denied coverage to Hastings based on the Employer's Liability Exclusion, and Hastings brought suit against Evanston, seeking a declaratory judgment that Evanston was required under the policy to defend and indemnify Hastings as to the Personal Injury Lawsuit, and asserting a claim for bad faith denial of coverage. Applying New York law, the U.S. District Court for the Eastern District of New York denied Evanston's motion to dismiss the declaratory judgment claim, reasoning that it was ambiguous whether the Employer's Liability Exclusion limited coverage only to personal injury suits brought against the Named Insured that actually employed the injured worker, or whether the exclusion limited coverage to any of the Named Insureds for a personal injury suit brought by any employee performing work on behalf of at least one of the Named Insureds. The court then granted Hastings's cross-motion for summary judgment, applying the contra-proferentem rule, which "requires the court to construe an ambiguity in favor of the insured and also, to construe policy exclusions narrowly," and finding as a matter of law that the exclusion did not bar coverage to Hastings for damages and costs associated with the Personal Injury Lawsuit. *Id.* at *14. The court, however, denied Hastings's claim for bad faith denial of insurance, reasoning that there is no separate, generalized tort claim for bad faith denial of insurance in New York, and Hastings did not allege an independent tort duty on Evanston's part. In doing so, the court noted that although it did not adopt Evanston's interpretation of the Employer's Liability Exclusion, it had found that Evanston's interpretation was a reasonable interpretation of an ambiguous exclusion.

FROM
TheREGULATORS

Connecticut

The Connecticut Insurance Department has issued Bulletin HC-108 & PC-80, dated Nov. 12, 2015. This bulletin highlights changes to stop loss insurance policies. The bulletin highlights a numbers of provisions that may not be included that would otherwise make the stop loss policy inconsistent with underlying group health policies. The bulletin also addresses the permission use of "lasering," which is a practice of assigning different attachment points or deductibles (or denying coverage altogether) for an individual employee with a pre-existing, high cost medical condition or other identified risk.

The Department has released its latest Insurance Matters Newsletter - a free online newsletter from the Connecticut Insurance Department. For more information CLICK HERE

On December 4, Insurance Commissioner Catherine Wade issued a statement warning insurance companies against using pricing methods that rely more on consumer buying habits than actuarial and risk-based principles. These practices, called "price optimization" or "elasticity of demand" can give insurers the ability to use a wide variety of non-cost based factors to increase premiums. Insurance Bulletin PC-81 gives property casualty carriers 60 days to resubmit any previous filings to remove such factors. For more information CLICK HERE

New York

The New York State Department of Financial Services announced potential new cybersecurity rules specifically aimed at banks and insurance companies. The Department sent a letter concerning its proposal to a group of state and federal regulators. Wiggin and Dana continues to monitor these and other data security and privacy developments. For additional information on the NYSDFS announcement CLICK HERE

Wiggin and Dana
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About Wiggin and Dana's Insurance Practice Group

The Wiggin and Dana Insurance Practice Group provides international, national and regional insurers, reinsurers, brokers, other professionals and industry trade groups with effective and efficient representation. Our group members regularly advise clients in connection with coverage issues, defense and monitoring of complex claims, regulatory proceedings, policy wordings, internal business practices, and state and federal investigations. We also represent clients in insurance and reinsurance arbitrations. We have broad experience in many substantive areas, including property, commercial general liability, inland and ocean marine, reinsurance, E&O, D&O and other professional liability, environmental, energy and aviation. A more detailed description of the Insurance Practice Group, and biographies of our attorneys, appear at www.wiggin.com.

About Wiggin and Dana LLP

Wiggin and Dana is a full service firm with more than 150 attorneys serving clients domestically and abroad from offices in Connecticut, New York and Philadelphia. For more information on the firm, visit our website at www.wiggin.com.

AttorneyNOTES

Michael Menapace was recently admitted to practice in Massachusetts, in addition to previous admissions in Connecticut and New York.

Michael Menapace will once again teach Insurance Law at the Quinnipiac University School of Law in the Spring 2016 semester.

Michael Menapace recently moderated a Panel at the Fall 2015 ARIAS-U.S. conference in New York. The panel focused on the use of technology in reinsurance arbitrations to promote efficiencies and effectiveness.

Joe Grasso and **John Kennedy** presented programs on cyber insurance and developing technologies at the annual meeting of the Association of Insurance Compliance Professionals in October in New Orleans.

Joe Grasso attended the IUMI Conference in Berlin September 13-17, the Annual Meeting of the Association of Average Adjusters of the US and Canada in New York on October 1, and the Fort Lauderdale Mariners seminar on November 4.

Joe Grasso gave a presentation on the Duty of Utmost Good Faith at the Houston Marine Insurance Seminar on September 21, and he moderated a panel on Machinery Damage Claims at International Marine Claims Conference in Dublin on September 24. He also moderated a Panel on the Marine Insurance Industry in the US and UK at the Fall Meeting of the US Maritime Law Association in Bermuda on October 22, and gave a legal update presentation at the AIMU Annual Meeting in New York on November 19.

Michael Thompson attended the IACP Fall Conference in Austin, Texas on September 27-30, and the 2015 ARIAS Fall Conference December 12-13 in New York.

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found where parties share a financial interest in a common legal outcome – which is often the exact position an insurer and its reinsurer find themselves, particularly regarding recoupment efforts from third parties, including other carriers. Nonetheless, cedents and their reinsurers should proceed with caution when exchanging privileged information in order to avoid possible waiver of an applicable privilege.

Members of the Insurance Practice Group regularly present to insurers and reinsurers on ways to minimize the risk of waiving privilege when sharing communications (for example, enter into a common interest agreement, include a favorable choice of law provision, reference the agreement in all communications between cedent and reinsurer) and would be happy to do so for anyone interested in further information.