The Year In Review: A Review of Hot Issues and Critical Case Updates from 2015-2016

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These slides are accompanied by an oral presentation and are not to be relied upon for legal advice.

Today's Panel

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--ALI Adviser

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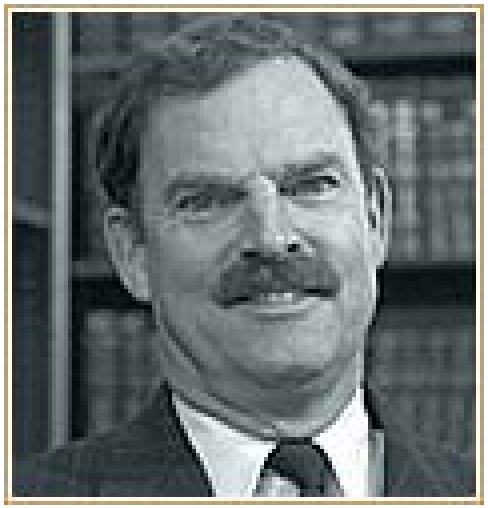
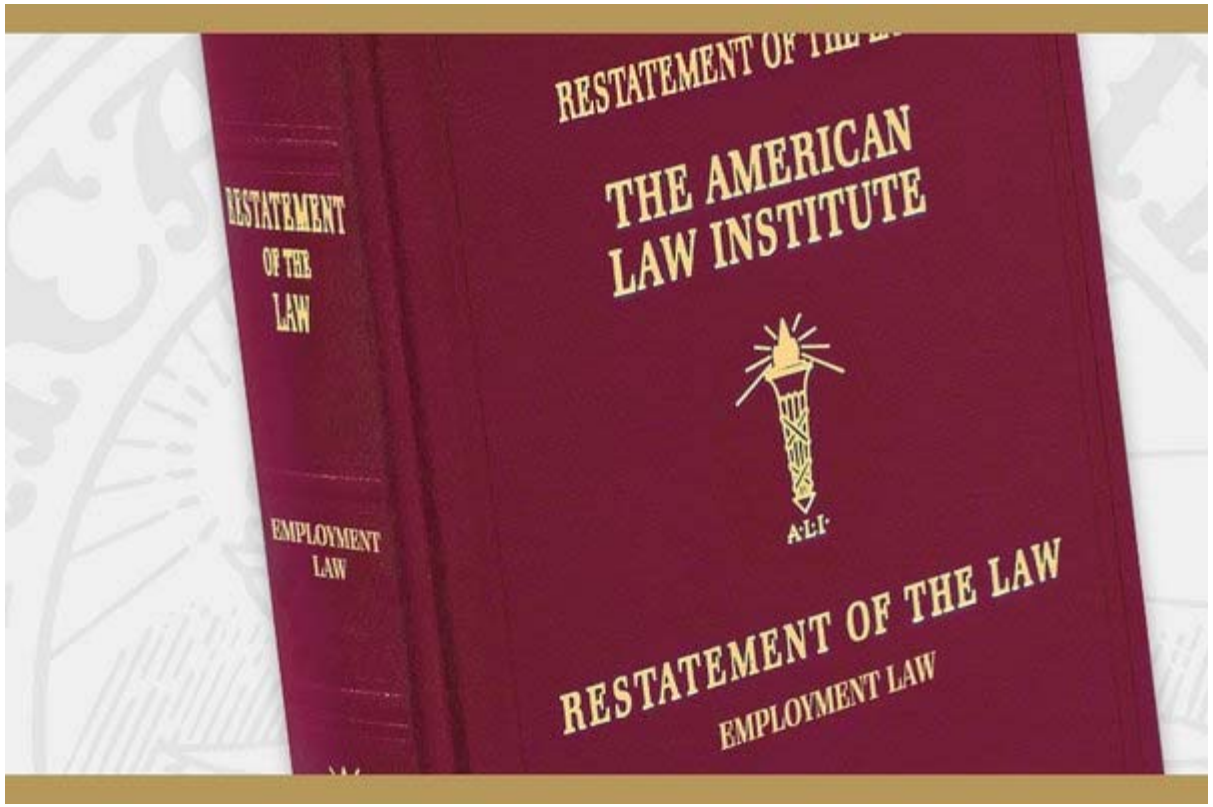
--ALI Liaison for the American Insurance Association



The Restatement of the Law of Liability Insurance: An Update



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Much Has Improved

- Treatment of Misrepresentation Now Normal
- No Vicarious Liability for Defense Counsel
- Resolution of Fee Dispute Provisions Eliminated
- Consequences of Failing to Defend Ameliorated

But Much Remains That is Problematic

- New rules for interpreting policies.
- Subjective intent as a default rule.
- Prejudice required for all conditions.
- Problematic failure to settle rules.
- Coverage required for punitive damages.

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Sections 3 and 4
Standards for Policy Interpretation

- "Plain meaning" is now just a presumption.
- Changed role of *contra proferentem*.
- Allows use of extrinsic evidence to determine policy meaning.

Section 12
Liability for Acts of Defense Counsel

- Insurers are no longer automatically liable for misconduct of defense counsel.

- But insurers may still be liable if they are:
  - Negligent in hiring counsel
  - Fail to confirm that firm had E&O cover

Section 19
Consequences of Failing to Defend

- In October 2015, Reporters abandoned earlier proposal that would have adopted automatic estoppel in every case where insurers failed to defend.
- Under new Section 19, insurers only loses right to contest indemnify if there was “no reasonable basis” for failing to defend.
- Bad faith standard (but not quite)

Section 32 Exclusions

- Insurer must prove subjective intent to injure unless worded otherwise.

- No consideration of
  - "Accident"
  - Intent inferred as a matter of law
  - Capacity issues

Section 33
Trigger of Coverage

- Adopts “actual injury” approach.
- No discussion of cut off for trigger
  - “Known Loss”
  - “Loss in Progress”
- May yet be added by Reporters in 2016.

Section 34
Aggravated Fault

- Punitive damages deemed insured unless expressly excluded
- Rejects public policy arguments
- Rejects distinction between independent and vicarious liability for awards.

Section 35 Conditions

- Adopts prejudice as a required element of all claims involving breach of conditions

- No distinction among:
  - Notice of claim
  - Notice of suit
  - Cooperation
  - Voluntary payment prohibition.

Restatement

Chapter One	Principles of Contract Interpretation
	Waiver and Estoppel
	Misrepresentations
Chapter Two	Duty to Defend
	Duty to Settle
	Duty of Cooperation
Chapter Three	Insuring Clauses & Exclusions
	Conditions
	Trigger & Allocation
Chapter Four	Bad Faith
	Remedies
	Damages

Status of the Restatement

- Chapters One, Two and Three were approved by the ALI Council on January 21, 2016.

- They will be debated at the ALI Annual Meeting in Washington, D.C. on May 17 and will almost certainly be approved.

- Chapter Four (Bad Faith) will be submitted for review this Fall and will likely be voted on in May 2017.

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UPDATE ON THE LAW 2015-20156

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Settlement Issues

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2015 Top Insurance Coverage Decisions

Settlement Issues

Piedmont Office Realty Trust, Inc. v. XL Specialty Insurance Co., 771 S.E.2d 864 (Ga. 2015)

- The policyholder exhausted the limits of a primary policy by payment of defense costs and incurred another $4 million under its excess policy, ultimately prevailing on summary judgment. After an appeal, the policyholder sought consent from the excess insurer to settle the case for the $6 million limits remaining under its policy. The insurer refused, but the policyholder settled on its own for $4.9 million.

- The policyholder then sued its insurer for breach of contract and bad faith, seeking coverage for the full settlement amount plus statutory interest. The policyholder claimed, among other things, that the insurer's consent to the settlement was not required because the insurer withheld its consent unreasonably and in bad faith.

- Answering the question certified, the Georgia Supreme Court ruled that the lack of consent barred the suit against the insurer. Reading a "no action" clause and a voluntary payments provision together, the court ruled that the policyholder was "precluded from pursuing this action against [the insurer] because [the insurer] did not consent to the settlement and [the policyholder] failed to fulfill the contractually agreed upon condition precedent."

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Settlement Issues (cont.)

The Babcock & Wilcox Co., et al. v. American Nuclear Insurers, et al., No. 2 WAP 2014, 2015 WL 4430352 (Pa. July 21, 2015)

- The policyholders operated nuclear facilities and were sued by hundreds of plaintiffs alleging bodily injury. Over their insurers' objection, the policyholders ultimately settled within policy limits for $80 million. The insurers refused to fund the settlement, maintaining that the policyholders breached the policies' cooperation clause by settling without consent.

- On appeal, the Pennsylvania Supreme Court held that the policyholders could recover provided the settlement was for covered loss and was "fair, reasonable, and non-collusive." The court limited the ruling, however, to "those cases where an insured accepts a settlement offer after an insurer breaches its duty by refusing a fair and reasonable settlement while maintaining its reservation of rights and, thus, subjects an insured to potential responsibility for the judgment in a case[.]"

- The court "observe[d] that a determination of whether the settlement is fair and reasonable necessarily entails consideration of the terms of the settlement, the strength of the insured's defense against the asserted claims, and whether there is any evidence of fraud or collusion on the part of the insured."

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Settlement Issues (cont.)

Kelly v. State Farm Fire & Casualty Co., 169 So.3d 328 (La. 2015)

- The policyholder was involved in an automobile collision with the claimant. The claimant's attorney wrote to the insurer, stating that it would "recommend release" of the insurer and the policyholder upon payment of the limits. The insurer did not respond to the letter in writing, but subsequently offered to settle the case for policy limits. That offer was rejected; after an underlying judgment, the claimant under an assignment of rights brought suit against the insurer for bad faith failure to settle.

- On several questions certified from the Fifth Circuit, the Louisiana Supreme Court held that a "firm settlement offer is unnecessary for an insured to sustain a cause of action against an insurer for a bad-faith failure-to-settle claim, because the insurer's duties to the insured can be triggered by information other than the mere fact that a third party has made a settlement offer."

- Instead, the court ruled that an insurer's "affirmative duty to make a reasonable settlement offer" – as set forth in the operative statute – is "triggered by knowledge of a particular situation, which knowledge the insurer has an affirmative duty to gather during the claims process." The court rejected the insurer's call for a bright-line rule, ruling instead that courts should determine on a case-by-case basis whether an insurer has made "a reasonable effort to settle claims."

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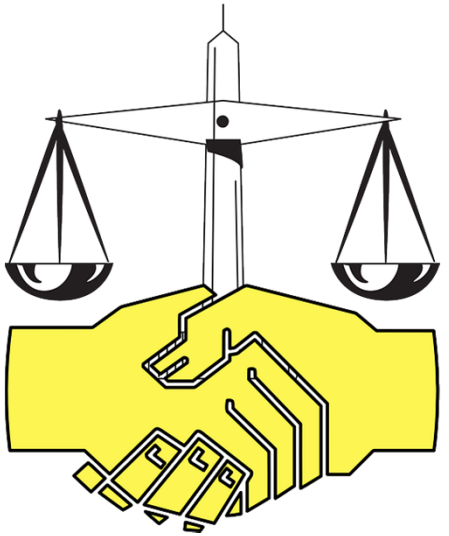
Predicting 2016
Settlement Issues

Stresscon Corp. v. Travelers Property Casualty Co. of America, No. 2013SC815 (Colo.)

- This case involves questions before the Colorado Supreme Court regarding whether a policyholder can obtain coverage for a settlement entered into without its insurer's consent – or even knowledge – if the insurer is not prejudiced by the settlement.

- The case also asks whether a policyholder's pre-suit settlement prejudices its insurer as a matter of law.



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Settlement Issues (cont.)

Stryker Corp, et al. v. National Union Fire Insurance Co. of Pittsburgh, Pa., et al., No. 15-1657 (6th Cir.) (Michigan law)

- This case involves the question about whether an excess insurer is obligated to pay for a settlement to which it did not consent.

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Predicting 2016
Settlement Issues (cont.)

Effect of Proposed ALI Restatement Position

Section 24 appears to impose automatic liability on an insurer who rejects a settlement demand later found to be anywhere within a range of "reasonable" values if there is an excess judgment. In addition to the insurer's decision whether or not to accept a given settlement offer that is the focus of Section 24, courts considering the reasonableness of settlement demands and offers generally consider a number of factors including but not limited to the potential damages award, the plaintiff's likelihood of success in proving liability, whether the insurer conducted a good faith investigation, whether the insurer considered advice of counsel and whether the insurer informed the policyholder of the settlement offers. For excess liability to attach, courts also generally require proof that the insurer's conduct caused the resulting excess judgment, both proximately and in fact.

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Predicting 2016
Settlement Issues (cont.)

Effect of Proposed ALI Restatement Position

In Section 36, the draft Restatement replaces actual policy terms requiring consent or approval of the insurer with a determination that any condition dependent on the insurer's consent or approval "is satisfied if the insured seeks to obtain the consent or approval of the insurer and a reasonable insurer would consent or approve in the circumstances." Section 36 is thus dedicated specifically to weakening any contractual requirement of insurer consent. Examples of provisions affected by this provision include consent-to-settle and no voluntary-payment provisions, which play an important role in protecting against collusion and fraud. These provisions are essential to the insurer's ability to control its exposure under liability insurance policies.

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Notice

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Notice

Craft v. Philadelphia Indemnity Co., 343 P.3d 951 (Colo. 2015)

- The policyholder sued its insurer for breach of contract after the insurer denied the policyholder's claim for coverage. The policy at issue required the policyholder to give notice: (1) as soon as practicable; and (2) no later than 60 days after the policy's expiration. The dispute centered on whether the insurer was required to show prejudice in order to disclaim coverage. After a federal district court ruled for the insurer; on appeal, the Tenth Circuit certified a question to the Colorado Supreme Court.

- Answering the question certified, the Colorado Supreme Court ruled that the "notice-prejudice" rule articulated in Friedland v. Travelers Indemnity Co., 105 P.3d 639, 643 (Colo. 2005) – which involved an occurrence policy – did not control the court's late notice analysis when addressing a date-certain notice requirement in a claims-made policy.

- According to the court, excusing non-compliance, even in the absence of prejudice, "would alter a fundamental term of the insurance contract" and would not advance the public policy interests advanced by the court in Friedland.

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Notice (cont.)

Anderson v. Aul, et al., 862 N.W.2d 304 (Wis. 2015)

- This case involved a claims-made-and-reported policy. The insurer denied coverage on late notice grounds, holding that there was no coverage for a claim noticed after the applicable policy period. The trial court ruled in favor of the insurer. On appeal, the state intermediate appellate court reversed, holding that Wisconsin "notice prejudice" statutes applied and that the insurer was not entitled to summary judgment if it could not show that it was prejudiced by the untimely notice.

- On appeal, the Wisconsin Supreme Court reversed, holding that the insurer could deny coverage on late notice grounds irrespective of prejudice.

- The court observed that, on their face, the two statutes, Wis. Stat. §§ 631.81 and 632.26(2), could be read literally to prohibit a liability insurer from denying coverage based on a policyholder's failure to report a claim within the policy period, absent a showing of prejudice. After closely analyzing the legislative history, however, the court ruled that the statutes were not intended to supersede the reporting requirements that are specific to claims-made-and-reported policies. The court held in the alternative that late notice in this case was per se prejudicial because it would improperly expand the policy's coverage grant.

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2015 Top Insurance Coverage Decisions

Notice (cont.)

Atlantic Casualty Insurance Co. v. Greytak, 350 P.3d 63 (Mont. 2015)

- The policyholder sued a third party, which later notified the policyholder by letter of various bases for counterclaims against the policyholder. Months later, the third party filed the counterclaims, and the parties eventually reached a settlement.

- Six months after the counterclaims were filed and more than a year after they were asserted, the policyholder first notified the insurer. The applicable policy required that notice be provided to the insurer of any occurrence or suit "as soon as practicable," and the insurer subsequently brought a coverage action against the policyholder and the third party. The district court granted the insurer's motion for summary judgment, holding that the policyholder did not comply with the notice provision and that the insurer need not demonstrate prejudice to deny coverage. On appeal, the Ninth Circuit certified this question to the Montana Supreme Court.

- Answering questions certified, the Montana Supreme Court ruled that prejudice was required. The court ultimately adopted a prejudice requirement for a late notice defense in the third-party context, specifically citing the state's public policy to "narrowly and strictly construe insurance coverage exclusions in order to promot the 'fundamental protective purpose' of insurance."

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2015 Top Insurance Coverage Decisions

Notice (cont.)

Travelers Indemnity Co. v. U.S. Silica Co., No. 14-0343, 2015 WL 7104116 (W. Va. Nov. 10, 2015)

- Numerous claims had previously been filed against the policyholder since 1975. In 2005, the policyholder discovered that it possessed three policies from an insurer, and it requested coverage. The insurer denied coverage based on late notice. In ensuing coverage litigation, the trial court imposed a prejudice requirement and ruled that the insurer had a duty to defend.

- On appeal, the West Virginia high court reversed, holding that timely notice was a condition precedent to coverage. The court observed that it must first consider the length of the delay and whether the delay was reasonable. If the delay is unreasonable, there is no coverage. Only if the delay is reasonable does the burden shift to the insurer to show prejudice.

- Here, notice was not "immediate" (as required by the policy) or even reasonable. The court also rejected the argument that the policyholder's ignorance of the policies excused its late notice.

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Notice

Templo Fuente v. National Union Fire Ins. Co. of Pittsburgh, PA, 2016 WL 529602 (N.J. Feb. 11, 2016)

- New Jersey Supreme Court ruled that "no prejudice" rule for claims made policies also includes cases that are reported late but prior to expiration of policy period.
- "Notice/prejudice" rule had been adopted to protect parties to "adhesion contracts" such as homeowners.
- Does not apply in this case where the parties were sophisticated entities who had purchased insurance through sophisticated brokers and who should know and appreciate what the policies require.

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Predicting 2016
Notice (Cont.)

Effect of Proposed ALI Restatement Position

The Restatement proposes a new extra-contractual requirement of prejudice for an insurer to rely on any policy condition. The draft states that "the failure of the insured to satisfy a condition in a liability insurance policy does not relieve the insurers of its obligations under the policy unless the failure caused prejudice to the insurer" in Section 35(3).

Insurers object to imposing a requirement that an insurer affirmatively demonstrate prejudice to avoid coverage when it did not receive timely notice required under the insurance agreement. Insurers require prompt notice to enable their personnel, who have special expertise in evaluating possible occurrences, to conduct an investigation in accordance with the company procedures. This is an important part of the insurance bargain.

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Predicting 2016
Notice (Cont.)

Effect of Proposed ALI Restatement Position

Importantly, Section 35(3) goes far beyond imposing a prejudice requirement on the notice condition. It would subject all policy conditions universally to an extra-contractual requirement that the insurer demonstrate prejudice before it is entitled to rely on the terms it contracted for in the insurance policy.

This is an extraordinary concept that is unsupported in existing insurance law. It goes far beyond the appropriate role of a Restatement. Conditions found in liability insurance policies cover a broad range of rights and obligations, including agreements concerning the insurer's right to conduct and receive records necessary for a premium audit; the transfer of the insured's rights to recovery against others; rights concerning other valid and collectible insurance; and when a third-party may join an insurer in a suit against the policyholder, among many others - including more commonly-cited provisions concerning notice, cooperation and separation of insureds.

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Personal Injury - Cyber

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2015 Top Insurance Coverage Decisions

Personal Injury - Cyber

Recall Total Information Management, Inc. v. Federal Insurance Co., et al., 86 A.3d 469 (Conn. 2015)

- In this case, data tapes containing sensitive personal information fell out of the back of a transport van, and the tapes were never recovered. The insured sought coverage for claims arising from the event, arguing that Coverage B was triggered.

- A state intermediate appellate court ruled that there was no "publication of material that violates a person's right of privacy" – and thus that coverage was not triggered – because there could be no "publication" without "access," and because there was no evidence that the information on the tapes had ever been accessed.

- On appeal, after recounting the facts, the Connecticut Supreme Court rejected the policyholders' argument, and it affirmed the intermediate appellate court's decision with respect to all of the coverage issues.

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2015 Top Insurance Coverage Decisions

Personal Injury – Cyber (cont.)

Zurich American Insurance Co. v. Sony Corporation of America, No. 651982/2011 (N.Y. Sup. Ct.)

- The New York Supreme Court for New York County, applying New York law, held that the theft of information by third-party hackers breaking into a computer system does not qualify as "oral or written publication in any manner of material that violates a person's right of privacy" for purposes of personal and advertising injury coverage (Coverage B) in a CGL policy. The court concluded that this coverage requires "an act by or some kind of act or conduct by the policyholder in order for coverage to be present."

- The case was appealed to the state intermediate appellate court, but the parties settled after oral argument.

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Predicting 2016
Personal Injury – Cyber

Travelers Indemnity Co. of America v. Portal Healthcare Solutions, LLC, No. 14-1944 (4th Cir.)

- This case will address whether the term "publication" as used in Coverage B of a CGL policy encompasses a policyholder's failure to protect from disclosure.

- This case is important because it is one of only a handful of cases to date to address privacy-related data exposures under Coverage B of CGL policies.

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Allocation

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2015 Top Insurance Coverage Decisions

Allocation

Arceneaux, et al. v. Amstar Corp. et al., No. 2014-CA-0271, 161 So.3d 115 (La. Ct. App. Feb. 25, 2015)

- The policyholder brought a third-party demand against its insurer in underlying litigation, in which plaintiffs alleged occupational hearing loss as a result of exposure to industrial noise while working for the policyholder during an approximate 60-year period. The insurer paid 25 percent of defense costs under a reservation of rights, asserting that the insurance policies provided coverage for only 26 months of the time span of the plaintiffs' alleged exposure.

- The policyholder subsequently brought a motion for partial summary judgment, seeking reimbursement from the insurer for 100 percent of the defense costs in the underlying litigation, and also seeking a declaration that the insurer owed the policyholder a full defense in future related proceedings. The trial court granted the motion in part, ruling that the insurer was required to provide a complete defense in future proceedings. On appeal, the court found no error in the trial court's judgment that the insurer's duty to defend the policyholder was not subject to proration.

- The insurer filed an application seeking to review the judgment at the intermediate appellate court. The Louisiana Supreme Court granted the insurer's application.

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Predicting 2016
Allocation

Century et al. v. Viking Pump, et al., NO. CQT-2015-00003 (N.Y.)

- This case involves a question certified to the New York Court of Appeals addressing whether, "under New York law, the proper method of allocation to be used [is] all sums or pro rata when there are non-cumulation and prior insurance provisions."

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Predicting 2016
Allocation (Cont.)

Effect of Proposed ALI Restatement Position

Section 43 provides that "[w]hen more than one policy provides coverage to an insured for a claim, the insurers are jointly and severally liable to the insured under their policies, subject to the limits of each policy" except as otherwise provided by a policy term (with reservations) or in the Restatement.

However, note that Section 44 governs allocation for long-tail harms and successive policies. It states that "[w]hen continuing or repeated harm triggers multiple policies issued in successive policy periods, the insurers' indemnification obligations under the policies are subject to allocation according to the rule of pro rata by years . . . "

Thus, joint and several liability applies to concurrent policies, except that a default rule in the policy will be enforced unless it cannot be harmonized with another policy and provided the insured does not pay more than it would under the policy with the terms most favorable to the insured.

For long-tail claims implicating successive policies, the allocation rule is pro rata by years.

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Contribution Claims

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2015 Top Insurance Coverage Decisions

Contribution

Continental Cas. Co. v. National Union Fire Ins. Co. of Pittsburgh, PA, No. 15-1547 (8th Cir. Feb. 9, 2016) (MN law)

- Continental Casualty sued National Union seeking contribution for costs incurred in defending numerous toxic tort actions involving long-term exposure to Valspar's paint products.
- Valspar intervened in the action as the 1990-2004 policies issued by National Union were largely "fronting" arrangements such that Valspar would end up having to pay most of these costs.
- The Eighth Circuit agreed with the Minnesota District Court that the fronting arrangements between Valspar and National Union did not eliminate National Union's obligation to defend in the first instance or, as in this case, to reimburse other insurers that were defending mutually covered suits.

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Recoupment

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2015 Top Insurance Coverage Decisions

Recoupment

Chiquita Brands Int'l, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, (Ohio App. Ct. Dec. 30 2015)

- Ohio Court of Appeals ruled that National Union was entitled to recover $11.7 million in defense costs after court found that it did not owe coverage for underlying liability claims.
- Restitution was appropriate in the specific narrow circumstances of this case where the insurer had only agreed to defend after being ordered to by a court order that was overturned on appeal years later.
- Justice Stautberg dissented, declaring that National Union's rights were controlled by its insurance policy and that National Uninsured could, had it so chose, have refused to pay defense costs until a final judgment entered affirming the lower court's declaration of coverage.

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2015 Top Insurance Coverage Decisions

Recoupment

Attorney's Liability Protection Society Inc. v. Ingaldson Fitzgerald, P.C., No. 7095 (Alaska Mar. 25, 2016)

- Alaska Supreme Court ruled that the state's independent counsel statute precludes the enforcement of language in a professional liability policy granting the insurer the right to recoup defense costs in the event that it is later determined not to have owed coverage.
- Clauses are unenforceable:
  - In cases where insurer initially had duty to defend and was later ruled not to owe coverage.
  - In cases where insurer never had a duty to defend but provided a “courtesy defense.”
- The determining event giving rise to the insurer's duty to pay independent counsel pursuant to AS 21.96.100 was not the question of whether the insurer actually had a duty to defend but "the objective fact of the insurer taken when reserving its position as to coverage."

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2015 Top Insurance Coverage Decisions
Recoupment

Restatement of the Law of Liability Insurance Approach

- Section 21 prohibits recoupment of costs of defense in most cases.
- If policy expressly permits recoupment, insurer may only claim if:
  - (i) the insurer has reserved its right to seek reimbursement;
  - (ii) the underlying claim has been resolved; and
  - (iii) a determination of no coverage has been made.

- Section 25 prohibits insurers from seeking recoupment for settlements that carrier has fronted "unless specifically provided for in the policy or the insured has otherwise agreed."

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Pollution Exclusions

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Pollution Exclusions

Georgia Farm Bureau Mutual Ins. Co. v. Smith, 2016 WL 1085397 (Ga. Mar. 21, 2016).

- Lead poisoning claim against landlord.
- Georgia Court of Appeals ruled in 2015 that exclusion was ambiguous and that if insurer didn't want to cover lead claims, it should include a specific lead exclusion.
- Georgia Supreme Court reversed in March:
  - These exclusions are not restricted to "traditional environmental pollution."
  - The lead present in paint qualifies as a "pollutant."

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2015 Top Insurance Coverage Decisions
Pollution Exclusions

United Fire and Casualty Company v. Condeb, L.P. No. 14-150 (E.D. Tex. Feb. 22, 2016).

- Exclusion precludes coverage for building occupant's claimed respiratory injuries due to inhaling fumes from mothballs that maintenance workers scattered to deter squirrels.

Whitney v. Vermont Mutual Ins. Co., 60 A.3d 120 (Vt. 2015)

- Absolute pollution exclusion held to bar coverage for respiratory injuries due to spraying of chlorpyrifos pesticide inside home to kill bedbugs.

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The Best of the Rest

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2015 Top Insurance Coverage Decisions

"Suits"

McGinnes Industrial Maintenance Corp. v. The Phoenix Ins. Co., No. 14 - 0465 (Tex. June 26, 2015).

- A narrowly divided Texas Supreme Court ruled 5-4 that governmental environmental claims constitute a "suit."
- Court chose to ignore the common and ordinary meaning of "suit" was that of a proceeding in a court of law.
- "Suit" be given a more expansive meaning when applied to enforcement claims under CERCLA as such actions are almost invariably resolved through administrative proceedings without recourse to conventional litigation.
- The majority also observed that as uniformity is an important goal of insurance, Texas should side with the great majority of courts in other states that have imposed a duty to defend in such cases.

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2015 Top Insurance Coverage Decisions
Assignments

Fluor Corp. v. Superior Court, S205889 (Cal. Aug. 20, 2015).

- California Supreme Court reversed its 2003 opinion in Henkel and rules that an 1872 statute prohibits any policy language that would prevent insureds for entering into post-loss assignment of insurance coverage for liability claims.
- But liability insurance didn't exist in 1872!!!

- Section 38 of the ALI Restatement distinguishes between the assignment of a specific claim and rights under a policy generally.
  - Insureds are free to assign individual claims.
  - Insureds may only assign rights under policy as a whole as part of a merger or other similar corporate transaction after policy has expired and the transfer does not substantially increase the risk insured by the carrier.

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2015 Top Insurance Coverage Decisions
"Legally Obligated"

Busch Properties, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, 2016 U.S. App. LEXIS 3174 (8th Cir. Feb. 29, 2016) (Missouri law).

- Operator of a condominium complex sought CGL coverage for costs it voluntarily incurred to remediate mold at the complex.
- Eighth Circuit agreed with Missouri District Court that the costs were not sums that the insured had "become legally obligated to pay as damages for liability imposed upon the Insured by law."
- There was no binding agreement or settlement between the unit owners and Busch to perform the remediation.
- The court rejected the insured's argument that there was no need for a formal written agreement where its legal obligations were clear as a matter of law.
- Eight Circuit disagreed: "liability imposed by law" implies an obligation placed upon the insured by declaration of law, not merely a pre-existing obligation to which the insured had assented.

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2015 Top Insurance Coverage Decisions

Indemnity: Aggregate Limits

Westchester Surplus Lines Ins. Co. v. Keller Transport, Inc., 2016 MT 6 (Mont. Jan. 12, 2016)

- Oil spill exhausted insurer's $1 million auto limit, umbrella carrier's $4 million limit and finally CGL policy's $1 million limit.
- Umbrella carrier argued that it had already exhausted its $4 million "general aggregate" and didn't owe another limit.
- Montana Supreme Court disagreed:
  - Following form language in umbrella policy required that treatment of aggregates in the excess policy follow separate limits in auto and CGL.
  - As the underlying CGL policy only had limited aggregate protection, the Supreme Court found that a reasonable insured might read the "following form" language in Westchester's policy as similarly precluding any overarching aggregate limitation on the excess insurer's duty to pay.

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The Year In Review:

QUESTIONS?

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