Top 10 Insurance Cases of 2018

2018 was a year of landmark decisions regarding insurance coverage for a variety of emerging claims, including cyber fraud, the "Me Too" movement, and wildfires. Read on to learn more as well as to find out what cases you should keep your eye on as 2019 unfolds.

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1 *Black & Veatch Corp. v. Aspen Ins. (Uk) Ltd*

882 F.3d 952 (10th Cir. 2018)
United States Court of Appeals, Tenth Circuit
February 13, 2018

Will New York join the majority in finding that faulty work by a subcontractor is a covered occurrence?

The Tenth Circuit predicts, yes. Black & Veatch ("B&V") was contracted by American Electric Power Service Corporation ("AEP") to build jet bubbling reactors for several power plants. B&V subcontracted the work and, after certain internal components of the jet bubbling reactors started to deform, crack, and collapse, AEP sued B&V. The only damages at issue were to B&V's own product, arising from its subcontractor's faulty workmanship. The parties entered into settlement agreements, and B&V sought coverage from its liability insurers for the amounts owed thereunder. The general liability policy at issue here provided $25 million in first layer excess coverage and was issued by Aspen Insurance (UK) Ltd. and Lloyd's Syndicate 2003 (collectively, "Aspen"). Applying New York law and noting that the issue of faulty workmanship as an occurrence had not yet been decided by New York's highest court, the Tenth Circuit decided in favor of coverage, stating that the subcontractor exception in the "Your Work" exclusion grants coverage to a general contractor for damage arising from faulty construction performed by a subcontractor.

A copy of the full decision is available here.
Also check out SDV's 50 State Survey on Defective Construction as an "Occurrence"

2 *Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co.*

97 N.E.3d 711 (N.Y. 2018)
New York Court of Appeals
March 27, 2018

Must a contractor be in contractual privity with a subcontractor to access coverage as an additional insured under a blanket AI endorsement?

According to the New York Court of Appeals, yes. The joint venture Gilbane/TDX was hired as construction

manager for a new forensic laboratory in New York City. After adjacent buildings began to settle due to alleged faulty foundation work by the general contractor, the owner sued the general contractor and architect, who then brought a claim against Gilbane/TDX. Gilbane/TDX sought coverage as an additional insured under the general contractor's policy, but because they were not a party "with whom" the general contractor had contracted, coverage was precluded. New York's highest court reaffirmed that this language requires the parties to be in direct contractual privity to obtain additional insured coverage.

A copy of the full decision is available here.
Also see an article on the case written by SDV partner Greg Podolak.

3 *Keyspan Gas E. Corp. v. Munich Reinsurance Am., Inc.*

96 N.E.3d 209 (N.Y. 2018)
New York Court of Appeals
March 27, 2018

Is a policyholder on the hook for long tail environmental exposure where pollution coverage was unavailable?

Yes, the policyholder is responsible for those uninsured policy periods, even if pollution coverage was unavailable in the market. KeySpan was ordered to remediate long-term environmental damage that resulted from manufactured gas plants operated in the late 1880's and early 1900's. KeySpan tendered its costs to Century from whom it obtained property damage policies from 1953 to 1969. While Century argued that it was only responsible for coverage within its specific policy periods, KeySpan argued that the court's allocation of damages should not take into account any periods during which pollution coverage was unavailable. The New York Court of Appeals rejected the unavailability rule and held tha when a policy requires pro rata allocation, the policyholder bears the risk for those policy periods during which no coverage was in place, even if it was unavailable in the marketplace. Interestingly, this case stands in contrast to the recent Connecticut Appellate Court's decision in *R.T. Vanderbilt Company v. Hartford Accident and Indemnity Company*, 171 Conn. App. 61 (2017), which adopted the "unavailability doctrine," holding that the insured should be excluded from the allocation formula in years where insurance was unavailable.

A copy of the full decision is available here.

4 *Cont'l Cas. Co. v. Amerisure Ins. Co.*

886 F.3d 366 (4th Cir. 2018)
United States Court of Appeals, Fourth Circuit
March 28, 2018

Does an unenrolled subcontractor's insurer have a duty to provide additional insured coverage to the general contractor despite the presence of a wrap-up exclusion in the subcontractor's policy?

In a hospital construction project insured under a rolling OCIP, the Fourth Circuit held that the wrap-up exclusion was inapplicable, and the general contractor was entitled to coverage as an additional insured. After a bodily injury suit was brought against the enrolled general contractor, it sought additional insured status under an unenrolled sub-subcontractor's policy as required by contract. The insurer, Amerisure, refused to participate, stating that coverage was unavailable because of a wrap-up exclusion in the policy. The court held the wrap-up exclusion was inapplicable because the underlying plaintiff's injuries arguably "arose out of" operations conducted by entities other than the subcontractor. As a result, Amerisure was held liable for the entire settlement.

A copy of the full decision is available here.
For SDV's related case alert, click here.

5 *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co.*

418 P.3d 400 (Cal. 2018)
Supreme Court of California
June 4, 2018

Does the intentional conduct of a contractor's employee preclude coverage for the contractor in a negligent hiring claim?

Ledesma & Meyer Construction Company ("Ledesma") was retained as general contractor on a middle school construction project. While on site, an employee of Ledesma sexually abused a student. Ledesma faced claims for negligent hiring, retention, and supervision of the employee. Ledesma's GL insurer denied cover-

age based upon the rationale that the intentional acts of the employee did not constitute an "occurrence" under the policy. The California Supreme Court rejected the insurer's arguments and held that because the alleged *negligent* acts of the contractor were too far removed from the *intentional* conduct of its employee and the plaintiff's injuries, the allegations against the contractor constituted a covered occurrence.

A copy of the full decision is available here.
For SDV's related case alert, click here.

6 *Medidata Solutions, Inc. v. Federal Ins. Co.*

729 Fed.Appx. 117 (2d Cir. 2018)
United States Court of Appeals, Second Circuit
July 6, 2018

AND

American Tooling Center, Inc. v. Travelers Casualty and Surety Company of America
895 F.3d 455 (6th Cir. 2018)
United States Court of Appeals, Sixth Circuit
July 13, 2018

Does the "computer fraud" provision within a crime policy cover losses due to "spoofing" schemes?

These two cyber coverage cases illustrate the growing importance of insurance coverage to protect against the proliferation of social engineering claims. Both cases considered "computer fraud" provisions within crime policies and the specific conduct necessary to trigger coverage under such a policy. In *Medidata*, the insured suffered a $5,841,787.37 loss as the result of a spoofing scheme, while in *American Tooling Center, Inc.*, the company lost $834,000 in a similar impersonator email scheme. In both instances, the insurers denied coverage and argued that the computer fraud provision covered only hacking-type activities where a perpetrator physically enters the insured's computer. Both courts rejected this argument, holding that email spoofing activity qualifies as computer fraud and that the insurers could have limited computer fraud to hacking-type conduct only if they wanted to, but did not do so. These holdings suggest the possibility of coverage for cyber-related losses under policies other than stand-alone cyber liability policies.

A copy of the full decision for *Medidata* is available here.
A copy of the full decision for *American Tooling Center, Inc.*, is available here.
For SDV's related case alert on *Medidata*, click here.
For SDV's related case alert on *American Tooling Center, Inc.*, click here.

7 *In re TIAA-CREF Ins. Appeals*

192 A.3d 554 (Del. 2018)
Supreme Court of Delaware
July 30, 2018

Can an investment manager obtain insurance coverage for disgorgements paid to investors as part of a class action settlement?

In contrast to a similar decision from a New York appellate court (*J.P. Morgan Sec., Inc. v. Vigilant Ins. Co.*, 166 A.D.3d 1 (N.Y. App. Div. 2018)), the Delaware Supreme Court held that TIAA-CREF could receive indemnification from its insurers for disgorgement payments made to investors in underlying class action suits. While the court recognized that there is a public policy against insurance coverage for disgorgement payments, it nonetheless distinguished a number of relevant New York cases to find coverage. According to the court, there was no finding that TIAA-CREF acted illegally or improperly, thereby preserving coverage for the insured and eliminating any public policy concerns. Coverage for disgorgements or refunds is always controversial, and a decision by a state supreme court on this topic is certainly worthy of attention.

A copy of the full decision is available here.

8 *Hartford Roman Catholic Diocesan Corp. v. Interstate Fire & Cas. Co.*

905 F.3d 84 (2d Cir. 2018)
United States Court of Appeals, Second Circuit
September 19, 2018

Are losses related to alleged sexual abuse covered as occurrences under excess liability policies and, if so, do they withstand an assault and battery exclusion?

This coverage litigation ensued from a series of lawsuits filed against the Hartford Roman Catholic

Diocese seeking damages for alleged sexual abuse by priests. The diocese tendered four claims to its excess insurers for the relevant time periods. The excess insurers denied the claims and litigation followed. The Second Circuit affirmed the decision of the trial court, holding among other things, that 1) the sexual abuse and resultant injuries constituted an "occurrence" under the policies because the injuries were not subjectively expected or intended by the insured diocese and 2) the assault and battery exclusion did not apply because the exclusion only bars coverage for the liable insured priest, not for all insureds under the policy.

A copy of the full decision is available here.

9 *SECURA Ins. v. Lyme St. Croix Forest Co., LLC*

918 N.W.2d 885 (Wis. 2018)
Supreme Court of Wisconsin
October 30, 2018

When a wildfire causes damage to multiple homes and properties, does it constitute one occurrence or multiple occurrences under a CGL policy?

One occurrence according to the Wisconsin Supreme Court. In May of 2013, a fire broke out while Lyme St. Croix Forest Company was conducting logging operations. The fire was started by a faulty piece of equipment and quickly spread due to the dry conditions at the time. It caused damage to 7,442 acres and many homes and businesses. Lyme St. Croix carried a CGL policy with a $500,000 per occurrence limit for lumbering operations and a $2,000,000 aggregate limit. The insurer argued that the wildfire constituted one occurrence and was only willing to pay the $500,000 occurrence limit. Lyme St. Croix, on the other hand, argued that the wildfire created a series of occurrences that entitled it to the full amount of aggregate coverage. The Supreme Court of Wisconsin applied the "cause theory" and held that the wildfire and resultant damages to multiple homes constituted one occurrence because the injuries stemmed from a single proximate cause.

A copy of the full decision is available here.

10 *Century Surety Company v. Dana Andrew, et al.*

Case No. 73756 (Nev. 2018)
Supreme Court of Nevada
December 13, 2018

Can an insurer be tagged for consequential damages in excess of policy limits if it wrongly refuses to defend?

Yes, an insurer may be liable for any consequential damages caused by its breach, even if in excess of the policy limits and even in the absence of bad faith. Michael Vasquez ("Vasquez") was operating his company vehicle when he hit Ryan Pretner ("Pretner") causing severe brain injuries. Dana Andrew ("Andrew") was appointed as Pretner's legal guardian. Vasquez tendered the claim to his company, Blue Streak Auto Detailing, LLC's ("Blue Streak"), commercial automobile liability insurer, Century Surety Company ("Century"). The Century policy had limits of $1 million. Century denied coverage, asserting that Vasquez was not acting in the course and scope of his employment at the time of the accident. Andrew entered into a covenant not to execute against Vasquez and Blue Streak, and in exchange, Blue Streak assigned its rights against Century to Andrew. A default judgment was entered against Vasquez for approximately $18 million, with a finding that he was indeed acting in the scope of his employment. Andrew, as assignee, filed suit against Century who argued that it was liable only for losses up to its policy limits. After considering the approaches of various jurisdictions, the court adopted the minority view and held that an insurer that breaches its duty to defend is liable for consequential damages resulting from its breach in excess of policy limits, regardless of whether the insurer acted in bad faith.

A copy of the full decision is available here.

Cases to Watch in 2019:

Crumbling Foundations

Jemiola, et al. v. Hartford Casualty Insurance Company
On appeal from: Connecticut Superior Court at Rockville

Homeowners in Connecticut are dealing with cracking and crumbling foundations which have caused severe and sometimes catastrophic damage to their homes. The damage has been linked to a bad batch of concrete containing pyrrhotite which was used to pour foundations for upwards of 35,000 homes in the state from 1983 to 2015 in as many as 41 towns. After receiving coverage denials from various homeowners' insurers, several insureds brought suit demanding coverage for the crumbling foundation damage. In a much anticipated decision, the Connecticut Supreme Court will decide whether extensive cracking in basement walls constitutes a "Collapse" as defined by the policies at issue. The decision could affect tens of thousands of homeowners who may be forced to bear the heavy financial burden for the extensive damage.

BitCoin as Covered "Property"

Kimmelman v. Wayne Insurance Group,
18CV001041 (Court of Common Pleas, Franklin County, Ohio, Sep. 25, 2018)
Proceeding to Trial

Kimmelman suffered a loss of approximately $16,000 when BitCoin was stolen from his online account and promptly submitted a claim to his homeowner's insurer, Wayne Insurance Group ("Wayne"). Wayne argued that the BitCoin constituted "money" under the policy and was subject to a sublimit of $200. In denying Wayne's Motion for Judgment on the Pleadings, the court applied the IRS definition of "virtual currency" in deciding that BitCoin constituted "property" and not money and therefore the plaintiff's claims for breach of contract and bad faith were properly alleged. The case is proceeding to trial which is scheduled for July 15, 2019. This case is one to keep an eye on, as the insurability of virtual currency is certain to generate much debate in the coming years.

Pro-Rata Allocation

RT Vanderbilt Company, Inc. v. Hartford Accident and Indemnity Company, et al.
156 A.3d 539 (Conn. App. 2017)
On Appeal from Appellate Court of Connecticut

The Connecticut Supreme Court will stay busy with insurance cases this year as it decides yet another issue of first impression in the state: whether the unavailability of insurance exception to the pro rata allocation method is applicable in Connecticut. In 2017, the Connecticut Appellate Court applied the unavailability rule to hold that a policyholder should not be liable for its own defense and indemnity costs where insurance for asbestos risk was not available in the market (for more on this, see last year's Top 10, available here.). Instead, the potentially liable insurers were required to share the cost for periods during which such insurance was unavailable. The Connecticut Supreme Court is set to tackle this significant allocation issue in 2019.

For more information on any of these decisions, please contact Jeffrey J. Vita at jjv@sdvlaw.com or Grace V. Hebbel at gvh@sdvlaw.com.