# What Were the Top 10 Insurance Coverage Decisions in 2014?

**1. *Ewing Constr. Co. v. Amerisure Ins. Co.* - Supreme Court of Texas, January 17, 2014 420 S.W.3d 30 (Tex. 2014)**

*Importance of case:* Contractual liability exclusion does not bar coverage for construction defect claim.

*Facts:* Ewing Construction Company contracted with a school district to renovate and build additions which included building tennis courts. Ewing constructed the courts and the district complained that the courts started to flake, crumble and crack, rendering them unstable and unusable for their intended purpose.

The following issue was presented: Does a general contractor that enters into a contract in which it agrees to perform its construction work in a good and workmanlike manner, without more specific provisions enlarging this obligation, "assume liability" for damages arising out of the contractor's defective work so as to trigger the Contractual Liability Exclusion.

*Holding:* No. Contractual liability exclusion does not apply to a standard construction breach of contract claim that alleges the contractor failed to perform its work in a good and workmanlike manner.

**2. *Intervest Constr. of Jax, Inc. v. General Fid. Ins. Co.* - Supreme Court of Florida, February 6, 2014 133 So. 3d 494 (Fla. 2014)**

*Importance of case:* Indemnity payments satisfy self-insured retention.

*Facts:* Intervest Construction of Jax, Inc. contracted with Custom Cutting, Inc. to install stairs in a home that Intervest was building. Contract contained an indemnification clause requiring Custom to indemnify Intervest for any damages resulting from Custom's negligence. After the home was completed, the homeowner fell down the stairs, sustaining serious injuries. Intervest maintained a CGL policy with General Fidelity which included a self-insured retention of $1 million. Intervest settled the homeowner's claim for $1.6 million and its indemnity claim against Custom for $1 million which was paid directly to the homeowner. Intervest sought the remainder of the settlement funds from General Fidelity and General Fidelity denied the claim on the grounds that the indemnity payment did not satisfy the self-insured retention.

*Holding:* Despite policy language requiring a self-insured retention to be paid by the insured, the insured could use an indemnity payment to satisfy the policy's SIR. The court also reaffirmed Florida's "made whole doctrine" relating to coverage.

**3. *Travelers Indem. Co. of Am. v. Portal Healthcare Solutions, LLC* - United States District Court for the Eastern District of Virginia, August 7, 2014 35 F. Supp. 3d 765 (E.D. Va. Aug. 7, 2014)**

*Importance of case:* Data breach triggers CGL, personal, and advertising injury coverage.

*Facts:* Portal Healthcare Solutions specialized in electronic safekeeping of medical records. Travelers issued two policies to Portal covering the electronic publication of certain materials. Patients found their names and medical records were available to the public online. A class action suit was brought for negligence or gross negligence, breach of warranty, breach

of contract and injunctive relief, alleging that Portal failed to safeguard the confidential medical records of patients at the hospital.

*Holding:* The presence of information online amounts to a "publication" as required by the policy: mere availability of the information online is sufficient. Court confirmed CGL coverage for claims where confidential medical information was made available online, absent evidence that anyone ever viewed the information.

**4. *First Mercury Ins. Co. v. Shawmut Woodworking & Supply, Inc.* - United States District Court for the District of Connecticut, September 23, 2014**
**No. 3:12cv1096 (JBA) (D. Conn., Sept. 23, 2014), reconsideration den., No. 3:12cv1096 (JBA) (D. Conn. Oct. 31, 2014).**

*Importance of case:* Favorable result for contractor policyholders pursuing additional insured coverage.

*Facts:* Three ironworkers were injured, and a fourth was killed, while constructing a steel web structure at Yale University. The workers (who were all employed by the second tier subcontractor on the job), alleged that the accident resulted from the absence of bolt holes that would have allowed the steel tubes to be secured during construction. First Mercury Insurance provided a primary general liability policy to the second tier subcontractor which included an ISO Form AI Endorsement. First Mercury denied any duty to defend Shawmut Woodworking & Supply, Inc. (the construction manager) and the first tier subcontractor.

*Holding:* GL carrier must defend upstream contractors in workplace injury suits. The court held that the ISO Form AI Endorsement at issue: (1) did not require contractual privity between the insured and the additional insured; (2) did not require the underlying complaint to specifically allege the named insured's liability; and (3) was not limited to allegations of vicarious liability.

**5. *First Commonwealth Bank v. St. Paul Mercury Ins. Co.* - United States District Court for the Western District of Pennsylvania, October 6, 2014**
**No. 14-19 (W.D. Pa. Oct. 6, 2014)**

*Importance of case:* Especially relevant case for policyholders seeking coverage for payments made to notify potential claimants in a data breach or cyber-related incident. Voluntary payment provisions may not be a valid basis for an insurer to deny coverage where an insured incurs notification costs prior to notifying its insurer of the payments.

*Facts:* First Commonwealth Bank client was the victim of a malware attack that allowed a hacker to obtain the on-line banking credentials of a Senior Vice President and transfers millions of dollars out of the client's account. Pursuant to a Pennsylvania banking statute, First Commonwealth refunded the client's money and submitted a claim to St. Paul under its professional liability policy. St. Paul denied coverage claiming that First Commonwealth breached the voluntary payments provision.

*Holding:* The court held that the payments were covered. Specifically, a policyholder's payments made pursuant to a self-effectuating statute in response to a hacking incident were not subject to a voluntary payments defense even though the policyholder did not seek the insurance company's consent before making the payments.

**6. *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.* - United States District Court for the District of New Jersey, November 25, 2014**
**No. 2:12-cv-04418 (WHW) (D.N.J. Nov. 25, 2014)**

*Importance of case:* The physical loss or damage requirement in an all-risk policy is afforded an expansive interpretation, covering release of ammonia gas.

*Facts:* Gregory Packaging, a juice packaging company, suffered damages when a refrigeration system malfunctioned, releasing ammonia gas into its facility. The premises was evacuated and operations suspended. Gregory Packaging's property policy with Travelers covered "direct physical loss of or damage to Covered property." Travelers argued that the gas release was not a "physical" loss.

*Holding:* Analyzing both New Jersey and Georgia law, the court held that a change in air quality resulting from the release of ammonia that renders a building unusable qualifies as physical loss or damage even though there is no structural damage. Of particular significance to policyholders was the court's emphasis on the change in air quality because it reinforces the position that physical loss does not require a physical change or alteration in structure.

**7. *Mejia v. Citizens Prop. Ins. Corp.* - Court of Appeal of Florida, Second District, November 26, 2014**
**No. 2D13-2248 (Fla. 2d DCA, Nov. 26, 2014)**

*Importance of case:* Demonstrates the importance of burden shifting on the outcome of coverage disputes. Policyholder does not reassume the burden of proof when seeking coverage pursuant to an endorsement modifying the exclusions of a standard all-risk policy.

*Facts:* A homeowner sought coverage for property damage sustained due to sinkhole activity. The policy was a standard all risk policy containing an exclusion for property loss stemming from sinkhole activity, but also including an endorsement for "Sinkhole Loss Coverage" at an additional premium. At the trial level, the court instructed the jury that the policyholder had the burden of showing the loss was caused by sinkhole activity.

*Holding:* Under an all-risk policy, a policyholder need only establish that a physical loss occurred in order to satisfy the threshold requirements of the insuring agreement, and the burden shifts to the insurer to prove an exclusion applies. Furthermore, the broad all-risk coverage is not diminished (or converted to specified-perils coverage) when the basis for a claim arises by way of an endorsement reinstating coverage for an excluded peril (a concept that can also have important application to ensuing loss provisions).

**8. *Travelers Indem. Co. of Am. v. AAA Waterproofing, Inc.* – United States District Court for the District of Colorado, January 17, 2014**
**No. 10-cv-02826-WJM-KMT (D. Colo. Jan. 17, 2014)**

*Importance of case:* Multi-party construction defect litigation. Addresses the issue of allocation of coverage owed to a general contractor where numerous subcontractors were obligated to afford it additional insured status and some did not acquire insurance.

*Facts:* Homeowner's association filed suit against the general contractor (D. R. Horton) for the construction of a residential community for alleged construction defects. The GC required each of the various subcontractors to carry a CGL policy which named the GC as an AI. Traveler's insured the GC. The construction defect litigation was settled, but Traveler's incurred a substantial sum of defense costs and fees.

*Holding:* The court held that Traveler's duty to defend the GC was joint and several. In determining how to allocate Traveler's defense costs and fees amongst the 54 subcontractors implicated by the GC, the court rejected allocation by respective liability as well as policy limits-based allocation. Ultimately, the court ordered allocation by equal shares and applied the allocation only to the subcontractors who were represented in the case.

**9. *Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co.* – Court of Appeals of Missouri, Western District, September 2, 2014**
**449 S.W.3d 16 (Mo. Ct. App., Sept. 2, 2014)**

*Importance of case:* Reservation of rights letters are ineffective if they lack an adequate explanation. They must be sufficiently specific and fairly inform the insured of the basis on which coverage may not be owed.

*Facts:* Advantage Builders (who had a general liability policy with Mid-Continent) was sued for construction defects. Mid-Continent provided a defense under a reservation of rights, filed a declaratory judgment action, and the trial court found that Mid-Continent owed no coverage. Mid-Continent had provided two lengthy reservation of rights letters. The letters generally discussed the nature of the underlying suit and set forth provisions of the policy. However, they were not timely or clear.

*Holding:* The reservation of rights letters were not effective and therefore, Mid-Continent was estopped from denying coverage to the extent of its policy limits. "Neither letter clearly and unambiguously explained how these provisions were relevant to Advantage's position or how they potentially created coverage issues."

**10. *Henriquez-Disla v. Allstate Prop. & Cas. Ins. Co.* - United States District Court for the Eastern District of Pennsylvania, August 7, 2014**
**No. 13-284 (E.D. Pa. Aug. 7, 2014)**

*Importance of case:* This case is one of many in 2014 (other states issuing similar decisions include: Arizona, Florida, Connecticut, New York, Montana, and California) that is representative of a trend of cases where courts allowed policyholders to obtain the coverage opinion or other work product prepared for insurers by their outside counsel. Although it is from the trial court level, its implications for the trend continuing are important. Insurers who employ outside counsel should require counsel to provide legal analysis in support of their opinions in order to insulate them from the discovery process.

*Facts:* This decision centered around a discovery dispute in a bad faith case. The policyholder sought unredacted claim logs relative to the policyholder's claims from the insurer. The insurer claimed attorney-client privilege.

*Holding:* Documents prepared by outside counsel for an insurer are discoverable by the policyholder to the extent that they provide coverage opinions absent legal analysis/advice. Notably, the court relied on cases from Minnesota and Pennsylvania which distinguish between legal work done by attorneys and claims investigation done by attorneys and hold that the latter is not "legal work." Activities such as "investigating subrogation possibilities, determining the cause of the fire, gathering background information on the claimants, and arranging for EUO's . . . are ordinary business functions in claims investigation. The fact that they were performed by an attorney at the behest of a claims adjustor does not change the character of the activity - basic claims investigation."

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