D&O AND PROFESSIONAL LIABILITY UPDATE

2008 | A Year In Review

2008 proved to be another active year for courts facing issues that affect directors and officers and other professional liability insurers, with at least ten federal courts of appeals, nine state supreme courts and numerous other courts issuing decisions of note. Notice issues, including those involving timeliness, prior notice/prior litigation exclusions and rescission resulted in a large number of decisions in a wide range of fact patterns. Assessment of whether claims and acts are interrelated continued to be the focus in a number of coverage cases. Insured-versus-insured and dishonesty exclusions resulted in several decisions and are sure to be of continuing interest in cases brought during the economic downturn. The ability of an insurer to recoup defense costs after a finding of no coverage has been addressed in a number of jurisdictions this year, as has the need for an insured to receive consent from its insurer before settling a claim. We have summarized a selection of the notable cases here and expect that these issues will continue to be important in the directors and officers and professional liability arena in 2009 and beyond.

Notice

Cont'l Cas. Co. v. Walker & Dunklin, No. 4:07cv00298, 2008 U.S. Dist. LEXIS 51819 (E.D. Ark. July 7, 2008)

A lawyers professional liability policy did not provide coverage for a claim that was not first made against the insured during the claims-made-and-reported policy period or during the policy's extended reporting period.

Acacia Research Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 2008 U.S. Dist. LEXIS 96955 (C.D. Cal. Feb. 8, 2008)

Where an insured had complied with the policy's notice provisions, the insured's failure subsequently to notify the insurer that the retention had been satisfied would not preclude coverage where policy did not require such notice.

Vision Quest Indus., Inc. v. Travelers Cas. & Sur. Co. of Am., No. 2007-cv-00512-JVS-AN, slip op. (C.D. Cal. March 25, 2008)

An insured's failure to report a claim until five months after the policy had expired precluded coverage under a claims-made policy requiring notice within 60 days after the policy expired, regardless of whether the insurer was prejudiced by the insured's delay in reporting.

In This Issue

The Housing Group v. Great Am. Ins. Co., A113337, 2008 Cal. App. Unpub. LEXIS 6502 (Cal. Ct. App. June 16, 2008)
An insured's two-year delay in providing notice of an underlying suit resulted in prejudice to the insurer and, thus, a forfeiture of coverage because the delay deprived the insurer of the opportunity to investigate the claim and to participate in settlement negotiations.

FDIC v. St. Paul Cos., No. 03-cv-00115, 2008 U.S. Dist. LEXIS 63208 (D. Colo. Aug. 15, 2008)
The notice-prejudice rule would not apply to a fidelity bond requiring notice of a claim within a 30-day period.

Am. Ctr. for Int'l Labor Solidarity v. Fed. Ins. Co., 548 F.3d 1103 (D.C. Cir. 2008)
Because an EEOC proceeding constituted a claim under a non-profit organization liability policy, the insured's failure to provide timely notice of that proceeding precluded coverage for a later discrimination lawsuit filed by the same claimant.

Axis Surplus Ins. Co. v. Lake CDA Dev., LLC, No. CV-07-505-E-BLW, 2008 U.S. Dist. LEXIS 69020 (D. Idaho Sept. 10, 2008)
A nearly year-long delay in providing notice of a loss to an insurer precluded coverage under a policy requiring "prompt" notice of loss.

Hood v. Cotter, No. 2008-C-0215 c/w No. 2008-C-0237, 2008 La. LEXIS 2754 (La. Dec. 2, 2008)
Claims-made-and-reported professional liability policies do not violate La. R.S. 22:629, which prohibits insurance policy provisions from limiting a right of action to one year from the date the cause of action accrues. Claims-made policies do not limit the time in which an injured party may file suit against an insured, but limit only the time during which an insurer provides coverage for such actions.

Williams v. Synergy Care, Inc., No. 07-0137, 2008 U.S. Dist. LEXIS 57242 (W.D. La. July 29, 2008)
A charge filed with the EEOC constituted a "claim" under a directors and officers liability policy. Thus, an insured's 18-month delay in providing notice of the EEOC charge precluded coverage both for the charge that was not noticed timely and for the subsequently filed lawsuit.

Ace Am. Ins. Co. v. Ascend One Corp., 570 F. Supp. 2d 789 (D. Md. 2008)
Administrative subpoenas issued by the consumer protection divisions of the states of Maryland and Texas constituted "claims" alleging wrongful acts within the meaning of a claims-made miscellaneous errors and omissions policy.

Gargano v. Liberty Int'l Underwriters, Inc., 575 F. Supp. 2d 300 (D. Mass. 2008)
An insurer did not need to prove prejudice to rely on a "late notice" defense because, under Massachusetts law, the notice-prejudice rule applies only to occurrence policies, and not to claims-made-and-reported policies.

State Bar of Mich. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., No. 07-12599, 2008 U.S. Dist. LEXIS 94029 (E.D. Mich. Nov. 10, 2008)
Because an insurer need not establish prejudice in order to deny coverage based on late notice under a claims-made policy, an insured's failure to provide notice of claim under a non-profit organization liability policy within the policy period precluded coverage as a matter of law.

Lee v. Great Divide Ins. Co., 182 P.3d 41 (Mont. 2008)
An insured's 38-month delay in providing notice to an insurer precluded coverage under a claims-made policy.

Chiera v. Liberty Ins. Underwriters, Inc., 2008 NY Slip Op 51817U (N.Y. Sup. Ct. Sept. 9, 2008)
A claims-made lawyers professional liability policy requiring notice only of claims or "potential claims" did not require that an insured provide notice of wrongful acts where "potential claim" was undefined in the policy and the policy contained a discovery clause rendering notice of wrongful acts optional. Additionally, the insurer could not deny coverage based on lack of notice where the insured did provide notice of the potential claim at issue in its application for the policy.

Matter of Ancillary Receivership of Reliance Ins. Co., 405987/01, 3145, 2008 NY Slip. Op. 6690 (N.Y. App. Div. 1st Dep't Sept. 2, 2008)
A letter requesting information so that claimants' counsel could "make a reasonable inquiry into the facts before filing a pleading with the courts" did not constitute a claim under a claims-made policy.

Ackerman v. Westport Ins. Corp., No. 06-4142, 2008 U.S. Dist. LEXIS 71258 (D.N.J. Sept. 4, 2008)
An insured could not pick and choose to report only "new" claims in an amended complaint and thereby circumvent the reporting requirements under a claims-made policy where the insured failed to give notice of the original suit under a prior year's policy.

Eagle Eng'g, Inc. v. Cont'l Cas. Co., 664 S.E.2d 62 (N.C. Ct. App. 2008)
Regardless of whether the insurer suffered any prejudice from the insured's late notice of a claim, the insured's failure to report a claim until at least a year after its policy expired precluded coverage under a claims-made policy requiring notice within 60 days after the expiration of the policy.

Oregon Sch. Activities Assoc. v. Nat'l Union Fire Ins. Co., 279 Fed. Appx. 494 (9th Cir. 2008)
Predicting that Oregon would hold the notice-prejudice rule inapplicable to claims-made-and-reported policies, the Court held that the insured's failure to provide timely notice under a claims-made-and-reported-policy precluded coverage as a matter of law.

Cope v. Ins. Commr. of the Commonwealth of Pa., No. 2217 C.D. 2007, 2008 Pa. Commw. LEXIS 384 (Pa. Commw. Ct. Aug. 18, 2008)
A writ of summons did not constitute a claim and, thus, the insured had no obligation to report the writ to its insurer until after the insured received service of an actual complaint.

Wolk v. Westport Ins. Corp., No. 06-CV-05346, 2008 U.S. Dist. LEXIS 74508 (E.D. Pa. Sept. 25, 2008)
An action to invalidate a settlement based on alleged attorney fraud would be deemed to constitute a "claim" against the attorney under his professional liability policy, even though the attorney was not named as a defendant in the action.

Ulico Cas. Co. v. Allied Pilots Assoc., 262 S.W.3d 773 (Tex. 2008)
An insurer was entitled to deny coverage under a claims-made policy based on the insured's failure to provide notice of the claim in question within the policy period.

Virginia Sur. Co., Inc. v. Wright, No. 06-41723, 2008 U.S. App. LEXIS 1216 (5th Cir. Jan. 22, 2008)
Under Texas law, an insured was not entitled to coverage under a claims-made professional liability policy for a lawsuit filed after the inception of policy where a pre-suit demand letter, which qualified as a claim under the policy, was received prior to policy's inception by the insured's employee.

Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 191 P.3d 866 (Wash. 2008)
An insured's failure to report a claim until nearly four years after the claim had been filed, and more than two years after it had been settled, resulted in prejudice to the insurer and, thus, a forfeiture of coverage.

Related Claims

KB Home v. St. Paul Mercury Ins. Co., No. 07-80850-CIV-MARRA/JOHNSON, 2008 U.S. Dist. LEXIS 101716 (S.D. Fla. Dec. 17, 2008)
Under California law, two employment discrimination actions were not covered under an employment practices policy as they included allegations about sexual harassment at an event at issue in a lawsuit filed before the policy incepted. There was coverage for a fourth suit, although it included some allegations similar to those in the second suit, because there was no overlap between its allegations and those in the first lawsuit, which predated the policy period.

Westrec Marina Mgmt., Inc. v. Arrowood Indem. Co., 163 Cal. App. 4th 1387 (Cal. App. 2008)
An employment discrimination lawsuit related back to an earlier claim made in a letter from a former employee's lawyer alleging discrimination and suggesting private resolution of the matter, such that the two were deemed a single claim for purposes of notice under the policy.

Fed. Ins. Co. v. Surujon, No. 07-22819-CIV-MARTINEZ-BROWN, 2008 U.S. Dist. LEXIS 57800 (S.D. Fla. July 29, 2008)
A claim under a healthcare organization directors and officers liability policy for a suit by the insured organization against its former directors was related to a prior suit by a third party against the insured organization where both were based on the directors' formation of a competing entity.

James River Ins. Co. v. Rinella & Rinella, Ltd., No. 07 C 4233, 2008 U.S. Dist. LEXIS 82978 (N.D. Ill. Sept. 10, 2008)
Where a lawyers professional liability policy addressed related wrongful acts only in the limits of liability section and not in the insuring agreement, the insurer had a duty to defend an action against the insured even though only the last two in a series of related acts took place after the retroactive date.

RLI Ins. Co. v. Conseco, Inc., 543 F.3d 384 (7th Cir. 2008)
Under Indiana law, a liability insurer that had obtained a coverage release from the insured for a securities action and claims that in any way related to that action did not have a duty to defend a later ERISA action brought by one of the securities action's class members because the term "related" includes a broad range of logical and causal connections.

Ace Am. Ins. Co. v. Ascend One Corp., 570 F. Supp. 2d 789 (D. Md. 2008)
Two state consumer protection investigations in Maryland and Texas were not "interrelated" to a prior class action lawsuit brought by four individuals based on the same unlawful business practices at issue in the administrative investigations.

Mass. Insurers Insolvency Fund v. Redland Ins. Co., 2008 Mass. App. LEXIS 875 (Mass. App Ct. Aug. 13, 2008)
Multiple lawsuits connected to the denial of necessary permits and naming the insured town as a defendant were not sufficiently related under an errors and omissions policy where the latest of the lawsuits named different town officials as defendants and involved factual allegations that occurred after a decision was reached in the prior suit.

In re SRC Holding Corp., 545 F.3d 661 (8th Cir. 2008)
Under Minnesota law, a directors and officers liability policy that excluded coverage for actions based on violations of federal or state securities laws also excluded coverage for actions alleging violations of NASD rules because all of the actions were related, in that they all were based on the same alleged wrongful acts.

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Cont'l Cas. Co. v. Orr, No. 8:07CV292, 2008 U.S. Dist. LEXIS 51205 (D. Neb. July 3, 2008)
Multiple claims asserted in a single lawsuit were related and, thus, subject to a single per claim limit of liability where all of the claims were based on representations provided in connection with franchise affairs.

Capital Growth Fin. LLC v. Quanta Specialty Lines Ins. Co., No. 07-80908-CIV-HURLEY, 2008 U.S. Dist. LEXIS 65814 (S.D. Fla. July 30, 2008)
Under New York law, a broker/dealer professional liability insurer had a duty to defend investor arbitration actions filed after the policy period because the later actions shared common allegations, causes of action, and misconduct with an earlier action, such that all were deemed a single claim under the policy provisions concerning interrelated wrongful acts.

Fed. Ins. Co. v. Tyco Int'l Ltd., 2008 NY Slip Op 9903 (N.Y. Sup. Ct. Dec. 18, 2008)
Alleged wrongful acts were not "causally connected" where one individual's conduct represented only a portion of the alleged misconduct and was of a different character from that of most of the wrongs alleged in other actions against the corporation, its executives, its accountants and some of its directors.

Axis Surplus Ins. Co. v. Johnson, No. 06-CV-500, 2008 U.S. Dist. LEXIS 77614 (N.D. Okla. Oct. 3, 2008)
A claim for breach of fiduciary duties based on general mismanagement throughout the life of an airline, which was asserted after the expiration of the airline's claims-made directors and officers policy, was not related to a claim made during the policy period that alleged breach of fiduciary duties based on mismanagement and default on an aircraft loan, because the mere fact that both claims alleged breach of fiduciary duties did not provide the policy's required "common nexus."

Exec. Risk Indem., Inc. v. Cigna Corp., 2008 Phila. Ct. Com. Pl. LEXIS 71 (Phila. Ct. Com. Pl. March 19, 2008)
Two lawsuits did not involve a common nexus of facts and circumstances where the lawsuits alleged different wrongs and injuries to different people. Thus, the later lawsuit would not relate back to the action predating the policy period.

Prior Knowledge/Known Loss/ Rescission

James River Ins. Co. v. Herbert Schenk, P.C., 523 F.3d 915 (9th Cir. 2008)
Under Arizona law, attorney's failure to disclose an unsatisfied client in an insurance application for a lawyers professional liability policy did not trigger the policy's prior knowledge exclusion where a reasonable person could find that the attorney did not expect the client in question to sue.

Admiral Ins. Co. v. Debber, No. 06-16944, 2008 U.S. App. LEXIS 20898 (9th Cir. Sept. 26, 2008)
Under California law, an insurer was entitled to rescind multiple employment practice liability policies based on the insured's failure to disclose prior harassment and discrimination claims in its applications for the policies.

Integon Preferred Ins. Co. v. Isztojka, No. 2:07-CV-00526, 2008 U.S. Dist. LEXIS 102951 (E.D. Cal. Dec. 9, 2008)
The failure of an insurer to comply with the California Fair Claims Settlement Practices regulations did not estop the insurer from rescinding a commercial motor vehicle insurance policy based on material misrepresentations in the application.

Sigelman v. Lawyers' Mut. Ins. Co., No. DO50783, 2008 Cal. App. Unpub. LEXIS 7983 (Cal. Ct. App. Oct. 1, 2008)
An insurer was entitled to rescind a professional liability policy where the insured attorney failed to disclose in his application that his failure to meet certain deadlines resulted in the dismissal of his clients' lawsuits, even if the attorney did not expect the clients to sue and even if the misrepresentations were negligently rather than fraudulently made.

Weddington v. United Nat'l Ins. Co., No. C07-1733, 2008 U.S. Dist. LEXIS 15610 (N.D. Cal. Feb. 29, 2008)
Applying an objective standard, a prior knowledge exclusion in a lawyers professional liability policy barred coverage for a legal malpractice claim where the claim was based on a dismissal of the claimant's lawsuit for failure to prosecute, which could reasonably be expected to result in a malpractice claim.

Rivelli v. Twin City Fire Ins. Co., No. 08-CV-1225, 2008 U.S. Dist. LEXIS 99678 (D. Colo. Nov. 21, 2008)
A warranty letter exclusion in an excess directors and officers liability policy precluded coverage for defense expenses incurred after the SEC filed an amended complaint which added allegations that insureds had knowledge, prior to the submission of the warranty letter, of wrongful activities that could give rise to a claim under the policy.

Westport Ins. Corp. v. Laschever, No. 3:06-CV-519, 2008 U.S. Dist. LEXIS 93828 (D. Conn. Nov. 10, 2008)
An insurer was entitled to rescind a professional liability policy based on uncontroverted testimony by the insurer's underwriter; insured's omission from the insurance application of a rescission suit by the insured's previous carrier constituted a material misrepresentation.

Albareda, Rosso, Maluje, & Nies, P.A. v. Westport Ins. Corp., No. 07-22148-Civ, 2008 U.S. Dist. LEXIS 31857 (S.D. Fla. April 16, 2008)
A prior knowledge exclusion in a lawyers professional liability policy barred coverage for a claim for negligent representation where such representation occurred prior to the effective date of the policy and, therefore, the insured, at the effective date of the policy, "could have reasonably foreseen that such act, error, omission . . . might be the basis of a claim."

Am. Special Risk Mgmt. Corp. v. Cahow, 192 P.3d 614 (Kan. 2008)
Applying a mixed subjective/objective standard, a prior knowledge exclusion contained in an application for an errors and omissions endorsement to a directors and officers liability policy precluded coverage for a claim alleging negligence and conversion against the insured bank where the bank was aware of, but failed to disclose, a customer's fraudulent check cashing scheme when it applied for the policy endorsement.

City of Shawnee, Kan. v. Argonaut Ins. Co., 546 F. Supp. 2d 1163 (D. Kan. 2008)
A prior knowledge exclusion in a public officials liability policy barred coverage for a claim for negligent misrepresentation because the insured had a reasonable basis to believe that accusations of misrepresentations prior to the effective date of the policy might result in a claim under the policy.

Liberty Mut. Ins. Co. v. Jotun Paints, Inc., 555 F. Supp. 2d 686 (D. La. 2008)
Under Louisiana law, an insurer is relieved from coverage under the fortuity or loss-in-progress doctrine only when the insured was actually aware of loss predating the insurance policy. The doctrine does not preclude loss of which the insured should have been aware, or loss that was merely probable or imminent, at the time the policy was issued.

Liberty Ins. Underwriters, Inc. v. Estate of Peter D. Faulkner, 957 A.2d 94 (Me. 2008)
Under Maine law, an insurer may not rescind a professional liability policy unless it can establish fraud on the part of the insured, materiality of the misrepresentation, and the insurer's reliance on the misrepresentation in issuing the policy. Under Maine's rescission statute, an insurer may rescind a renewal policy if such fraud, misrepresentation and reliance are shown in connection with the insured's original application for insurance.

Axis Surplus Ins. Co. v. Clear!Blue, Inc., No. 07-14903, 2008 U.S. Dist. LEXIS 38283 (E.D. Mich. May 12, 2008)
A prior knowledge exception in the insuring agreement of a miscellaneous professional liability policy precluded coverage for a trademark infringement claim where, prior to the inception of the policy, the insured had filed, but never served, a declaratory judgment action against the claimant regarding an anticipated trademark dispute, had received a letter from the claimant's counsel stating that insured had infringed on the claimant's trademark, and had engaged in settlement discussions with the claimant regarding the trademark dispute.

H&R Block, Inc. v. Am. Int'l Specialty Lines Ins. Co., No. 07-3156, 2008 U.S. App. LEXIS 23587 (8th Cir. Nov. 14, 2008)
Under Missouri law, a condition of prior acts coverage requiring that the insured "had no knowledge of the prior wrongful act on the effective date of this Policy, nor any reasonable way to foresee that a claim might be brought" precluded coverage under a professional liability policy for a claim alleging breach of fiduciary duty and various consumer protection violations because multiple class action lawsuits filed against the insured prior to the policy's inception gave the insured both knowledge of the prior wrongful acts and a reason to foresee that claims might be brought in the future.

Blum v. Travelers Indem. Co., No. 06-916, 2008 U.S. Dist. LEXIS 48037 (D.N.J. June 23, 2008)
A prior knowledge exclusion in a lawyers professional liability policy barred coverage for a claim which arose out of a potential claim described by the insured in a supplemental claim form, which the application clearly stated would become part of the policy if issued.

Citak & Citak v. St. Paul Travelers Cos., No. 07 Civ. 5459, 2008 U.S. Dist. LEXIS 35914 (S.D.N.Y. Apr. 28, 2008)
A lawyers professional liability policy did not provide coverage for a legal malpractice claim where the insured attorney whose errors resulted in dismissal of his client's claim "could have reasonably foreseen" that such conduct might become the basis for a claim or suit.

Executive Risk Indem. Inc. v. Pepper Hamilton LLP, 865 N.Y.S.2d 25 (N.Y. App. Div. 2008)
Applying a mixed subjective/objective standard, a prior knowledge exclusion in an excess lawyers professional liability policy did not bar coverage for a claim arising out of alleged securities fraud committed by a firm client where, although the insured attorneys subjectively feared a claim might be asserted against the law firm by parties injured by the client, there was no objective evidence permitting a reasonable professional to conclude that the insured law firm had done anything to subject itself to such a claim.

Precision Auto Accessories, Inc. v. Utica First Ins. Co., 859 N.Y.S.2d 799 (N.Y. App. Div. 2008)
An insurer was entitled to rescind a general liability policy based on material misrepresentations in the insured's

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application regarding insured's claim history, even if the misrepresentations were not willfully made. The insurer did not waive its right to rescind based on its alleged knowledge of the insured's actual loss history where there was no evidence that the insurer had accepted a premium from the insured after allegedly acquiring this knowledge.

Scottsdale Ins. Co. v. Tolliver, 261 Fed. Appx. 153 (10th Cir. 2008)
Under Oklahoma law, an insurer was not required to tender its premium in order to cancel or rescind the insureds' dwelling policy where the insureds would not have accepted that tender or agreed to forego their claims against the policy in any event.

Abood v. Gulf Group Lloyds, No. 3:2007-299, 2008 U.S. Dist. LEXIS 51406 (W.D. Pa. July 1, 2008)
Applying a mixed subjective/objective standard, a prior knowledge exclusion in a lawyers professional liability policy barred coverage for a legal malpractice claim where the insureds knew of their failure to toll the statute of limitations on behalf of a client and, based on such knowledge, a reasonable person would have known that the client might bring a lawsuit against the insureds.

MDL Capital Mgmt., Inc. v. Fed. Ins. Co., No. 05cv1396, 2008 U.S. Dist. LEXIS 57089 (W.D. Pa. Jul. 25, 2008)
A warranty exclusion in the insureds' application for an investment advisors errors and omissions policy barred coverage for a lawsuit regarding the insured's management of an investment fund where the insured directors were aware of significant losses and excessive leveraging of the fund, and an objective person in the directors' position would have recognized that such circumstances might give rise to liability.

Seneca Ins. Co., Inc. v. Lexington and Concord Search and Abstract, LLC, No. 07-714, 2008 U.S. Dist LEXIS 40477 (E.D. Pa. May 19, 2008)
An insurer was entitled to rescind a title company's professional liability policy based on the insured's failure to disclose its precarious financial situation and several pending or potential claims in its application. The fact that the president of the company intended to satisfy all claims with personal funds and had been assured that plaintiffs in the pending claims were not seeking to prosecute the lawsuits to conclusion did not excuse the failure to disclose the adverse information.

Whitford Land Transfer Co. v. Seneca Ins. Co. Inc., No. 08-0071, 2008 U.S. Dist. LEXIS 89097 (E.D. Pa. Oct. 31, 2008)
An insurer was entitled to rescind successive errors and omissions policies where the insured failed to disclose prior lawsuits involving allegations of wrongful conduct by the insured in rendering professional services.

Trammell Crow Residential Co. v. Va. Sur. Co. Inc., No. 3:08-CV-0501-D, 2008 U.S. Dist. LEXIS 97341 (N.D. Tex. Dec. 1, 2008)
The fortuity doctrine did not bar defense or indemnity coverage under a commercial general liability policy where the insurer did not identify factual allegations in the underlying complaint indicating that the insured knew or should have known of an ongoing loss when it purchased the policy in question.

Westport Ins. Corp. v. Ong, No. 1:07CV10, 2008 U.S. Dist. LEXIS 26683 (D. Utah Mar. 28, 2008)
Applying an objective standard, a prior knowledge exclusion in an accountant's professional liability policy precluded coverage for a claim for accounting malpractice and breach of fiduciary duty because the insured reasonably should have foreseen, prior to the policy's inception, that a claim based on deficient tax filings would be made where the insured knew the filings had been rejected, and the claimants had indicated their intent to seek recovery from the insured and had demanded that the insured notify her malpractice insurer of the situation.

Great Am. Ins. Co. v. Gross, No. 3:05-CV-159, 2008 U.S. Dist. LEXIS 10079 (E.D. Va. Feb. 11, 2008)
A triable issue of fact existed as to whether the person signing an application to increase limits under a directors and officers liability policy had made reasonable efforts to consult other directors and officers regarding their knowledge of facts or circumstances that could give rise to a claim. Relying on language in the application, the Court held that rescission, if proven, would apply to innocent insureds where the application contained material misrepresentations and the misrepresentations concerned material facts or circumstances known to person who signed the application.

Nordquist v. Lumberman's Mut. Cas. Co., No. 5967-4-I, 2008 Wash. App. LEXIS 1282 (Wash. Ct. App. June 2, 2008)
A prior knowledge exclusion in a lawyers professional liability policy barred coverage for a claim by the attorney's client, which the attorney knew about and had attempted to resolve through a settlement agreement prior to the policy's inception.

Trinity Universal Ins. Co. of Kan. v. Northland Ins. Co., No. C07-0884-JCC, 2008 U.S. Dist. LEXIS 72196 (W.D. Wash. Sept. 23, 2008)
A stucco subcontractor's liability policy did not provide coverage for water damage because the damage was a known loss prior to the policy's inception. Under Washington law, the relevant inquiry is whether the insured was on notice of the damage prior to the policy period, regardless of whether the insured believed it actually was liable for the damage.

Prior Acts, Prior Notice, and Pending and Prior Litigation Exclusions

HR Acquisition I Corp. v. Twin City Fire Ins. Co., 547 F.3d 1309 (11th Cir. 2008)

Under Alabama law, a shareholder suit alleging an accounting fraud scheme based on sale and leaseback of buildings was related to a prior qui tam suit alleging that the same sale and leaseback scheme defrauded the U.S. government, thereby implicating the organization liability policy's prior litigation exclusion.

Hilb Rogal & Hobbs Ins. Servs. of Cal. v. Indian Harbor Ins. Co., No. 2007-CV-7104, slip op. (C.D. Cal. Nov. 5, 2008)

A pending and prior litigation exclusion in an insurance agents and brokers professional liability policy barred coverage for a suit alleging negligence by the insured for failing to obtain workers' compensation coverage because the suit arose out of a prior suit against the insured, which had been filed before the applicable pending and prior litigation date.

Nat'l Waste Assocs., LLC v. Travelers Cas. & Sur. Co. of Am., No. CV075013789S, 2008 Conn. Super. LEXIS 1584 (Conn. Super. Ct. June 20, 2008)

A prior and pending proceeding exclusion in an employment practices liability policy barred coverage for a claim that was related to a prior unemployment proceeding before the Connecticut Department of Labor.

Ryan v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 3:03-CV-0644, 2008 U.S. Dist. LEXIS 25750 (D. Conn. Mar. 31, 2008)

A prior acts exclusion in a securities broker/dealer professional liability policy did not preclude coverage where it could not be determined with certainty from the claimant's allegations that wrongful acts occurring before the retroactive date were "interrelated" with wrongful acts occurring after that date or that any of the alleged misconduct occurred before the retroactive date.

James River Ins. Co. v. Rinella & Rinella, Ltd., No. 07 C 4233, 2008 U.S. Dist. LEXIS 82978 (N.D. Ill. Sept. 10, 2008)

A prior notice exclusion in a lawyers professional liability policy did not preclude coverage where the other policy under which notice was given was not a "prior policy" within the terms of the exclusion because both policies were in effect at the time notice was given to each insurer. Additionally, although "wrongful acts" committed prior to the retroactive date were excluded by the policy's insuring agreement, the facts alleged in the complaint were at least partially within coverage because two of the five alleged "wrongful acts" occurred subsequent to the policy's retroactive date.

ACE Am. Ins. Co. v. Ascend One Corp., 570 F. Supp.2d 789, 2008 WL 3275644 (D. Md. Aug. 7, 2008)

A prior notice exclusion applying to "Interrelated Wrongful Acts" in a miscellaneous errors and omissions policy did not preclude coverage where the wrongful acts at issue included circumstances and events distinct from other wrongful acts occurring before the retroactive date, notwithstanding the fact that both sets of wrongful acts related to the insured's marketing consumer counseling business practices.

Ferguson v. Gen. Star Indem. Co., No. 05-11970, 2008 U.S. Dist. LEXIS 86530 (D. Mass. Sept. 18, 2008)

A prior acts exclusion in a lawyers professional liability policy barred coverage for a lawsuit where events purportedly occurring after the retroactive date arose out of uncovered events occurring prior to the retroactive date.

Mass. Insurers Insolvency Fund v. Redland Ins. Co., 891 N.E.2d 718 (Mass. App. Ct. 2008)

Prior acts and pending or prior litigation exclusions in a public entities professional liability policy did not apply to the third of three lawsuits brought against an insured town where the lawsuit was filed within the policy period and alleged new wrongful acts distinct from those alleged in the first two lawsuits.

N. Am. Specialty Ins. Co. v. Corr. Med. Servs., Inc., 527 F.3d 1033 (10th Cir. 2008)

Under Missouri law, an exclusion for "claims arising from a demand, summons or other notice received by the insured prior to the effective date of the policy" in a healthcare professional liability policy did not preclude coverage because the undefined phrase "other notice" was ambiguous and, thus, would be construed to mean notice received by the insured from a claimant rather than actions or knowledge possessed by the insured.

Carolina Cas. Ins. Co. v. McGhan, 572 F. Supp. 2d 1222 (D. Nev. 2008)

Although the policy's non-imputation provision would not invalidate its past acts exclusion, the definition of "wrongful acts" used in the exclusion rendered the exclusion ambiguous as to whether it applied to both "actual" and "alleged" wrongful acts. Thus, the Court construed the exclusion in favor of the insured, holding that it would apply only to "actual" wrongful acts.

Lexington Ins. Co. v. Chicago Ins. Co., No. H-06-1741, 2008 U.S. Dist. LEXIS 60629 (S.D. Tex. Aug. 8, 2008)

A retroactive date in a healthcare professional liability policy did not bar coverage where the policy's declarations page and prior acts exclusions contained two different retroactive dates, only one of which postdated the date of the claim in question.

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Additionally, an exclusion for "wrongful acts covered under any policy in effect before this policy" did not apply due to ambiguity of the phrase "in effect before this policy."

Dishonesty and Personal Profit Exclusions

Research Corp. v. Westport Ins. Corp., 289 Fed. Appx. 989 (9th Cir. 2008)
Under Arizona law, an unjust enrichment/profit exclusion in a nonprofit liability policy did not bar coverage for an underlying settlement, even though the lawsuit may have included uncovered counts, where the insurer could not rebut the insured's evidence that it did not receive a profit and was not unjustly enriched.

Homebank of Ark. v. Kan. Bankers Sur. Co., No. 4:06CV001670, 2008 U.S. Dist. LEXIS 51767 (E.D. Ark. July 7, 2008)
Dishonesty and personal profit exclusions did not apply where allegations against the insured director and officer alleged a potentially covered claim in his capacity as a director, officer and/or employee of the insured bank.

Greenwich Ins. Co. v. The Daniel Law Firm, No. 07-CV-02445, 2008 U.S. Dist. LEXIS 98625 (D. Colo. Dec. 3, 2008)
A dishonesty exclusion in a lawyers professional liability policy barred coverage for the insured lawyer's misappropriation of client funds.

AT&T v. Clarendon Am. Ins. Co., No. 04C-11-167, 2008 Del. Super. LEXIS 220 (Del. Super. June 11, 2008)
A fraudulent acts exclusion in a directors and officers liability policy did not bar coverage for the settlement of a securities case because the case did not conclude in a "finding" or "adjudication" as the Court determined was required under the policy.

Clarendon Nat. Ins. Co. v. Vickers, 265 Fed.Appx. 890 (11th Cir. 2008)
Under Florida law, a dishonesty exclusion in an errors and omissions policy did not bar coverage for all claims arising out of an underlying lawsuit because at least one count in the lawsuit could be maintained without consideration of the insured's *mens rea*.

Gargano v. Liberty Int'l Underwriters. Inc., 575 F. Supp. 2d 300 (D. Mass. 2008)
Three versions of a fraud exclusion in three different lawyers professional liability policies each barred coverage for an insured attorney and law firm for a lawsuit alleging misrepresentations by the attorney regarding fees.

New Fed Mortgage Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 543 F.3d 7 (1st Cir. 2008)
Under Massachusetts law, allegations of fraud and dishonesty against a residential mortgage loan originator triggered the fraud and dishonesty exclusion within an errors and omissions policy, thus relieving the insurer of any obligation to defend or indemnify.

Fokken v. Steichen, 274 Neb. 743 (2008)
A dishonesty exclusion in a lawyers professional liability policy barred coverage for an attorney's unauthorized endorsements of his clients' settlement checks.

MDL Capital Mgmt., Inc. v. Fed. Ins. Co., No. 05cv1396, 2008 U.S. Dist. LEXIS 57089 (W.D. Pa. July 25, 2008)
Dishonesty and personal profit exclusions barred coverage for an investment advisor who was convicted of fraud and conspiracy and was found to have wrongfully obtained a significant amount of money through his fraudulent activities.

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. U.S. Bank, No. 4:07-CV-1958, 2008 U.S. Dist. LEXIS 47413 (S.D. Tex. June 11, 2008)
A "profit or advantage" exclusion precluding coverage for loss "arising out of, based upon, or attributable to the gaining in fact of any profit or advantage to which the insured was not legally entitled" barred coverage for an insured director's improperly obtained severance payments and did not require an explicit finding of fraud or other "illegal" conduct.

Restitution, Disgorgement and Damages

The Los Osos Cmty. Servs. Dist. v. Am. Alternative Ins. Corp., No. CV 08-01279, 2008 U.S. Dist. LEXIS 93880 (C.D. Cal. Nov. 12, 2008)
A lawsuit seeking the return of tax revenues allegedly wasted by members of the insured public entity potentially seeks insurable damages under California law, because the public policy concern against insuring restitution applies only when funds were wrongfully acquired by the insured or when the relief sought is punitive.

CNL Hotels & Resorts, Inc. v. Twin City Fire Ins. Co., 291 Fed. Appx. 220 (11th Cir. 2008)
Under Florida law, the return of money received through a violation of Section 11 of the Securities Act of 1933, even if the actions of the recipient were innocent, constitutes a restitutionary payment, not a covered "loss" under a directors and officers liability policy.

First Specialty Ins. Co. v. Caliber One Indem. Co., 988 So. 2d 708 (Fla. Dist. Ct. App. 2008)
Although the policy did not explicitly exclude coverage for punitive damages – civil fines meant to punish a defendant or to serve as a deterrent – punitive damages were not covered where the policy defined "damages" as "any compensatory amount" and also included an exclusion for fines or penalties.

Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 948 A.2d 1285 (N.J. 2008)

A policy's service of suit clause did not preclude the insurers from instituting suit in New Jersey, where the insurers agreed that Delaware law (which permits the insurance of punitive damages) would apply and neither the New Jersey Supreme Court nor the legislature had declared that the insurance of punitive damages violates the public policy of New Jersey.

Fairfield Ins. Co. v. Stephens Martin Paving, LP, 246 S.W.3d 653 (Tex. 2008)

In the context of a workers' compensation insurance policy, Texas public policy does not prohibit a liability insurer from indemnifying an award for punitive damages imposed on its insured because of gross negligence.

Insured Capacity

HR Acquisition I Corp. v. Twin City Fire Ins. Co., 547 F.3d 1309 (11th Cir. 2008)

Under Alabama law, the Eleventh Circuit upheld a lower court's finding that defendants could have acted in their insured capacity as directors and officers of one corporation where they allegedly used their positions as directors and officers of both that corporation and another corporation to commit wrongful acts.

HomeBank of Ark. v. Kan. Bankers Sur. Co., No. 4:06cv001670, 2008 U.S. Dist. LEXIS 51767 (E.D. Ark. July 7, 2008)

A directors and officers liability insurer had a duty to defend an insured bank president so long as some of the allegations in a complaint were made against the insured solely in his capacity as bank president despite the insurer's assertion that the acts giving rise to the underlying litigation were principally conducted in the bank president's personal, non-insured capacity.

Ackerman v. Westport Ins. Corp., No. 06-4142, 2008 U.S. Dist. LEXIS 71258 (D.N.J. Sept. 4, 2008)

An insured was acting in his capacity as a lawyer where he was sued by a non-client for wrongful acts committed in connection with his representation of a client because the insurance policy did not specify for whom the insured must be acting in his capacity as a lawyer, only that the act was committed during the rendition of legal services.

Insured v. Insured Exclusions

Focal Point, LLC v. CNA Ins. Co., No. C 07-05764, 2008 U.S. Dist. LEXIS 53952 (N.D. Cal. June 10, 2008)

An "insured versus insured" exclusion in a directors and officers liability coverage part precluded coverage for claims of breach of fiduciary duties brought by a former member of the insured entity against current members, even though the individual members who were sued could seek indemnification from the insured entity.

Fed. Ins. Co. v. Surujon, No. 07-22819-CIV-MARTINEZ-BROWN, 2008 U.S. Dist. LEXIS 57800 (S.D. Fla. July 29, 2008)

An "insured versus insured" exclusion in a directors and officers liability policy barred coverage for claims brought by the insured company against former officers. The Court did not discuss whether the company became a new entity post-bankruptcy because, in the underlying litigation, the company asserted the rights of the pre-bankruptcy entity identified in the policy.

In re Laminate Kingdom, LLC, No. 07-10279-BKC-AJC, 2008 Bankr. LEXIS 805 (Bankr. S.D. Fla. Mar. 13, 2008)

An "insured versus insured" exclusion in a management liability policy did not bar coverage for an action brought by a bankruptcy trustee against a former manager of the insured entity, because the trustee was a separate and distinct entity from the debtor with different rights, powers, and interests.

Oliver v. Indian Harbor Ins. Co., No. 07 C 5002, 2008 U.S. Dist. LEXIS 15552 (N.D. Ill. Feb. 27, 2008)

An "insured versus insured" exclusion in a financial services liability policy barred coverage for a receiver's lawsuit brought on behalf of the insured company against individual insureds, because the receiver was appointed to protect and preserve the assets of the company, not those of the company's investors.

Strange v. Genesis Ins. Co., 536 F. Supp. 2d 71 (D. Mass. 2008)

An "insured versus insured" exclusion in a directors and officers liability policy barred coverage for a stockholder's misrepresentation claim brought against an officer of the insured corporation because the term "security holder," as used in the policy's exclusion, included stockholders and holders of notes and warrants.

Foodtown, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., No. 05-3627, 2008 U.S. Dist. LEXIS 63629 (D.N.J. Aug. 20, 2008)

An "insured versus insured" exclusion in a directors and officers liability policy barred coverage for a derivative claim, but did not preclude coverage for breach of fiduciary claims and a claim alleging inconsistencies in how the insured's board allocated insurance premiums and marketing costs among the insured's members.

Trustees of Princeton Univ. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 859 N.Y.S.2d 174 (N.Y. App. Div. 2008)

An "insured versus insured" exclusion in a not-for-profit liability policy did not apply to claims brought against insured entities by individual insureds acting in their individual capacities.

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Macey v. Carolina Cas. Ins. Co., 585 F. Supp. 2d 277 (D. Conn. 2008)
Under Virginia law, an "insured versus insured" exclusion in a directors and officers liability policy unambiguously excluded losses arising from breach of fiduciary duty lawsuits brought by former directors or officers.

Coverage for Contractual Liability

Penzer v. Transportation Ins. Co., 545 F.3d 1303 (11th Cir. 2008)
Under Florida law, a breach of contract exclusion in a general liability policy was susceptible to multiple interpretations and, thus, would be construed narrowly in favor of the insured to apply only where the breach of contract in question occurred between the insured and claimant.

Am. Family Mut. Ins. Co. v. Roth, 886 N.E.2d 1149 (Ill. App. Ct. 2008)
Based on a breach of contract exclusion in a business owner's package policy, an insurer had no obligation to defend two of its former agents against the insurer's own claim for breach of an agency agreement.

Sigma Chi Corp. v. Westchester Fire Ins. Co., No. 08C767, 2008 U.S. Dist. LEXIS 86026 (N.D. Ill. Oct. 22, 2008)
An insuring agreement in a management liability policy obligating the insurer to cover losses the insured became "legally obligated to pay" did not exclude coverage for contract claims against the insured. Moreover, the policy's breach of contract exclusion did not bar coverage for claims against the insured corporation arising out an employee's alleged entry into unauthorized contracts where the exclusion appeared in the directors and officers liability provisions, but not in those provisions governing coverage for the corporation's liability.

City of Shawnee, Kan. v. Argonaut Ins. Co., 546 F. Supp. 2d 1163 (D. Kan. 2008)
Because a factual dispute existed as to whether the insured breached a contractual duty, a breach of contract exclusion in the insured's public officials liability policy did not bar coverage for a negligent misrepresentation claim asserted by a building contractor, even though the factual basis for the negligent misrepresentation claim was the same as that contained in the contractor's count for breach of contract.

Spirtas Co. v. Fed. Ins. Co., 521 F.3d 833 (8th Cir. 2008)
Under Missouri law, a breach of contract exclusion in a directors and officers liability policy was broad enough to preclude coverage for both tort and contract allegations asserted against an insured subcontractor based on the subcontractor's performance of a demolition contract where the insured would not have been liable under any theory of liability absent the contract at issue.

Town of Geraldine v. Mont. Mun. Ins. Auth., No. DA 06-0402, 2008 Mont. LEXIS 650 (Mont. Dec. 9, 2008)
A breach of contract exclusion in a municipal liability policy barred coverage for a lawsuit brought by a building contractor against the insured town alleging breach of contract, negligent misrepresentation, and constructive fraud where all three counts, and the alleged duties underlying those counts, arose out of the construction contract at issue.

Foodtown, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., No. 05-3627, 2008 U.S. Dist. LEXIS 63629 (D.N.J. Aug. 20, 2008)
A claimant's "mere mention of a contract" in its lawsuit against the insured did not trigger a breach of contract exclusion contained in the insured's directors and officers liability policy where the suit did not contain a count for breach of contract and only cited the insured's alleged disregard of contractual obligations as evidence of the insured's alleged breach of fiduciary duty.

Light v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., No. 08-2534, 2008 U.S. Dist. LEXIS 100732 (D.N.J. Dec. 12, 2008)
A breach of contract exclusion contained in a public officials and employment liability policy precluded coverage for a building contractor's lawsuit alleging a conspiracy by city utility commissioners to hold the builder liable for faulty construction of a sewage treatment facility, because the injuries allegedly perpetrated by the insureds would not have occurred "but for" the utility commission's alleged breach of the contract entered into with the builder.

Julio & Sons Co. v. Travelers Cas. and Sur. Co. of Am., No. 08 Civ. 300, 2008 U.S. Dist. LEXIS 103198 (S.D.N.Y. Dec. 17, 2008)
A breach of contract exclusion precluded coverage for breach of contract, misrepresentation and fraud claims brought by a creditor and warrant holder of the insured where each claim arose out of a note purchase agreement and amendments thereto. However, the exclusion did not bar coverage for a breach of fiduciary duty claim asserted against the insured where that claim arose out of the claimant's status as a warrant holder, rather than a contract creditor, of the insured.

Preserver Ins. Co. v. Ryba, 893 N.E.2d 97 (N.Y. 2008)
A breach of contract exclusion in a workers compensation and employers liability policy precluded coverage for a breach of contract action brought by a general contractor against a subcontractor seeking contractual indemnification for injuries suffered by the subcontractor's employee on the general contractor's job site.

Fleming Fitzgerald & Assocs. v. U.S. Specialty Ins. Co., No. 07-1596, 2008 U.S. Dist. LEXIS 76613 (W.D. Pa. Sept. 30, 2008)
A breach of contract exclusion in a directors and officers liability policy did not preclude coverage for a thirteen-count

complaint involving a fishing rights dispute where only one of the thirteen counts was pled as breach of contract.

Home Owners Mgmt. Enters., Inc. v. Mid-Continent Cas. Co., No. 05-11370, 2008 U.S. App. LEXIS 18597 (5th Cir. Aug. 26, 2008)
Under Texas law, a breach of contract exclusion in a general liability policy would not apply where the insured would have been liable to the claimant even in the absence of the contract in question.

St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp., 539 F.3d 809 (8th Cir. 2008)
Under Texas law, a technology errors and omissions insurer was obligated to defend its insured against class actions alleging breach of contract and warranty based on the insured's sale of allegedly defective computer parts where the policy provided coverage for "errors," which could be construed to include an unintentional breach of contract.

Yates Carpet, Inc. v. Travelers Lloyds Ins. Co., No. 07-06-0478-CV, 2008 Tex. App. LEXIS 4536 (Tex. App. June 19, 2008)
A breach of contract exclusion barred indemnity coverage for a lawsuit alleging breach of contract, trademark infringement, unfair competition and unfair trade practices where the insured's use of the trademarks in question was predicated on the insured's compliance with, and thus bore an incidental relationship to, the contract allegedly breached.

Professional Services

Penn. Nat'l Mut. Cas. Ins. Co. v. Roberts Bros. Inc., 550 F. Supp. 2d 1295 (S.D. Ala. 2008)
The failure of a real estate agent to fix a sliding door, which allowed an intruder to assault a tenant, was an administrative oversight rather than a professional service involving specialized knowledge, labor, or skill, such that a professional liability exclusion in a general liability policy would not apply.

Am. Cas. Co. of Reading, Pa. v. Kemper, No. CIV-07-1149-PHX-KHC, 2008 U.S. Dist. LEXIS 54365 (D. Ariz. July 16, 2008)
A defamation claim based on statements made to the state board of behavioral health examiners regarding billing practices and administrative issues fell within the scope of a counselor's professional services under a professional liability policy because the alleged defamatory acts were "intertwined with [the insured's] professional services as a counselor."

Apartment Inv. & Mgmt. Co. v. Nutmeg Ins. Co., No. 06-cv-00508-WDM-MJW, 2008 U.S. Dist. LEXIS 28960 (D. Colo. Mar. 31, 2008)
No coverage was available under professional liability policies for various underlying lawsuits that arose solely out of the insured's failure to pay its debts because those claims involved business decisions rather than professional services requiring "special learning or intellectual skill." Claims based on the insured's failure to pay its debts *as well* as additional fraudulent conduct were similarly outside the scope of coverage where the additional fraudulent conduct was either merely background/context or otherwise fell within one of the policies' exclusions.

Zurich Am. Ins. Co. v. O'Hara Reg'l Ctr. For Rehab., 529 F.3d 916 (10th Cir. 2008)
Under Colorado law, the professional services provisions of a general liability policy providing coverage for nursing and medical services did not encompass claims for submitting false reimbursement requests to the government because the alleged injury was caused by the insured's billing practices, not its failure to provide professional services.

The Health Care Indus. Liability Ins. Program v. United States, 548 F. Supp. 2d 632 (C.D. Ill. 2008)
Qui tam claims under the False Claims Act and Illinois Whistleblower Reward and Protection Act brought by nurses against a nursing home did not fall within the professional liability coverage of a general liability policy because a "medical incident" was not the cause of any of the claims.

Westport Ins. Corp. v. Jackson Nat'l Life Ins. Co., No. 2-07-1205, 2008 Ill. App. LEXIS 1302 (Ill. App. Ct. Dec. 19, 2008)
An insurance agent's act of sending unsolicited advertisements to potential customers did not constitute professional services sufficient to trigger coverage under a professional liability policy because the act was merely an offer to perform a professional service and not a service in its own right.

W. World Ins. Co. v. Azoff, No. 07-0494-BLS2, 2008 Mass. Super. LEXIS 271 (Mass. Super. Ct. May 15, 2008)
An "Engineers, Architects or Surveyors Professional Liability" exclusion in a general liability policy barred coverage for an insured's failure to site a house properly.

Feszchak v. Pawtucket Mut. Ins. Co., No. 06-0076(NLH), 2008 U.S. Dist. LEXIS 29295 (D.N.J. Apr. 8, 2008)
A customer suffering an injury due to a mechanical defect in a "standard, non-specialized, and unadjusted" stationary bike did not trigger the professional services exclusion in a rehabilitation center's general liability policy.

Wimberly Allison Tong & Goo, Inc. v. Travelers Prop. Cas. Co. of Am., 559 F.Supp.2d 504 (D.N.J. 2008)
Injuries arising out of a garage collapse were not covered under an architect's general liability policy, which included a

professional services exclusion, because a "substantial nexus exists between the context in which the acts complained of occurred and the professional services [performed]."

Burkart, Wexler & Hirschberg, LLP v. Liberty Ins. Underwriters, No. 18744/07, 2008 N.Y. Misc. LEXIS 1775 (N.Y. Sup. Ct. Mar. 14, 2008)
An allegation that a law firm improperly created a company to compete with one of the firm's own clients was not professional negligence triggering coverage under a lawyers professional liability policy because the firm's members were engaging in self-dealing rather than acting as lawyers.

Am. Guar. & Liability Ins. Co. v. Moskowitz, 856 N.Y.S.2d 820 (N.Y. Sup. Ct. 2008)
A lawyers professional liability policy provided coverage for a lawsuit that alleged fraud by the insured attorney when it also appeared to allege wrongful acts related to the attorney's provision of legal services.

Cowell v. Gaston County, 660 S.E.2d 915 (N.C. Ct. App. 2008)
A professional services exclusion in a public officials liability policy did not bar coverage for acts of a building inspector because the language of the exclusion was ambiguous in describing what occupations were included within its scope.

MDL Capital Mgmt., Inc. v. Fed. Ins. Co., No. 06-4815, 2008 U.S. App. LEXIS 7134 (3d Cir. Apr. 2, 2008)
Under Pennsylvania law, allegations stemming from the insured's purported failure to provide adequate services as an investment adviser and/or investment manager triggered a professional services exclusion in the insured's directors and officers liability policy.

Lumbermens Mut. Cas. Co. v. Erie Ins. Co., No. 07-4028, 2008 U.S. App. LEXIS 21395 (3d Cir. Oct. 10, 2008)
Under Pennsylvania law, despite an insurer's argument that inspecting and maintaining roadside safety did not constitute "professional services" as defined under its professional liability policy, roadside inspection services performed by the insured triggered coverage under the policy because the insured inspector was engaged in a specialized task.

Smith v. Cont'l Cas. Co., No. 07-CV-1214, 2008 U.S. Dist. LEXIS 76818 (M.D. Pa. Sept. 30, 2008)
Where a policy defined professional services as requiring the selling of either registered securities or securities sold through a broker registered with NASD and where the insured sold unapproved, unregistered securities, the professional liability policy did not provide coverage.

Scottsdale Indem. Co. v. Hartford Cas. Ins. Co., No. 06-5339, 2008 U.S. Dist. LEXIS 2454 (E.D. Pa. Jan. 14, 2008)
The act of inspecting a construction site did not trigger professional services exclusion in a general liability policy because the inspector had limited training and lacked the authority to make changes to improve the safety of the site.

Transcore, L.P. v. Caliber One Indem. Co., No. 02657, 2008 Phila. Ct. Com. Pl. LEXIS 188 (Phila. Ct. Com. Pl. July 28, 2008)
A professional liability policy providing coverage for any act in the rendering of professional services related to "transportation information management systems" covered a patent infringement lawsuit based on the insured's *sale and installation* of its product, despite the insurer's argument that product sales were outside the scope of the policy. The Court noted that the insurer could have excluded patent infringement claims but failed to do so.

URS Corp. v. Tristate Envtl. Mgmt. Servs., Inc., No. 08-154, 2008 U.S. Dist. LEXIS 57049 (E.D. Pa. July 28, 2008)
A professional services exclusion was deemed ambiguous with regard to coverage for injuries arising out of drilling activities where an endorsement to the policy defined professional services to exclude environmental drilling, but the definition of professional services in the policy was broad enough to encompass such activities.

Reese v. Alea London Ltd., No. 3:07-cv-1402-CMC, 2008 U.S. Dist. LEXIS 29951 (D.S.C. Apr. 11, 2008)
A professional services exclusion in a general liability policy barred coverage for injuries occurring when a motivational speaker instructed an individual to attempt to break a board with her hand because the exercise was part of the speaker's professional services.

Davis-Ruiz Corp. v. Mid-Continent Cas. Co., No. 07-40727, 2008 U.S. App. LEXIS 11730 (5th Cir. June 2, 2008)
Under Texas law, a professional services exclusion in an insured radiographer program's general liability policy did not apply to the insured's inspection of a storage tank and ladder on which a person suffered injury because the policy limited the exclusion's applicability to only the professional service of radiography and did not include the service of visual inspection.

Gore Design Completions, Ltd. v. Hartford Fire Ins. Co., 538 F.3d 365 (5th Cir. 2008)
Under Texas law, a professional services exclusion in a general liability policy is not applicable and will not relieve an insurer of its duty to defend potentially covered claims where the complaint fails unequivocally to allege that the insured's professional services caused the damages at issue.

Phila. Indem. Ins. Co. v. Hallmark Claims Serv., Inc., No. 3:07-CV-1469-O, 2008 U.S. Dist. LEXIS 101484 (N.D. Tex. Dec. 10, 2008)
A provision in a professional liability policy, which excluded from coverage those claims arising out of "'professional

services' performed for any entity in which any 'Insured' is a principal, partner, officer, director or a more than three percent (3%) shareholder," was deemed ambiguous because it was unclear whether the exclusion applied to the insured's actions at the time the claim was made or at the time the underlying wrongful act giving rise to the claim might have occurred.

Capitol Envtl. Servs., Inc. v. N. River Ins. Co., 536 F. Supp. 2d 633 (E.D. Va. 2008)
A waste handlers liability policy, which included a professional services exclusion that specifically included "transportation" as a professional service, was ambiguous as to whether it barred coverage for the insured hitting a motorist while driving a truck that was empty of waste when the accident occurred.

Independent Counsel

Compulink Mgmt. Ctr., Inc. v. St. Paul Fire and Marine Ins. Co., 169 Cal. App. 4th 289 (2008)
The amount of attorneys' fees owed by the insurer to the insured's independent counsel was subject to mandatory arbitration under Cal. Civil Code § 2860(c), even though the action also involved other unrelated issues that fell outside the scope of § 2860(c).

Long v. Century Indem. Co., 163 Cal. App. 4th 1460 (2008)
Where a reservation of rights created a conflict of interest that triggered the insurer's duty to provide independent counsel, provisions in Cal. Civil Code § 2860 imposing a cap on attorneys' fees and requiring that fee disputes be arbitrated would apply even if the insurer did not control the defense and elected only to retain the insured's independent counsel.

Sovereign Gen. Ins. Servs., Inc. v. Nat'l Cas. Co., No. 2:06-CV-2725, 2008 U.S. Dist. LEXIS 11601 (E.D. Cal. Feb. 15, 2008)
An insurer was not obligated to retain independent counsel to defend the insured in an underlying action where there was no competent evidence that the attorney retained by the insurer could control the outcome of the coverage issue on which the insurer had reserved its rights.

Elacqua v. Physicians' Reciprocal Insurers, 860 N.Y.S.2d 229 (N.Y. App. Div. 2008)
Where an insurer's reservation of rights created a potential conflict between it and its insured, the insurer was obligated to inform the insured of the right to select independent counsel at the insurer's expense. The insurer's failure to inform the insured of this right, coupled with facts indicating that the insured was not provided uncompromised representation, subjected the insurer to liability for deceptive business practices.

Advancement of Defense Costs

HLTH Corp. v. Agricultural Excess and Surplus Ins. Co., No. 07C-09-1-2 RRC, 2008 Del. Super. LEXIS 280 (Del. Super. Ct. July 31, 2008)
Insurers in a complicated multi-tier insurance arrangement were required to advance defense fees under a directors and officers liability policy prior to a determination on allocation between the insurers, because neither Delaware nor New Jersey law requires that allocation be determined prior to the final disposition of a claim.

Axis Reinsurance Co. v. Bennett, No. 07 Civ. 7924 (GEL), 2008 U.S. Dist. LEXIS 53921 (S.D.N.Y. June 27, 2008)
Because both insurer and insured offered reasonable interpretations of a provision in a directors and officers liability policy obligating the insurer to "pay covered Defense Costs on an as-incurred basis," the Court interpreted the policy in favor of the insured and required the insurer to advance defense costs despite a dispute regarding whether claim was covered.

Julio & Sons Co. v. Travelers Cas. & Sur. Co., 08 Civ. 3001 (RJH), 2008 U.S. Dist. LEXIS 103198 (S.D.N.Y. Dec. 17, 2008)
Under Texas law, the eight corners rule (providing that a liability insurer must determine its defense obligation solely from the terms of the policy and the pleadings without resorting to evidence outside these documents) applies not only to policies containing a duty to defend, but also to policies containing a duty to advance defense costs.

The Trustees of Princeton Univ. v. Nat'l Union Fire Ins. Co., 2008 NY Slip Op 5004 (N.Y. App. Div. June 5, 2008)
Under New York law, a not-for-profit liability policy obligated the insurer to advance defense costs as they were incurred, subject to the right to recoup non-covered amounts after the underlying litigation was completed.

Fleming Fitzgerald & Assocs. Ltd. v. U.S. Specialty Ins. Co., No. 07-1596, 2008 U.S. Dist. LEXIS 76613 (W.D. Pa. Sept. 30, 2008)
A directors and officers liability policy that provided for payment of covered defense costs on an "as-incurred" basis required immediate payment of covered defense costs as they became due and did not permit the insurer initially to deny coverage until a court or jury determined which, if any, claims were covered. But since the insurer was obligated to pay only "covered" defense costs as incurred, the insurer could make an initial determination concerning which claims were covered and which were not.

Troutman Sanders

Allocation

City of Sterling Heights v. United Nat'l Ins. Co., No. 03-72773, 2008 U.S. Dist. LEXIS 26990 (E.D. Mich. Apr. 3, 2008)
After the conclusion of a coverage action in which the trial court awarded the insured taxable costs, the Court held that the pro rata "time-on-the-risk" allocation method should be applied to apportion the costs between various general liability insurers.

In re Consol. Feature Realty Litig., No. Cv-05-0333-WFN, 2008 U.S. Dist. LEXIS 5505 (E.D. Wash. Jan. 25, 2008)
In allocating loss between insurers over successive policies, the Court applied the "maximum loss" rule, rejecting one insurer's contention that the "policy limits" rule should be applied.

Recoupment of Defense Costs and Settlement Payments

Med. Liab. Mut. Ins. Co. v. Alan Curtis Enters., Inc., 373 Ark. 525 (2008)
Where an insurance policy does not include language regarding recoupment of expenses by the insurer, an insurer cannot recoup expenses based on its reservation or rights letter because such recoupment is only available if authorized by statute.

Progressive West Ins. Co. v. Dallo, No. 07cv1003IEG(AJB), 2008 U.S. Dist. Lexis 70151 (S.D. Cal. Sept. 10, 2008)
The Court dismissed the insured's claim that its automobile insurer had breached the insurance contract by reserving its rights and filing a reimbursement action. Under California law, an insurer is entitled to recoup settlement payments if it later is determined that the underlying claims were not covered under the policy. By offering a qualified defense under reservation of rights, the insurer met its obligation to furnish a defense.

Sigelman v. Lawyers' Mut. Ins. Co., No. D050783, 2008 Cal. App. Unpub. LEXIS 7983 (Oct. 1, 2008)
After rescinding a professional liability policy based on misrepresentations contained in the application, an insurer that had defended and settled claims against the insured subject to a reservation of the right to recoup was entitled to recover the amounts spent.

Nationwide Mut. Fire Ins. Co. v. Royall, No. 6:06-cv-1695-Orl-31KRS, 2008 U.S. Dist. LEXIS 91352 (M.D. Fla. Oct. 28, 2008)
Although a general liability insurer that was defending its insured pursuant to a reservation of rights was held not to have a duty to defend in coverage litigation, the insurer was not permitted to recoup non-covered defense costs because it had issued a unilateral reservation of rights and had not obtained, per Florida law, the insured's agreement to accept the conditional defense.

Am. Nat'l Fire Ins. Co. v. York County, 582 F. Supp. 2d 69 (D. Me. 2008)
A law enforcement liability insurer could not recoup amounts paid in settlement on behalf of its insured because, although the insurer reserved its right to recoup non-covered amounts, it failed to repeat the reservation at the time it was negotiating and contributing toward the settlement.

Travelers Prop. Cas. Co. v. R.L. Polk & Co., No. 06-12895, 2008 U.S. Dist. LEXIS 22676 (E.D. Mich. Mar. 24, 2008)
For claims arising from the insured's conduct before the policies' effective dates, the insurer could recoup defense costs paid on behalf of the insured. However, for all claims that even arguably fell under the insurance policy, the insurer could not recoup defense costs, even if it later were determined that the duty to defend did not exist.

Ohio Cas. Ins. Co. v. Biotech Pharm., Inc., 547 F. Supp. 2d 1158 (D. Nev. 2008)
Under Texas law, a general liability insurer could not recoup non-covered defense costs it had paid pursuant to a unilateral reservation of the right to recoup because the insured had not agreed to reimbursement either in the policy or in a separate agreement.

Am. and Foreign Ins. Co. v. Jerry's Sport Ctr., Inc., 948 A.2d 834 (Pa. Super. Ct. 2008)
A general liability insurer had no right to recoup defense costs paid on behalf of the insured under a duty to defend policy where the right to recoup was stated only in the insurer's reservation of rights letter and not in the policy itself.

Gen. Star Indem. Co. v. Virgin Islands Port Auth., 564 F. Supp. 2d 473 (D.V.I. 2008)
An employment practices and public officials liability insurer could not seek recoupment from an insured based on the insurer's reservation of rights letter where the policy at issue did not provide the insurer the right to recoup expenses.

Kreuger Int'l v. Fed. Ins. Co., No. 07-C-0736, 2008 U.S. Dist. LEXIS 94493 (E.D. Wis. Nov. 19, 2008)
Since there had been no duty to defend, a general liability insurer that had paid defense costs under a reservation of the right to recoup could be entitled to reimbursement of defense costs and would be allowed to amend its counterclaim to seek reimbursement.

Consent

Daly City v. Specialty Nat'l Ins. Co., C-08-03603, 2008 U.S. Dist. LEXIS 95619 (N.D. Cal. Nov. 17, 2008)
In denying a liability insurer's motion to dismiss claims for breach of contract and bad faith, the Court concluded that the policy's no-voluntary-payments provision, when read together with other provisions of the policy, was susceptible to more than one reasonable

interpretation and, thus, the insured did state an actionable claim based on its interpretation of the ambiguous policy language.

Schwartz v. Liberty Mut. Ins. Co., 539 F.3d 135 (2d Cir. 2008)
Under California law, excess directors and officers liability insurers that had been actively involved in monitoring and attempting to settle a claim against the insured could not rely on their policies' consent provisions to deny coverage for a settlement reached between the claimant and insured after two weeks of trial testimony even though the insured did not request consent until late Sunday night and put the settlement on the record the next day because the insurers had had an adequate opportunity to consider and evaluate the settlement opportunities and the settlement amount was reasonable.

Cont'l Cas. Co. v. City of Jacksonville, 283 Fed Appx. 686, 693 (11th Cir. 2008)
Under Florida law, the insured's material breach of the policy's cooperation clause was substantially prejudicial to the insurer, and "[u]nder the undisputed facts about the [underlying] settlement, the district court did not err in concluding that, as a matter of law, [the insurer] exercised due diligence and good faith in securing the [insured's] cooperation and that the [insured's] dishonesty rendered [the insurer's] attempts to secure its cooperation futile."

Gallina v. Commerce & Indus. Ins., No. 8:06-CV-1529-T-27EAJ, 2008 U.S. Dist. LEXIS 75676 (M.D. Fla. Sept. 30, 2008)
Under Florida law, the insured was not excused from complying with a general liability policy's no-voluntary-payments provision even though the insurer refused to accept what the insured viewed as reasonable settlement offers.

Fed. Ins. Co. v. Arthur Andersen LLP, 522 F.3d 740 (7th Cir. 2008)
Under Illinois law, the insured's failure to obtain consent from the insurer before settling a claim barred coverage under an executive protection policy despite the insurer's eight-month delay in filing a declaratory judgment action because, even if this delay were considered unreasonable, the insured, and not the insurer, controlled the defense of the underlying action.

Castronovo v. Nat'l Union Fire Ins. Co., No. 2:06-CV-142-JVB, 2008 U.S. Dist. LEXIS 60113 (N.D. Ind. Aug. 6, 2008)
An insured's failure to request approval from its excess insurer before entering into a consent judgment that reached the excess policy limits amounted to a breach of the excess policy's consent provision and precluded coverage under the policy.

Vigilant Ins. Co. v. Bear Stearns Cos., Inc., 2008 NY Slip Op 2080 (N.Y. Mar. 13, 2008)
By executing a settlement agreement before informing its carriers of the terms of the settlement, the insured violated a professional liability policy's consent-to-settle provision and could not recover the settlement funds from the insurer. The insured, which was "a sophisticated business entity," was aware of the consent-to-settle provision, but nonetheless "elected to finalize all outstanding settlement issues and executed a consent agreement before informing its carriers of the terms of the settlement."

Kollman v. Nat'l Union Fire Ins. Co., No. 04-3106-PA, 2008 U.S. Dist. LEXIS 33628 (D. Or. Apr. 21, 2008)
In a dispute pertaining to the settlement of a claim without the insurer's consent, the Court held that because the insurer incorrectly refused to defend the insured, the insurer could not rely on the policy's consent-to-settle provision.

The Greenbrier Co. v. Am. Dynasty Surplus Lines Ins. Co., No. 07-1445-KI, 2008 U.S. Dist. LEXIS 64281 (D. Or. Aug. 21, 2008)
A general liability insurer could not rely on the policy's consent provision to deny coverage for defense costs incurred after the insured satisfied its self-insured retention because the insurer earlier had argued that two retentions would apply before the insurer's obligation to fund defense costs was triggered. Not only did the insured rely on the insurer's position that two retentions applied when incurring the defense costs in question, but it also would have been impractical for the insured to obtain consent before incurring defense costs in excess of the single retention because of ongoing litigation.

Md. Cas. Co. v. Am. Home Assur. Co., No. 01-07-00711-CV, 2008 Tex. App. LEXIS 7720 (Tex. App. Oct. 9, 2008)
An insured that entered into a settlement without its general liability insurer's consent and before providing the insurer with notice of the claim violated the policy's consent provision. The insurer, therefore, was entitled to deny coverage upon a showing of prejudice, even though the insurer had actual notice of the claim and despite the insured's allegation that it did not learn that it was an additional insured under the policy until after the settlement had been consummated.

Rupp v. Transcontinental Ins. Co., 2:07-CV-333-TC, 2008 U.S. Dist. LEXIS 93170 (D. Utah Nov. 17, 2008)
The insureds' bad faith claims against their general liability insurer were not barred as a matter of law despite the fact that the insureds entered into a settlement without the insurer's consent in violation of the policy's consent provision because a valid claim of bad faith refusal to settle would release the insureds from complying with the policy's consent provision.

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