wiley

# Insurance Appellate

Insurers often call upon Wiley to represent them on appeal in cases raising issues of precedential importance to the industry or presenting high financial exposure to the insurer. Wiley attorneys have represented insurers and industry trade groups in federal and state appellate courts throughout the country – including all of the federal courts of appeals, as well as many state supreme courts and intermediate courts of appeals. Wiley's appellate team includes former judicial law clerks from federal and state courts, including the United States Supreme Court.

Wiley has the capability to provide full briefing and oral argument of insurance issues in any appellate setting. The Insurance Appellate Practice often advises insurance clients on how to coordinate nationwide litigation strategy to pursue desired legal results while minimizing litigation risk, including the selection of cases and issues for appeal. Wiley handles many coverage cases from inception in the trial court through completion of appellate proceedings. Other times, Wiley is retained at the post-trial motion or appellate stage to take a fresh look at the issues and to act as lead counsel on appeal.

Wiley's insurance appellate work addresses the full range of contractual and extracontractual issues arising under general liability and professional liability policies, including the meaning of substantive policy provisions, issues relating to the duty to defend or to pay defense costs (such as reimbursement and reasonableness of defense costs and choice of counsel) and indemnification, procedural issues (such as jurisdiction, *forum non conveniens*, arbitration, choice of law, and forum selection clauses), and "bad faith" claims. Representative cases include:

- *Joy Global Inc. v. Columbia Cas. Co., No. 21-2695 (7th Cir. Jan. 23, 2023).* Obtained summary judgment in the trial court and an affirmance by the Seventh Circuit determining that a D&O policy did not provide coverage for $20.8 million in settlements of shareholder lawsuits challenging the acquisition of the insured by another company because they constituted settlements of claims alleging that the price of the acquisition was inadequate and so fell within the "bump-up" carve out from the definition of covered "Loss."

- *First Solar, Inc. v. National Union Fire Ins. Co.*, 274 A.3d 1006 (Del. 2022). Represented insurer on appeal to the Delaware Supreme Court regarding the interpretation of "related claim" language under Delaware law. The Supreme Court held that the plain language of the policies governs, rejecting a judge-made "fundamentally identical" test for relatedness that had been applied in numerous Delaware trial court decisions prior to the ruling. The case is a significant insurer victory given the

prevalence of related claim issues and the difficulty of satisfying the "fundamentally identical" test.

- *SAS Int'l Ltd. v. General Star Indem. Co.*, 36 F.4th 23 (1st Cir. 2022). Represented insurer on appeal to the First Circuit in a case involving commercial property insurance policy coverage for a claim relating to COVID-19 allegedly causing "property damage." The policyholder's suit against General Star is one of many insurance coverage lawsuits by property owners nationwide arguing that commercial property policies cover income lost as a result of the COVID-19 pandemic. Wiley persuaded the First Circuit to affirm the judgment and hold that, under Massachusetts law, economic losses related to the COVID-19 pandemic do not trigger coverage under a commercial property insurance policy. The district court agreed that SAS had not shown "direct physical loss of or damage" to its property. The ruling is the first of its kind by the First Circuit.
- *Georgia Am. Alloys, et al. v. AXIS Ins. Co.*, No. 20-1634-LPS (D. Del.), *aff'd* 21-1947 (3d Cir. Aug. 31, 2022). Represented insurer in the district court and on appeal to the Third Circuit. PrivatBank, one of Ukraine's largest privately held commercial banks, sued Georgia American Alloys and its affiliates (GAA), alleging it was defrauded out of hundreds of millions of dollars by Ukrainian oligarchs associated with GAA. GAA sought coverage for the litigation under E&O policies issued by AXIS but failed to provide timely notice, asserting the impact of the COVID-19 pandemic delayed notice. When AXIS denied coverage based on late notice and other defenses, GAA sued for bad faith denial of coverage. The district court determined that, as a matter of law, timely notice is a condition precedent to coverage under claims-made-and-reported policies. The court also dismissed the bad faith claims in full. The Third Circuit affirmed, holding that under Delaware law, an insurer need not demonstrate that it was prejudiced by the late notice to deny coverage under a claims-made policy.
- *Academy of Country Music v. Cont'l Cas. Co.*, 991 F.3d 1059 (9th Cir. 2021). Represented insurer on appeal to the Ninth Circuit from an order remanding back to state court a case that was removed to federal court. The Ninth Circuit vacated the remand order notwithstanding the statutory bar on appellate review set forth in 28 U.S.C. Section 1447(d) on the ground that the district court's sua sponte decision that it lacked jurisdiction was not "colorable." The decision is an important precedent for defendants in all types of cases, regardless of subject matter, by creating a narrow exception to what previously had been viewed as an absolute bar to appellate review of a district court remand order.
- *Day Kimball Healthcare, Inc. v. Allied World Surplus Lines Ins. Co., et al*, No. 20-3803, (2d Cir. 2021). Represented insurer as appellee after obtaining a summary judgment determining that there is no coverage for a hospital under a policy including professional liability coverage for a medical malpractice claim alleging a serious birth defect and other injuries because the claim was not both first made and reported during the policy period. Insured raised novel arguments to attempt to avoid the claim made and reported rule. The Second Circuit affirmed the judgment in favor of Wiley's client.
- *UniPixel, Inc. v. XL Specialty Ins. Co.*, No. 14-18-00828-CV (Tex. 14th Ct. App., Mar. 31, 2020). Won appellate affirmance that no coverage was available for Wells notices issued and an enforcement action brought by the SEC because they were related to the SEC's original investigation, which commenced prior to the claims-made policy period.

- *UBS Fin. Servs. Inc. of Puerto Rico, et. al v. XL Specialty Ins. Co., et. al,* 289 F. Supp. 3d 335 (D.P.R. 2018), *aff'd* 929 F.3d 11 (1st Cir. 2019). Obtained a decision by the First Circuit affirming summary judgment for XL Specialty and its co-defendant insurers, holding that the insurers did not owe $20 million in coverage to UBS Financial Services for investor claims filed after the collapse of the Puerto Rican bond market. Wiley obtained summary judgment shortly before trial in district court and briefed and argued the case on appeal, securing a victory on behalf of client XL Specialty Insurance Company.
- *Travelers Indem. Co. v. CNH Indus. Am., LLC*, 2018 WL 3434562 (Del. July 16, 2018). Represented insurer on appeal to the Delaware Supreme Court from a nearly $14 million judgment in a case involving whether a comprehensive general liability policy provided coverage for hundreds of asbestos claims and obtained decision reversing and directing that judgment be entered for the insurer.
- *First Horizon Nat'l Corp. v. Houston Cas. Co.*, 742 F. App'x 905 (6th Cir. 2018), *aff'd* 2017 WL 2954716 (W. D. Tenn. June 23, 2017). Briefed and argued successful appeal affirming district court decision holding that an insured's boilerplate notice of a potential claim was untimely and insufficient to provide notice of an actual claim.