

# All Sums Allocation, Reimbursement of Defense Costs Between Insurers, Fees or Charges Exclusion Coverage Update

October 16, 2017

**Missouri, New York, Mississippi Coverage Cases**

*The e-POST*

## **All Sums Allocation – Missouri**

***Nooter Corp. v. Allianz Underwriters Ins. Co.***

--- S.W.3d ---, 2017 WL 4365168 (Mo. App. Oct. 3, 2017)

The Missouri Court of Appeals held that the “all sums” allocation method applies to long-tail claims. In the underlying claims, it was alleged that there was asbestos at various refineries and chemical sites where the policyholder designed, installed and distributed pressure vessels. The appellate court held, among other things, that the excess carriers’ insurance policies should be allocated under the “all sums” approach based upon the plain policy language. In particular, the appellate court noted that the definition of “occurrence,” which limited coverage to “during the policy period,” did not operate to “limit the policies’ promise to pay all sums of the policy holder’s liability solely to damage during the policy period[.]” Thus, the appellate court held that “the express language of the applicable insurance policies requires the adoption of the all sums allocation scheme[.]” The appellate court also noted that “[t]he ‘all sums’ approach allows the policyholder to select a policy among the range of years triggered by the ‘occurrence’ at issue.” Accordingly, the appellate court affirmed the trial court’s ruling that the “all sums” allocation method applied to the excess carriers’ insurance policies.

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## **Reimbursement of Defense Costs Between Insurers – Second Circuit (New York Law)**

***Zurich Am. Ins. Co. v. Liberty Mut. Ins. Co.***

--- F.3d ---, 2017 WL 4422506 (2d Cir. Oct. 5, 2017)

The U.S. Court of Appeals for the Second Circuit held that Zurich American Insurance Company (Zurich) was not entitled to reimbursement from Wausau Business Insurance Company (Wausau) for costs incurred in defending the insured in a construction site injury case, because a New York insurance statute requiring timely notice of coverage denials did not apply to disputes between

insurers. Wausau declined coverage for the underlying lawsuit based on a construction exclusion in its general liability policy, and the lower court agreed that Wausau's declination was proper. Zurich, however, contended that Wausau waived its right to disclaim coverage as Wausau violated N.Y. Ins. Law § 3420(d)(2), which requires an insurer to give written notice of a denial of coverage to the insured as soon as reasonably possible. Zurich posited that Wausau waited nearly three years to disclaim coverage, which did not comply with the statute. The appellate court, however, affirmed the lower court's ruling in favor of Wausau, declining to "depart from the litany of New York cases holding that § 3420(d) does not apply to claims between insurers."

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### **Fees or Charges Exclusion – Seventh Circuit (Mississippi Law)**

#### ***BancorpSouth Inc. v. Federal Ins. Co.***

--- F.3d ---, 2017 WL 4546144 (7th Cir. Oct. 12, 2017)

The U.S. Court of Appeals for the Seventh Circuit ruled that a "fees or charges" exclusion was unambiguous. BancorpSouth Inc. (Bancorp), a financial institution that provides checking and savings accounts to individuals, was sued by a class of plaintiffs for allegedly charging, assessing and collecting "unfair," "unconscionable" and excessive overdraft fees. Bancorp settled the class action and subsequently sought coverage from its insurer, Federal Insurance Company (Federal). Federal denied coverage for the settlement, relying on the fees or charges exclusion, which provided that Federal "shall not be liable for Loss on account of any Claim ... based upon, arising from, or in consequence of any fees or charges." The appellate court agreed with Federal that the fees or charges exclusion was unambiguous, stating "there is nothing ambiguous about exactly what is excluded from coverage. ... The exclusion itself is plain and ordinary – the policy does not cover claims based upon, arising from, or in consequence of any fees or charges." Because the class action complaint sought damages as a result of overdraft fees, the appellate court determined that the fees or charges exclusion precluded coverage.

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