# Excess Insurance, Computer Fraud Coverage, Unsolicited Communications Exclusion Coverage Update

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**New York, Colorado Coverage Cases**
*The e-POST*

## Excess Insurance – Second Circuit (New York Law)

***Olin Corporation v. OneBeacon Am. Ins. Co.***
--- F.3d ---, 2017 WL 3027214 (2d Cir. July 18, 2017)

The Second Circuit Court of Appeals ruled that where a policy contains a prior insurance provision, "vertical exhaustion is the appropriate method for determining the attachment of excess policies." Olin Corporation (Olin) sought indemnification from its excess insurer, OneBeacon America Insurance Company (OneBeacon), for environmental contamination at Olin manufacturing sites throughout the United States. OneBeacon issued three excess policies to Olin that attached at various points above underlying primary commercial general liability policies issued by Insurance Company of North America (INA). The first OneBeacon policy attached at $300,000 with a $1 million per occurrence limit; the second OneBeacon policy attached at $1.3 million with a $4 million per occurrence limit; and the third OneBeacon policy attached at $5.3 million with a $15 million per occurrence limit. OneBeacon argued that horizontal exhaustion should apply to the INA primary layers and vertical exhaustion should apply to the OneBeacon policies. The appellate court rejected OneBeacon's approach and held that "an insured in Olin's position does not need to exhaust primary policies outside the policy year to reach the excess layers for its chosen policy year."

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## Computer Fraud Coverage – Southern District of New York (New York Law)

***Medidata Solutions, Inc. v. Fed. Ins. Co.***
--- F. Supp.3d ---, 15-CV-907 (ALC) (S.D.N.Y. Jul. 21, 2017)

The U.S. District Court for the Southern District of New York ruled that a thief's use of emails to trick employees into wiring money oversees was a covered incident under the crime coverage of the company's federal executive protection policy. The computer fraud provision in the policy covered losses that occurred because of the fraudulent entry or changing of data in the policyholder's computer system. Though the company's computers were not directly hacked by a third party, the federal district court held there was fraudulent entry because the thief used a computer code to alter email messages requesting a funds transfer made to appear as though they originated from the company's president. The court also found there was coverage under the funds transfer fraud provision, which applied when there were fraudulent electronic instructions purportedly issued from a company to a financial institution directing the transfer of money, without the company's knowledge or consent. The court found that even though the insurer argued the transfer of money in this case was with the company's knowledge and consent, the company would not have initiated the wire transfer but for the manipulation of the emails, and "larceny by trick is still larceny."

## Unsolicited Communications Exclusion – Colorado Law

***The Phoenix Ins. Co.v. Heska Corp.***
2017 WL 3190380 (D. Colo. July 26, 2017)

The U.S. District Court for the District of Colorado held that the unsolicited communications exclusion clearly applied to preclude coverage. After the insured, Heska Corp.(Heska), was sued for alleged violations of the Telephone Consumer Protection Act (TCPA), it sought insurance coverage from The Phoenix Insurance Company (Phoenix), its commercial liability insurer. Phoenix filed a declaratory judgment action seeking, in part, a determination that the policies' unsolicited communications exclusion applied to preclude coverage for the alleged violations of the TCPA. The court agreed with Phoenix that it had no duty to defend Heska in the underlying action, stating that "the unsolicited-communications exclusion, by the plain meaning of its text, indicates that Phoenix will not cover any claims for damages 'arising out of unsolicited communications by or on behalf of the insured.'" "The plain meaning of 'unsolicited communication' is no mystery – the Policies expressly state the definition is any communication not requested by the recipient." Thus, "[t]here can be no reasonable disagreement – and indeed, the disagreement here borders on frivolous – that the claim in the Underlying Litigation is not only excluded from coverage under the Policies, but clearly contemplated by Phoenix as a situation under which it will not provide coverage." Accordingly, the court granted Phoenix's partial motion for summary judgment.

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