Simpson Thacher

Insurance Law Alert

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Ninth Circuit Predicts That California Supreme Court Would Hold That Intentional Acts Cannot Be "Accidents" Regardless Of Insured's Reasonable Subjective Beliefs

The Ninth Circuit predicted that the California Supreme Court would rule that a policyholder's intentional act cannot be considered an "accident" for coverage purposes, regardless of the policyholder's subjective reasonable beliefs. *Crown Tree Serv. v. Atain Specialty Ins. Co.*, 2018 WL 1042673 (9th Cir. Feb. 26, 2018). (Click here for full article)

North Carolina Court Rules That Claims Arising Out Of Two Bridge Collapses Are "Related" And Thus Subject To Single Claim Limit

A North Carolina federal district court ruled that an insurer was obligated to pay only a single claim limit under a liability policy with respect to multiple claims arising from two bridge collapses because claims arising out of the collapses were "related claims." *Stewart Engineering, Inc. v. Continental Cas. Co.*, 2018 WL 1403612 (E.D.N.C. Mar. 20, 2018). (Click here for full article)

Finding Ambiguity, Nevada Court Rules That Per-Occurrence Limit Does Not Apply To Policy Endorsement

A Nevada federal district court ruled that a policy was ambiguous as to whether a coverage endorsement was subject to the policy's per-occurrence limit and thus construed the ambiguity against the insurer. *AIG Specialty Ins. Co. v. Liberty Mutual Fire Ins. Co.*, 2018 WL 1245488 (D. Nev. Mar. 9, 2018). (Click here for full article)

California Court Refuses To Dismiss Suit Against Insurer Based On Appointed Counsel's Alleged Inadequacies

A California federal district court declined to dismiss a breach of contract claim against an insurer based on the allegedly inadequate defense provided by appointed counsel. *DiMuccio v. Government Employees Ins. Co.*, 2018 WL 1382048 (E.D. Cal. Mar. 19, 2018). (Click here for full article)

Colorado District Court Rules That Failed Software Installation Is Not Property Damage

A Colorado federal district court ruled that liability insurers had no duty to defend or indemnify claims arising out of the botched installation of a software system, finding no physical injury to or loss of use of tangible property. *Ciber, Inc. v. Federal Ins. Co.*, 2018 WL 1203157 (D. Colo. Mar. 5, 2018). (Click here for full article)

"Simpson Thacher has many litigators who are very experienced in handling complex, multi-faceted litigation involving novel issues."

***– Benchmark Litigation* 2018 (quoting a client)**

California Appellate Court Rules That Property Policy Does Not Cover Losses Arising From Purchase Of Counterfeit Wine

A California appellate court ruled that a policyholder was not entitled to coverage under a valuable possessions policy for losses incurred as a result of the purchase of counterfeit wine, finding no loss to property. *Doyle v. Fireman's Fund Ins. Co.*, 2018 WL 1177929 (Cal. Ct. App. Mar. 7, 2018). (Click here for full article)

Tenth Circuit Rules That TCPA Damages and Injunctive Relief Are Uninsurable Penalties, Not Covered Damages

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Trial Court Erred In Denying Insurer's Fee Request Based On Nominal Settlement Offer, Says Florida Appellate Court

A Florida appellate court ruled that a trial court erred in denying an insurer's attorneys' fee request on the basis that the insurer's nominal settlement offer was made in bad faith. *Mount Vernon Fire Ins. Co. v. New Moon Mgmt.*, 2018 WL 844131 (Fla. Ct. App. Feb. 14, 2018). (Click here for full article)

Tenth Circuit Rules That Equitable Contribution Claim Is Governed By Statute Of Limitations For Contract, Not Equity, Claims

The Tenth Circuit ruled that an insurer's complaint against another insurer, alleging equitable contribution, was governed by Utah's six-year statute of limitations for claims based on written instruments, rather than the four-year statute of limitations for claims sounding in equity. *Maryland Cas. Co. v. Mid-Continent Cas. Co.*, 2018 WL 1388515 (10th Cir. Mar. 20, 2018). (Click here for full article)

Texas Appellate Court Rules That Insurer Need Not Produce Engineering Reports From Other Claims

A Texas appellate court ruled that an insurer was not obligated to produce engineering reports used in evaluating other property damage claims, notwithstanding that the coverage dispute before the court involved a report issued by the same engineering firm. *In re Hanover Lloyds Ins. Co.*, 2018 WL 1127436 (Tex. Ct. App. Mar. 2, 2018). (Click here for full article)

Simpson Thacher News Alerts:

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Coverage Alert:

Ninth Circuit Predicts That California Supreme Court Would Hold That Intentional Acts Cannot Be "Accidents" Regardless Of Insured's Reasonable Subjective Beliefs

The Ninth Circuit predicted that the California Supreme Court would rule that a policyholder's intentional act cannot be considered an "accident" for coverage purposes, regardless of the policyholder's subjective reasonable beliefs. *Crown Tree Serv. v. Atain Specialty Ins. Co.*, 2018 WL 1042673 (9th Cir. Feb. 26, 2018).

The coverage dispute arose when a policyholder was sued for removing trees that he mistakenly believed were on his property. A California federal district court had ruled that his insurer need not defend the suit because the policyholder's conduct was intentional and thus did not give rise to an insured "occurrence." The Ninth Circuit affirmed. Acknowledging the inconsistency of California appellate case law in this context, the Ninth Circuit predicted that "the California Supreme Court would hold that an insured's subjective belief – no matter how reasonable – cannot transform an intentional act into accidental conduct." The court further held that the unclear status of case law on this issue did not give rise to a "potential for coverage" obligating the insurer to defend.

Policy Limit Alerts:

North Carolina Court Rules That Claims Arising Out Of Two Bridge Collapses Are "Related" And Thus Subject To Single Claim Limit

A North Carolina federal district court ruled that an insurer was obligated to pay only a single claim limit under a liability policy with respect to multiple claims arising from two bridge collapses because claims arising out of the collapses were "related claims." *Stewart Engineering, Inc. v. Continental Cas. Co.*, 2018 WL 1403612 (E.D.N.C. Mar. 20, 2018).

Stewart, an engineering company, was retained to provide structural design services for two pedestrian bridges. During construction, both bridges collapsed, killing one worker and injuring several others. Numerous individuals thereafter sued Stewart. Stewart sought defense and indemnity from Continental up to the aggregate policy limit of $5 million. Continental argued that its obligation was limited to the $3 million per-claim limit. The court agreed and granted Continental's summary judgment motion.

The court ruled that claims arising out of both bridge collapses constituted "related claims," defined by the policy as "all claims . . . arising out of: (1) a single wrongful act; (2) multiple wrongful acts that are logically or causally connected by any common fact, situation, event, transaction, advice, or decision." The court explained that even if the design failures were considered separate wrongful acts, those acts were logically and causally connected based on common circumstances, events and decisions. In particular, there was a single contract for Stewart's design services for both bridges, and the same engineer of record and project manager supervised both bridges. The court noted that "[a]lthough there may have been some different actors and decisions involved in the design and construction of Bridge 1 and Bridge 2, such differences do not defeat a finding of relatedness." In so ruling, the court rejected Stewart's assertion that the related claim provision was ambiguous.

Finding Ambiguity, Nevada Court Rules That Per-Occurrence Limit Does Not Apply To Policy Endorsement

A Nevada federal district court ruled that a policy was ambiguous as to whether a coverage endorsement was subject to the

policy's per-occurrence limit and thus construed the ambiguity against the insurer. *AIG Specialty Ins. Co. v. Liberty Mutual Fire Ins. Co.*, 2018 WL 1245488 (D. Nev. Mar. 9, 2018).

A hotel owner sued its contractors for property damage caused by construction defects. The contractors were insured under a primary policy issued by Liberty and an excess policy issued by AIG. Liberty tendered its $2 million per-occurrence limit, arguing that the property damage was caused by a single occurrence. AIG sought a declaration that there were multiple occurrences, and thus that its policy was not implicated until Liberty paid its $4 million aggregate limit. AIG additionally argued that a contractor's rework endorsement in the Liberty policy, which provided coverage for the underlying claims, was not subject to the per-occurrence limit. The court agreed with this assertion and granted AIG's summary judgment motion.

The court concluded that Liberty's policy was ambiguous as to whether the contractor's rework endorsement was a separate insuring agreement that is not subject to the per-occurrence limit, or alternatively whether it was a modification to the coverage set forth in Coverage A (which relates to coverage for "property damage"), and thus subject to the per-occurrence limit. In finding ambiguity, the court noted that the endorsement did not refer to "occurrence" and did not indicate that it was replacing any provision within Coverage A. Further, the endorsement contained its own insuring agreement that did not define coverage with reference to "property damage" and had its own exclusions. The court acknowledged that "it may be a reasonable construction of the policy to conclude that the endorsement is just another form of 'property damage' that is subject to the per occurrence limit," but held that the ambiguity must be construed against Liberty, as the drafter of the policy.

Defense Alert:

California Court Refuses To Dismiss Suit Against Insurer Based On Appointed Counsel's Alleged Inadequacies

Last month's Alert discussed an Eleventh Circuit decision that held that even assuming appointed counsel was negligent in defending a policyholder, the insurer could not be held liable, so long as counsel was competent and qualified. *See Kapral v. Geico Indem. Co.*, 2018 WL 509308 (11th Cir. Jan. 23, 2018). This month, a California federal district court declined to dismiss a breach of contract claim against an insurer based on the allegedly inadequate defense provided by appointed counsel. *DiMuccio v. Government Employees Ins. Co.*, 2018 WL 1382048 (E.D. Cal. Mar. 19, 2018).

Sherita Wicks was sued for her involvement in an automobile accident. Geico initially refused to defend but thereafter provided a defense without a reservation of rights. Geico appointed counsel who was identified in various communications as a salaried employee of GEICO and as "GEICO Staff Counsel." Once assigned, counsel failed to oppose a pending summary judgment motion or seek a continuance. When judgment was ultimately entered against Wicks, counsel failed to appeal or move to set the judgment aside. Plaintiffs, as assignees of Wicks' claims against Geico, sued the insurer for failure to provide an adequate defense. The court refused to dismiss the suit on summary judgment.

The court explained that because counsel represented himself as a Geico employee, he could "hardly argue" that he was in the same position as independent counsel, free from the control and direction of Geico. The court found that issues of fact existed as to whether Geico was responsible for its counsel's conduct in providing a defense. In so ruling, the court highlighted the distinction between independent counsel retained by an insurer, and in-house staff counsel. Notably, the *Kapral* court deemed that distinction

immaterial, explaining that "under Florida law, an insurer has no more right to exercise control over staff counsel's professional conduct and independent judgment than it does over outside counsel's conduct and judgment."

Property Damage Alerts:

Colorado District Court Rules That Failed Software Installation Is Not Property Damage

A Colorado federal district court ruled that liability insurers had no duty to defend or indemnify claims arising out of the botched installation of a software system, finding no physical injury to or loss of use of tangible property. *Ciber, Inc. v. Federal Ins. Co.*, 2018 WL 1203157 (D. Colo. Mar. 5, 2018).

The Hawaii Department of Transportation ("HDOT") hired Ciber to install a new financial management system on its computers. The contract was terminated when Ciber failed to complete the project successfully. In ensuing litigation, HDOT asserted breach of contract and fraud claims against Ciber. Ciber's primary and umbrella insurers refused to defend on several bases, including the lack of property damage. The court agreed and granted the insurers' summary judgment motion.

The court held that allegations relating to the failed software system did not allege a loss of use of tangible property. The court reasoned that the claims were based on the software's inadequacies, not the loss of use of HDOT's computer system. The court distinguished *Eyeblaster, Inc. v. Federal Ins. Co.*, 613 F.3d 797 (8th Cir. 2010), in which the court concluded that software failure claims alleged covered property damage. Unlike the present case, the allegations in *Eyeblaster* included claims relating to the loss of use of the entire computer system as a result of failed software.

In addition, the court held that the underlying claims did not allege physical injury to the computer system. The court reasoned that the loss of "programming and custom configurations" does not constitute physical injury. Likewise, although HDOT claimed damages for "infrastructure costs," the court held that "there is no indication that [infrastructure] refers to anything other than software."

California Appellate Court Rules That Property Policy Does Not Cover Losses Arising From Purchase Of Counterfeit Wine

A California appellate court ruled that a policyholder was not entitled to coverage under a valuable possessions policy for losses incurred as a result of the purchase of counterfeit wine, finding no loss to property. *Doyle v. Fireman's Fund Ins. Co.*, 2018 WL 1177929 (Cal. Ct. App. Mar. 7, 2018).

Doyle purchased consecutive valuable possessions policies from Fireman's Fund to insure his rare wine collection. During the policy period, Doyle purchased nearly $18 million worth of purportedly vintage wine that he later discovered to be counterfeit. When Doyle sought reimbursement for losses arising from the counterfeit wine purchase under the policies, Fireman's Fund denied the claim on the ground that it did not present a covered loss under the policies. A California trial court agreed and sustained Fireman's Fund's demurrer. The appellate court affirmed.

The policy covered "direct and accidental loss or damage to covered property." The court concluded that there was no damage to covered property because there was no physical or other harm to the wine. The court explained: "When Doyle purchased the wine . . . it was counterfeit. The wine remained counterfeit (and essentially worthless) throughout the entire coverage period of the policy." The court concluded that the only loss was to Doyle's finances and investment, which is not a covered peril under a property policy.

The court rejected Doyle's assertion that his losses were covered because the policy (1) was not expressly limited to "physical" damages; and (2) did not list fraud as an exclusion. The court explained that the fundamental nature of property insurance is to protect against harm to property, not financial loss, and that the absence of a fraud exclusion is irrelevant because Doyle failed to establish an initial grant of coverage in the first place.

TCPA Alert:

Tenth Circuit Rules That TCPA Damages and Injunctive Relief Are Uninsurable Penalties, Not Covered Damages

The Tenth Circuit affirmed a Colorado federal district court decision holding that an insurer had no duty to defend or indemnify claims that DISH Network violated the Telephone Consumer Protection Act ("TCPA") because relief under the statute is an uninsurable penalty rather than covered damages. *Ace American Ins. Co. v. Dish Network, LLC*, 883 F.3d 881 (10th Cir. 2018).

The United States and several states sued DISH, alleging that it had violated the TCPA and related state laws by making solicitation calls to phone numbers on the Do Not Call Registry. Plaintiffs sought statutory damages, civil penalties and an injunction preventing future TCPA violations. Ace filed a declaratory judgment action, seeking a ruling that it had no duty to defend or indemnify the claims. A Colorado district court agreed and granted Ace's summary judgment motion. *Ace American Ins. Co. v. Dish Network, LLC*, 2016 WL 1182744 (D. Colo. Mar. 28, 2016) (*see* April 2016 Alert). The Tenth Circuit affirmed.

The Tenth Circuit ruled that TCPA statutory damages are penal in nature and thus uninsurable under Colorado public policy. The court rejected DISH's argument that portions of the TCPA were remedial (rather than punitive) because they allowed for damages representing "actual monetary loss." The court explained that even assuming that the TCPA has both remedial and penal components and that the remedial portions could fall within insurance coverage, the underlying complaint did not seek any remedial actual damages. Additionally, the court rejected DISH's contention that Colorado's public policy against insuring punitive damages was inapplicable because at least some of DISH's alleged conduct was unintentional. The court explained: "If a distinction is to be drawn between penal statutes that involve willful conduct and penal statutes merely designed to deter, as DISH argues, 'that decision is [the Colorado Supreme Court's] decision to make, not ours.'"

Finally, the Tenth Circuit rejected DISH's assertion that injunctive relief under the TCPA falls within the scope of insurable damages. The court acknowledged that the Colorado Supreme Court "has refused to draw a bright line between legal remedies and equitable remedies" in the context of environmental remediation, but deemed precedent in that context inapposite. The court explained that equitable relief in the pollution context addresses already existing damage (*e.g.*, pollution), whereas here, the equitable relief sought against DISH aimed to prevent potential future damages.

The question of whether TCPA claims are covered under a general liability policy under Florida law is likely to arise in light of a recent class action settlement in *Horn v. iCan Benefit Grp., LLC*, No. 9:17-cv-81027 (S.D. Fla. Mar. 2, 2018). A Florida federal district court issued preliminary approval of the settlement this month, setting the stage for coverage litigation between Liberty International Underwriters, Inc., the company's insurer, and the plaintiff class, assignees of the insurance benefits under the policy. We will keep you posted on any developments in this matter.

As discussed in previous Alerts, the Supreme Courts of Illinois and Missouri have ruled that TCPA damages were not uninsurable punitive damages. *See Standard Mutual Ins. Co. v. Lay*, 989 N.E.2d 591 (Ill. 2013) (June 2013 Alert); *Columbia Casualty Co. v. HIAR Holding, L.L.C.*, 411 S.W.3d 258 (Mo. 2013) (Sept. 2013 Alert).

Attorneys' Fee Alert:

Trial Court Erred In Denying Insurer's Fee Request Based On Nominal Settlement Offer, Says Florida Appellate Court

A Florida appellate court ruled that a trial court erred in denying an insurer's attorneys' fee request on the basis that the insurer's nominal settlement offer was made in bad faith. *Mount Vernon Fire Ins. Co. v. New Moon Mgmt.*, 2018 WL 844131 (Fla. Ct. App. Feb. 14, 2018).

New Moon sought coverage from Mount Vernon for water-related damage. After obtaining an engineering report, Mount Vernon denied the claim based on policy exclusions. New Moon sued the insurer, alleging breach of contract and bad faith. After nearly two years of discovery, Mount Vernon made a nominal settlement offer of $1,000 and moved for summary judgment as to coverage under the policy. A trial court granted the motion. Thereafter, Mount Vernon sought attorneys' fees and costs under Florida statutory law based on New Moon's failure to accept its settlement. The trial court denied Mount Vernon's motion for fees and costs, finding that its settlement offer was not made in good faith. The appellate court reversed.

The appellate court held that the trial court abused its discretion by ruling that the nominal settlement offer was not made in good faith. The court explained that because the offer was made after two years of extensive discovery and was based on engineering and investigative damage reports, Mount Vernon had a "reasonable basis" to conclude that its exposure was nominal.

Statute Of Limitations Alert:

Tenth Circuit Rules That Equitable Contribution Claim Is Governed By Statute Of Limitations For Contract, Not Equity, Claims

The Tenth Circuit ruled that an insurer's complaint against another insurer, alleging equitable contribution, was governed by Utah's six-year statute of limitations for claims based on written instruments, rather than the four-year statute of limitations for claims sounding in equity. *Maryland Cas. Co. v. Mid-Continent Cas. Co.*, 2018 WL 1388515 (10th Cir. Mar. 20, 2018).

When Red Point was sued for defective design and construction of a condominium, it sought general liability coverage from Maryland Casualty and Mid-Continental. Maryland Casualty defended Red Point, while Mid-Continent refused on the basis of several policy exclusions. The underlying suit was ultimately settled and Red Point assigned to Maryland Casualty any claims it had against Mid-Continent. Thereafter, Maryland Casualty sued Mid-Continent seeking a declaratory judgment as to coverage and alleging claims for equitable contribution and breach of contract. A Utah federal district court granted Maryland Casualty's summary judgment motion, finding that Mid-Continent had a duty to defend the underlying action and that Maryland Casualty's claims were timely. The Tenth Circuit affirmed.

The Tenth Circuit ruled that Maryland Casualty's complaint, including its equitable contribution claim, was governed by (and timely under) the six-year statute of limitations for written instruments. Rejecting the argument that the four-year statute of limitations for equity claims applied, the court held that all of Maryland Casualty's claims were "founded upon an instrument in writing." The court stated:

> Were it not for Red Point's policies with Mid-Continent, Mid-Continent would not potentially have a duty to defend Red Point in the underlying action, and Red Point would not potentially have a claim against Mid-Continent for failure to defend. . . . Further, were it not for Red Point's policy with Maryland, which contained the transfer of rights provision, Maryland would not potentially have the right to recover from Mid-Continent . . . . Thus, Mid-Continent's potential liability to Maryland in this action grows directly out of both policies.

The court distinguished Utah precedent holding that an insurer's contribution claim against another insurer sounds in equity, explaining that such case law establishes equity as an alternative avenue of recourse against a fellow insurer in the absence of a

contractual right to recovery, but does not stand for the proposition that equitable contribution claims cannot be derived from and founded upon written contracts.

The court also ruled that Mid-Continent's duty to defend was not negated by "Your Work" or "Impaired Property" exclusions. The court held that even assuming that the Your Work exclusion barred liability for all allegations relating to property damage to Red Point's own work or its subcontractors' work, Mid-Continent still had a duty to defend because the complaint also alleged damage to other real and personal property. The court further held that the Impaired Property exclusion – which applies to claims alleging loss of use of property – did not eliminate coverage because the underlying complaint included allegations of actual damage, not just loss of use.

Discovery Alert:

Texas Appellate Court Rules That Insurer Need Not Produce Engineering Reports From Other Claims

A Texas appellate court ruled that an insurer was not obligated to produce engineering reports used in evaluating other property damage claims, notwithstanding that the coverage dispute before the court involved a report issued by the same engineering firm. *In re Hanover Lloyds Ins. Co.*, 2018 WL 1127436 (Tex. Ct. App. Mar. 2, 2018).

Indoor Sports made a claim for property damage to Markel Insurance, who retained HAAG Engineering to investigate the claim. HAAG concluded that a hail storm during the policy period was not large enough to have caused the damage but that a storm during a previous policy period (covered by Hanover) produced hail large enough to have caused the damage. Indoor Sports then filed a claim with Hanover, which also denied the claim on the basis that a date of damage could not be determined.

In ensuing litigation, Indoor Sports alleged that Hanover's denial was in bad faith because Hanover routinely relies on HAAG Engineering reports in evaluating claims. Indoor Sports sought production of 50 previous storm damage-related HAAG Engineering reports filed with Hanover. Hanover refused to produce the documents. A Texas trial court granted Indoor Sports' motion to compel and denied Hanover's motion to reconsider. A Texas appellate court granted Hanover's writ of mandamus.

The appellate court ruled that the trial court abused its discretion by compelling production of the HAAG Engineering reports used by Hanover in deciding other claims. The court concluded that the reports were not reasonably calculated to lead to the discovery of relevant evidence, stating that "we fail to see how Hanover's use of HAAG Engineering reports on claims of unrelated third parties is probative of Hanover's conduct with respect to its handling of this claim." The court rejected Indoor Sports' assertion that the reports established Hanover's previous reliance on HAAG Engineering in approving claims and was thus probative as to the alleged unreasonableness of the investigation and denial in the present case.

Simpson Thacher News Alerts:

Simpson Thacher's Insurance Litigation Practice received the National Practice Group of the Year Award at Euromoney's *Benchmark Litigation* 2018 Awards Dinner. This is the sixth consecutive year that the Firm was named the Insurance Firm of the Year. In addition, Mary Beth Forshaw was shortlisted for the Insurance Lawyer of the Year, which she won in 2016.

Mary Beth Forshaw and Elisa Alcabes are contributing co-editors of the recently-published *Getting the Deal Through: Insurance Litigation* (5th edition 2018), which provides expert advice and insight into contentious insurance issues in a variety of international jurisdictions.

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Simpson Thacher has been an international leader in the practice of insurance and reinsurance law for more than a quarter of a century. Our insurance litigation team practices worldwide.

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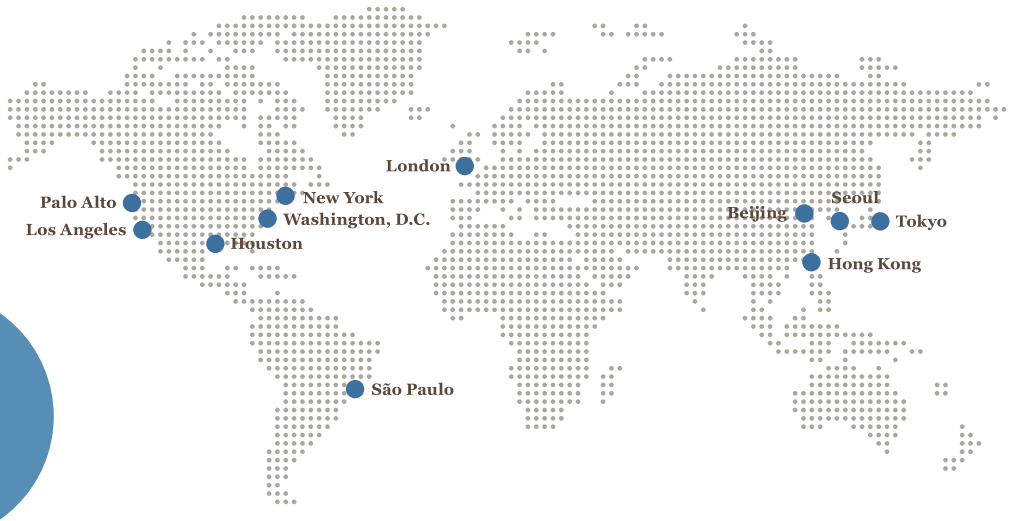

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