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The California Supreme Court ruled that California's common law notice-prejudice rule is a fundamental public policy for the purpose of potentially overriding an explicit choice-of-law provision in an insurance policy. *Pitzer College v. Indian Harbor Ins. Co.*, 2019 WL 4065521 (Cal. Aug. 29, 2019) (Click here for full article).

Delaware Court Rules That Appraisal Action Is Covered "Securities Claim" And That Policy Covers Pre-Judgment Interest For Non-Covered Losses

A Delaware court ruled that an appraisal action against an insured company qualifies as a covered "Securities Claim" under a D&O policy and that "Loss" encompasses pre-judgment interest for non-covered losses. *Solera Holdings, Inc. v. XL Specialty Ins. Co.*, 2019 WL 3453232 (Del. Super. Ct. July 31, 2019) (Click here for full article).

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An Indiana appellate court ruled that financial losses caused by computer hackers were not covered by a crime policy's forgery or theft provisions, but that statements relating to cyber coverage in the insurer's promotional materials create an issue of fact as to coverage by estoppel. *Metal Pro Roofing, LLC v. Cincinnati Ins. Co.*, 2019 WL 3756738 (Ind. Ct. App. Aug. 9, 2019) (Click here for full article).

Deteriorating Concrete Is Not "Collapse" Under Property Policy, Says Connecticut District Court

Another Connecticut federal district court joined the growing majority of courts that have held that damage caused by defective concrete is not covered by the homeowners' property policy. *Dumas v. USAA Gen. Indem. Co.*, 2019 WL 3574920 (D. Conn. Aug. 6, 2019) (Click here for full article).

Loss Of Wine Bottles In Ponzi Scheme Not Covered By Valuable Items Policy, Says Tenth Circuit

The Tenth Circuit ruled that policyholders were not entitled to recover for the loss of wine bottles never delivered by a retailer who had been operating a Ponzi scheme, reasoning that the policyholders had never actually "owned" or "possessed" the wine. *Hasan v. AIG Prop. Cas. Co.*, 2019 WL 4019902 (10th Cir. Aug. 27, 2019) (Click here for full article).

Insurer Is Entitled To Compel Appraisal Because It Did Not "Wholly Deny" Coverage, Says Florida Appellate Court

A Florida appellate court ruled that a property insurer was entitled to compel appraisal even though it refused to make payments to the homeowners because it did not "wholly deny" coverage. *Underwriters at Lloyd's, London v. Sorgenfrei*, 2019 WL 4383441 (Fla. Dist. Ct. App. Sept. 13, 2019) (Click here for full article).

STB News Alerts

Click here to read about the Firm's insurance-related honors and engagements.

Public Policy Alert:

California Supreme Court Says California's Notice-Prejudice Rule May Override Policy's Choice-Of-Law Provision

The California Supreme Court ruled that California's common law notice-prejudice rule is a fundamental public policy for the purpose of potentially overriding an explicit choice-of-law provision in an insurance policy. The court also held that the notice-prejudice rule applies to consent provisions in first-party policies. *Pitzer College v. Indian Harbor Ins. Co.*, 2019 WL 4065521 (Cal. Aug. 29, 2019).

Pitzer College discovered soil damage at a construction site on its campus and promptly commenced remediation work. Pitzer did not inform its insurer Indian Harbor of the issue until approximately three months after remediation had been completed. Indian Harbor denied coverage based on Pitzer's failure to give notice as soon as practicable and its failure to obtain consent prior to remediation. A California district court granted Indian Harbor's summary judgment motion, finding that Pitzer had violated the policy's notice and consent provisions. The district court applied New York law in accordance with the policy's choice-of-law provision. New York law does not require a showing of prejudice in order to deny coverage based on late notice for policies delivered and issued outside of New York. The district court also ruled that summary judgment was warranted based on Pitzer's failure to obtain consent prior to incurring remediation costs.

On appeal, the Ninth Circuit explained that if California's notice-prejudice rule is deemed a "fundamental public policy," it can override the parties' choice of New York law. Citing a lack of controlling precedent on this and other issues, the court certified the following questions to the California Supreme Court:

> (1) Is California's common law notice-prejudice rule a fundamental public policy for the purpose of choice of law analysis?
>
> (2) If so, does the notice-prejudice rule apply to the consent provision of the insurance policy in this case?

The California Supreme Court answered the first question in the affirmative. It reasoned that requiring an insurer to establish prejudice as a result of late notice is a fundamental state policy because it promotes fairness, protects against inequity among contracting parties with unequal bargaining power, and promotes the public interest by protecting the public from bearing the costs of harm that insurance purports to cover. The California Supreme Court remanded to the Ninth Circuit the issue of "whether California has a materially greater interest than New York in determining the coverage issue, such that the contract's choice of law would be unenforceable."

As to the second certified question, the court held that the notice-prejudice rule applies to consent provisions in first-party policies. The court explained that the rationale that justifies a showing of prejudice for violations of notice provisions applies with equal force to policy provisions that require consent prior to incurring costs. However, the court expressly limited this holding to first-party policies, noting that different concerns are implicated in the context of third-party coverage. The court remanded the matter for a determination of whether Indian Harbor's policy provided first-party or third-party coverage.

D&O Alert:

Delaware Court Rules That Appraisal Action Is Covered "Securities Claim" And That Policy Covers Pre-Judgment Interest For Non-Covered Losses

A Delaware court ruled that an appraisal action against an insured company qualifies as a covered "Securities Claim" under a D&O policy and that "Loss" encompasses pre-judgment interest for non-covered losses. *Solera Holdings, Inc. v. XL Specialty Ins. Co.*, 2019 WL 3453232 (Del. Super. Ct. July 31, 2019).

After Solera, a publicly-traded company, was acquired by another entity, a group of shareholders filed an appraisal action seeking determination of the fair value for their shares. That action culminated in a finding that the value of the petitioners' shares at the time of merger was actually lower than the merger price. Following the ruling, Solera was ordered to pay the petitioners the fair value of their shares plus pre-judgment interest. Solera paid more than $13 million in attorneys' fees and other costs defending the appraisal action.

Solera's D&O insurers denied coverage, arguing that the appraisal action was not a "Securities Claim," which the policy defined as a claim "made against [Solera] for any actual or alleged violation of any federal, state or local statute, regulation, or rule or common law regulating securities." The insurers contended that the appraisal action did not allege any "violation" of law or any wrongdoing that satisfied the "Securities Claim" definition. The court disagreed, noting that allegations of wrongdoing are not required by the policy language. The court explained that the undefined term "violation" includes any breach of the law or contravention of a right or duty. Allegations of unfair share valuation in an appraisal action meet this standard, the court concluded, because "[b]y its very nature, a demand for appraisal is an allegation that the company contravened that right by not paying shareholders the fair value to which they are entitled."

Additionally, the court ruled that even though Solera's payment of the fair market value of the shares was not a covered loss, the pre-judgment interest on that payment is covered. The policy defines "Loss" as "damages, judgments, settlement, pre-judgment and post-judgment interest or other amounts . . . that [Solera] is legally obligated to pay." The court stated: "Defendants' argument that 'Loss' includes pre-judgment interest only on a covered judgment is untethered to the language in the Policy." However, the court declined to grant summary judgment on this issue, finding issues of fact as to whether other provisions precluded coverage and whether Solera actually paid the interest award, among other things.

Finally, the court addressed the insurers' argument that they had no duty to cover Solera's pre-notice defense costs because Solera violated the policy's consent clause by failing to give notice before incurring those costs. The court concluded that a coverage denial based on a violation of a consent clause requires a showing of material prejudice under Delaware law. The court held that the issue of prejudice could not be decided on summary judgment, explaining that there is a presumption that the insurers were prejudiced by the breach, but that Solera could rebut that presumption with specific evidence.

Cyber Coverage Alert:

Indiana Appellate Court Rules That Hacking Losses Are Not Covered By Policy, But That Insurer's Assurances In Promotional Materials Create Issues Of Fact As To Coverage

An Indiana appellate court ruled that financial losses caused by computer hackers were not covered by a crime policy's forgery or theft provisions, but that statements relating to cyber coverage in the insurer's promotional materials create an issue of fact as to coverage by estoppel. *Metal Pro Roofing, LLC v. Cincinnati Ins. Co.*, 2019 WL 3756738 (Ind. Ct. App. Aug. 9, 2019).

After computer hackers stole funds from Metal Pro's bank accounts, the company

sought coverage under a crime policy. The insurer denied coverage on the grounds that the hacking activities did not fall within the forgery or theft provisions. A trial court agreed and dismissed Metal Pro's breach of contract claim. However, the court allowed a bad faith claim to proceed based on alleged misrepresentations made by the insurer relating to the scope of computer hacking coverage. Metal Pro alleged that statements in the insurer's coverage quotes created a reasonable belief that the policy would cover hacking losses. In response, the insurer argued that even if the representations could be interpreted to assure coverage, any reasonable reliance was negated by an express disclaimer stating that "This is not a policy. For a complete statement of the coverages and exclusions, please see the policy contract."

The trial court dismissed the bad faith claim. It reasoned that although language in the promotional material could be interpreted as a misleading representation of coverage, the claim nonetheless failed because Metal Pro did not rely on the document. The trial court held that any purported reliance was negated by deposition testimony indicating that Metal Pro did not read the policy until after coverage was denied.

The appellate court affirmed in part and reversed in part. The appellate court affirmed that computer hacking losses were not covered by the forgery or theft provisions of the policy. As to the bad faith claim, the appellate court held that the explicit reference to "computer hackers" in the promotional material and its assurance of "peace of mind with Cincinnati's crime coverage to insure the money and securities you worked so hard to earn" created a reasonable expectation of coverage for computer hacking loss. The appellate court ruled that the trial court erred in finding a lack of reliance, noting that although Metal Pro conceded that it did not read the policy initially, it did allegedly read (and rely on) the descriptive statements in the coverage quotes. Finally, the court held that the question of whether the disclaimer "neutralizes otherwise misleading quote language" is one for the finder of fact.

Defective Concrete Alert:

Deteriorating Concrete Is Not "Collapse" Under Property Policy, Says Connecticut District Court

Another Connecticut federal district court joined the growing majority of courts that have held that damage caused by defective concrete is not covered by the homeowners' property policy. *Dumas v. USAA Gen. Indem. Co.*, 2019 WL 3574920 (D. Conn. Aug. 6, 2019).

Homeowners filed a claim with their property insurer for cracks and deterioration in the concrete foundation of their home. When the insurer denied the claim, the homeowners sued, alleging breach of contract, bad faith and violations of state statutory law. The court granted the insurer's summary judgment motion on all claims.

The policy defines collapse as "a sudden falling or caving in" or "a sudden breaking apart or deformation such that the building . . . is in imminent peril of falling or caving in and is not fit for its intended use." The court concluded that this requirement was not met because the evidence established that the damage occurred gradually over time. The court noted that although other Connecticut courts have deemed substantial impairment sufficient to constitute collapse for the purposes of insurance coverage, those cases involved policies that did not define collapse, whereas here, the policy expressly includes a "sudden" requirement.

The court rejected several other arguments asserted by the homeowners, including that coverage was available under the ensuing loss or reasonable repairs provisions, or that the chemical reaction that occurred in the concrete was itself a sudden physical loss that was covered by the policy.

Coverage Alert:

Loss Of Wine Bottles In Ponzi Scheme Not Covered By Valuable Items Policy, Says Tenth Circuit

The Tenth Circuit ruled that policyholders were not entitled to recover for the loss of wine bottles never delivered by a retailer who had been operating a Ponzi scheme, reasoning that the policyholders had never actually "owned" or "possessed" the wine. *Hasan v. AIG Prop. Cas. Co.*, 2019 WL 4019902 (10th Cir. Aug. 27, 2019).

The policyholders ordered wine from Premier Cru, a California-based wine merchant. In actuality, however, Premier Cru did not order or deliver much of the wine that it promised; rather, its president operated a Ponzi scheme and spent most of Premier Cru's funds on personal use. In a guilty plea on wire fraud charges, Premier Cru's president admitted to selling $20 million of phantom wine. After Premier Cru filed for bankruptcy, the policyholders submitted a claim to AIG for approximately $1.7 million—the asserted market value of the wine that they purchased but never received.

The AIG policy insured against "direct physical loss or damage to valuable articles anywhere in the world." Valuable articles is defined as "personal property you own or possess." AIG denied coverage on the ground that the policyholders did not own or possess the wine at issue, and that the loss at issue was a loss of money, which is not insured by the policy. In ensuing litigation, a Colorado district court granted AIG's summary judgment motion, holding that even assuming the policyholders "owned" the wine, they could not establish physical loss or damage. The Tenth Circuit affirmed on different grounds.

The Tenth Circuit ruled that the loss was not insured because the policyholders never owned or possessed the undelivered wine bottles. The court explained that there was no evidence that Premier Cru ever purchased the ordered bottles in the first place. The court stated: "Absent evidence that any of the 2,448 ordered bottles of wine were actually purchased by Premier Cru, much less specifically purchased for Plaintiffs, Plaintiffs have failed to carry their burden on an essential element of their insurance claim—that there are unaccounted for bottles of wine that they owned."

As discussed in our March 2018 Alert, a California appellate court similarly denied coverage under a valuable possessions policy for wine-related loss in *Doyle v. Fireman's Fund Ins. Co.*, 2018 WL 1177929 (Cal. Ct. App. Mar. 7, 2018). There, the policyholder purchased nearly $18 million of purportedly vintage wine that he later discovered to be counterfeit. The court held that there was no "direct and accidental loss or damage to covered property" because there was no physical harm to the wine, but rather only financial loss as a result of the fraudulent sale.

Appraisal Alert:

Insurer Is Entitled To Compel Appraisal Because It Did Not "Wholly Deny" Coverage, Says Florida Appellate Court

A Florida appellate court ruled that a property insurer was entitled to compel appraisal even though it refused to make payments to the homeowners because it did not "wholly deny" coverage. *Underwriters at Lloyd's, London v. Sorgenfrei*, 2019 WL 4383441 (Fla. Dist. Ct. App. Sept. 13, 2019).

Homeowners filed a claim with their property insurer for hurricane-related damage. The insurer admitted coverage under the policy, but argued that the loss did not meet the required deductible. Additionally, the insurer claimed that there was pre-existing damage to the property. The insurer sought to compel an appraisal, which a trial court denied.

The appellate court reversed, ruling that under Florida law, "when an insurer does not wholly deny coverage, a disagreement between the parties as to causation presents an amount-of-loss issue to be determined, under the contract, by appraisal." The court explained that although the insurer refused to issue payment based on the deductible and alleged pre-existing damage, the insurer had conceded that a portion of the claim was within the policy's coverage and thus did not wholly deny coverage.

STB News Alerts

Susannah Geltman was named to *Benchmark Litigation*'s fourth annual "40 and Under Hot List." The feature honors the most notable up and coming litigation attorneys in the country under the age of 40. The list is based on extensive research and feedback from peers and clients. In addition, Susannah was the featured speaker on a webinar hosted by Thomson Reuters, titled "The Impact of Social Media on Litigation: What you Need to Know." She provided an overview of critical issues for litigators to consider with respect to social media, including the impact of social media on discovery and evidentiary issues, jury selection and juror conduct, employee conduct, and ethical issues for lawyers and judges.

Mary Beth Forshaw and Lynn Neuner are among the six litigators at the Firm to be recognized as this year's "Top 250 Women in Litigation" by Euromoney's *Benchmark Litigation*. The feature honors the accomplishments of America's leading female litigators who have participated in some of the most impactful litigation matters in recent history and who have earned the respect of their peers and clients. In addition to being named to the "Top 250 Women in Litigation" list, Lynn was also recognized as a "Top 10 Female Litigator" in the United States.

Simpson Thacher

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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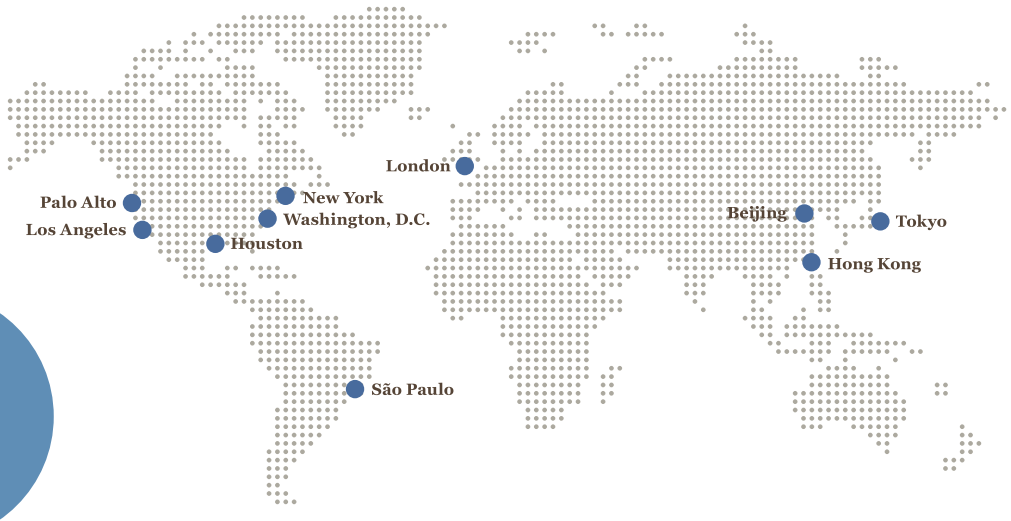

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