Simpson Thacher

Insurance Law Alert

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The New York Court of Appeals ruled that an additional insured provision applies only to injury proximately caused by the named insured and does not extend "broadly to any injury causally linked to the named insured." *Burlington Ins. Co. v. NYC Transit Authority*, 2017 WL 2427300 (N.Y. June 6, 2017). (Click here for full article)

"Simpson Thacher is a premier firm in this space. The lawyers there continue to do good work and they are commercially respected."

–*Chambers USA* 2017, quoting a client

West Virginia Court Addresses Scope Of General Liability Coverage For Wrongful Eviction

Addressing a matter of first impression under West Virginia law, a federal district court ruled that an insurer had no duty to defend or indemnify claims alleging that a restaurant wrongfully refused service to a disabled individual because such conduct does not constitute a "wrongful eviction" under the policy. *Grand China Buffet & Grill, Inc. v. State Auto Property & Casualty Co.*, 2017 WL 2129307 (May 16, 2017). (Click here for full article)

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The Ninth Circuit ruled that primary and umbrella insurers had no duty to defend suits alleging that the policyholder secretly installed spyware programs on consumers' computers. *Am. Econ. Ins. Co. v. Hartford Fire Ins. Co.*, 2017 WL 2323440 (9th Cir. May 26, 2017). (Click here for full article)

New Jersey Supreme Court Rules That Flood Limit Caps Policyholder's Recovery For Debris Removal

The Supreme Court of New Jersey ruled that a policyholder's coverage for flood and debris damage was limited to the $1 million cap set forth in the flood endorsement, even though a debris removal clause contained a separate sublimit. *Oxford Realty Grp. Cedar v. Travelers Excess and Surplus Lines Co.*, 2017 WL 2290135 (N.J. May 25, 2017). (Click here for full article)

Eighth Circuit Rules That Crime Policy Does Not Cover Loss Of Investment Returns Caused By Ponzi Scheme

The Eighth Circuit ruled that a crime policy does not cover the loss of returns that the policyholder allegedly earned on certain investments but lost due to the fraud of its investment advisors. *3M Co. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2017 WL 2347105 (8th Cir. May 31, 2017). (Click here for full article)

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A New York appellate court ruled that a policyholder's late notice is excused if it has a reasonable, good faith belief that the underlying claims are outside of the scope of policy coverage. *Cohen Bros. Realty Corp. v. RLI Ins. Co.*, 2017 WL 2540546 (N.Y. App. Div. 1st Dep't June 13, 2017). (Click here for full article)

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The Tenth Circuit dismissed monopoly, conspiracy and common law tort claims against Blue Cross and Blue Shield Association, finding that the complaint failed to sufficiently allege such violations. *Bristow Endeavor Healthcare, LLC v. Blue Cross and Blue Shield Assoc.*, 2017 WL 2350204 (10th Cir. May 31, 2017). (Click here for full article)

Two Courts Rule That Earth Movement Exclusion Unambiguously Bars Coverage

Addressing matters of first impression under West Virginia and Michigan law, two courts ruled that earth movement exclusions unambiguously preclude coverage for rock-related damage, whether caused by natural or man-made events. *Erie Ins. Prop. and Cas. Co. v. Chaber*, 2017 WL 2415333 (W. Va. June 1, 2017); *Home-Owners Ins. Co. v. Andriacchi*, 2017 WL 2491886 (Mich. Ct. App. June 8, 2017). (Click here for full article)

Texas Supreme Court Rules That Attorney Billing Information Of Party Opposing Attorneys' Fees Is Not Discoverable

The Texas Supreme Court ruled that attorney billing information is protected work-product, and that a party does not waive privilege by challenging the opposing party's fee request if it does not use its own fees as a comparator or seek to recover any portion of its own fees. *In re National Lloyds Ins. Co.*, 2017 WL 2501107 (Tex. June 9, 2017). (Click here for full article)

Additional Insured Alert:

New York Court Of Appeals Limits Additional Insured Coverage To Injury Proximately Caused By Named Insured

Reversing an appellate court decision, the New York Court of Appeals ruled that an additional insured provision applies only to injury proximately caused by the named insured and does not extend "broadly to any injury causally linked to the named insured." *Burlington Ins. Co. v. NYC Transit Authority*, 2017 WL 2427300 (N.Y. June 6, 2017).

The New York City Transit Authority ("NYCTA") contracted with Breaking Solutions, Inc. ("BSI") for tunnel excavation. Pursuant to the contract, BSI obtained liability insurance from Burlington, listing NYCTA and the MTA as additional insureds. When a NYCTA employee was injured during the course of work, NYCTA sought defense and indemnity from Burlington. Discovery in the underlying personal injury suit revealed that the injury was caused solely by NYCTA's negligence. Thereafter, Burlington denied coverage, asserting that NYCTA and MTA were not additional insureds under the policy for the purposes of the injury at issue. In ensuing litigation, a New York trial court granted Burlington's summary judgment motion. An intermediate appellate court reversed, ruling that additional insured coverage was available because there was a causal link between BSI's conduct and the injury, even though BSI was not negligent or the proximate cause of injury. The New York Court of Appeals reversed.

The additional insured endorsement provides that the NYCTA and MTA are additional insureds "only with respect to liability . . . caused, in whole or in part, by: 1. Your acts or omissions; or 2. The acts or omissions of those acting on your behalf." The New York Court of Appeals ruled that this language requires BSI (the named insured) to be the proximate cause of the injury in order to trigger additional insured coverage. The court rejected the argument that "caused, in whole or in part" means only but for causation, such that additional insured coverage is available so long as there is some causal link between the named insured's conduct and the injury. In so ruling, the court expressly rejected the appellate court's finding that the phrase "caused by" does not materially differ from "arising out of."

Coverage Alerts:

West Virginia Court Addresses Scope Of General Liability Coverage For Wrongful Eviction

Addressing a matter of first impression under West Virginia law, a federal district court ruled that an insurer had no duty to defend or indemnify claims alleging that a restaurant wrongfully refused service to a disabled individual because such conduct does not constitute a "wrongful eviction" under the policy. *Grand China Buffet & Grill, Inc. v. State Auto Property & Casualty Co.*, 2017 WL 2129307 (May 16, 2017).

Scott Ullom sued Grand China Buffet for statutory and constitutional violations based on the restaurant's refusal to allow Ullom and his service dog into the restaurant. The complaint sought damages for emotional distress, embarrassment and humiliation. Grand China Buffet thereafter sought a declaration that State Auto, its general liability insurer, was obligated to defend and indemnify the underlying claims. Finding no coverage under the policy, the court granted State Auto's summary judgment motion.

The court ruled that Ullom's claims do not allege "wrongful eviction" under the Personal and Advertising Liability section of the policy.

Although "eviction" is not defined, the court concluded that it requires the underlying plaintiff to have a legal right to be on the premises from which he was evicted (such as a tenant). The court reasoned that language referring to "a room, dwelling or premises that a person occupies" indicates an intent to limit the scope of eviction to situations in which the plaintiff has a right of occupation. Because Ullom had no possessory interest in Grand China Buffet that gave him a right to occupy the restaurant, there is no coverage under the "wrongful eviction" provision. As the court noted, courts in other jurisdictions have issued mixed decisions in this context.

The court also concluded that the complaint does not allege bodily injury under the policy. Under West Virginia law, purely mental or emotional harm that lacks physical manifestation does not generally constitute bodily injury for coverage purposes when the definition of "bodily injury" is limited to "bodily injury, sickness, or disease."

Ninth Circuit Affirms That Insurers Have No Duty To Defend Spyware Suits

Our October 2015 Alert reported on a Montana federal district court decision holding that primary and umbrella insurers had no duty to defend two suits alleging that the policyholder secretly installed spyware programs on consumers' computers. *Am. Econ. Ins. Co. v. Aspen Way Enters., Inc.*, 2015 WL 5680134 (D. Mont. Sept. 25, 2015). Last month, the Ninth Circuit affirmed the ruling. *Am. Econ. Ins. Co. v. Hartford Fire Ins. Co.*, 2017 WL 2323440 (9th Cir. May 26, 2017).

A class action suit alleged that Aspen Way installed undetectable software on computers that were leased or sold to customers. According to the complaint, the software allowed Aspen Way to take photographs with the computer's webcam, capture keystrokes and take screen shots without the consumer's knowledge. The complaint alleged violations of federal statutory law and the common law right to privacy. The common law claims were dismissed, leaving only the cause of action alleging a violation of the Electronic Communications Privacy Act. Liberty agreed to defend the suit under a reservation of rights. A second suit was filed against Aspen Way by the State of Washington alleging violations of state statutory law. This suit was resolved by a consent decree, under which Aspen Way agreed to pay $150,000. Liberty paid this sum on behalf of Aspen Way, but reserved the right to seek recoupment upon a declaration of non-coverage. Thereafter, Liberty filed suit seeking reimbursement from Aspen Way and a declaration that it had no duty to defend either suit.

The Ninth Circuit ruled that coverage for the class action suit was barred by an exclusion relating to violations of statutes that address the collection or distribution of material or information. With respect to the Washington State action, the court concluded that Liberty had no duty to defend because the complaint did not allege "publication" of personal information to third parties. Finally, the court ruled that the insurers were entitled to recoup defense costs, explaining that under Montana law, Aspen Way "implicitly accepted" their defenses under a reservation of rights.

New Jersey Supreme Court Rules That Flood Limit Caps Policyholder's Recovery For Debris Removal

The Supreme Court of New Jersey ruled that a policyholder's coverage for flood and debris damage was limited to the $1 million cap set forth in the flood endorsement, even though a debris removal clause contained a separate sublimit. *Oxford Realty Grp. Cedar v. Travelers Excess and Surplus Lines Co.*, 2017 WL 2290135 (N.J. May 25, 2017).

After Superstorm Sandy, Oxford submitted a claim to Travelers under its surplus lines policy claiming flood damage in excess of $1 million and debris removal in excess of $200,000. Travelers asserted that all damage caused by the flood was subject to the $1 million limitation for a flood occurrence. In ensuing litigation, a New Jersey trial court granted Travelers' summary judgment motion, finding that the policy unambiguously limited all flood damage to $1 million. An appellate court reversed and remanded for entry of judgment in Oxford's favor. The appellate court held that the policy provided $500,000 of coverage for debris removal in addition to the flood limit. The New Jersey Supreme Court reversed and reinstated the trial court's grant of summary judgment in Travelers' favor.

The flood endorsement provides that "[t]he most [Travelers] will pay for the total of all loss or damage caused by Flood in any one policy year is the single highest Annual Aggregate Limit of Insurance specified for Flood shown in the Supplemental Coverage Declarations." The New Jersey Supreme Court concluded that this language unambiguously limits total recovery for all flood occurrence losses to $1 million. The court further explained that a separate clause "fortifies this hard cap by explaining that, even if multiple Annual Aggregate Limits of Insurance apply to flood damage, the Limit of Insurance specified in . . . the Supplemental Coverage Declarations is the most Travelers will pay." Thus, the court concluded that even though the policy assigns a separate debris removal sublimit of $500,000, it does not constitute a self-contained policy provision outside the application of the $1 million flood limit. Finally, the court declined to address Oxford's contentions as to the doctrines of reasonable expectations or *contra proferentem* in light of its ruling that the policy is unambiguous.

Eighth Circuit Rules That Crime Policy Does Not Cover Loss Of Investment Returns Caused By Ponzi Scheme

The Eighth Circuit ruled that a crime policy does not cover the loss of returns that the policyholder allegedly earned on certain investments, but lost due to the fraud of its investment advisors. *3M Co. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2017 WL 2347105 (8th Cir. May 31, 2017).

3M invested its employee-benefit plan assets in WG Trading Company. The investment was structured as a limited partnership interest in WG Trading. After it was discovered that WG Trading's founders had engaged in fraudulent activity, 3M submitted a claim under a crime policy, arguing that 3M suffered a loss because some of its capital had been invested in legitimate vehicles and produced legitimate earnings, which 3M never recovered. National Union denied coverage on several bases, including that 3M failed to establish "ownership" of those earnings, as required by the policy. A Minnesota federal district court agreed and granted National Union's summary judgment motion. *See* October 2015 Alert. Last month, the Eighth Circuit affirmed. 3M argued that it was entitled to coverage under an Employee Dishonesty provision that covers the loss of money, securities or "other property" caused by theft or forgery. 3M contended that the Employee Dishonesty clause is not subject to the policy's general "ownership" requirement because it refers to "other property" (rather than "insured property"). Rejecting this argument, the court explained: "Although the Employee Dishonesty provision does not expressly state whose other property is covered, it is entirely unreasonable to interpret the provision as extending coverage under the Policy to other property that is not insured property."

Alternatively, 3M argued that the ownership requirement was satisfied because it had a limited partnership interest in WG Trading. The court dismissed this argument as well, stating that "up until the point at which the earnings were distributed to the partners, the stolen earnings were property of WG Trading – not property of 3M."

Notice Alert:

New York Appellate Court Reaffirms That Good Faith, Reasonable Belief In Non-Liability Excuses Late Notice

A New York appellate court ruled that a policyholder's late notice is excused if it has a reasonable, good faith belief that the underlying claims are outside of the scope of policy coverage. *Cohen Bros. Realty Corp. v. RLI Ins. Co.*, 2017 WL 2540546 (N.Y. App. Div. 1st Dep't June 13, 2017).

The coverage dispute arose out of a fatal accident that occurred during construction of a building managed by Cohen Bros. Realty. On the day of the accident, Cohen Bros. contacted its insurance broker and was advised that because the accident was a workers' compensation matter, a general liability policy issued by RLI would not apply. The workers' compensation carrier, State Insurance Fund ("SIF"), agreed to defend and indemnify Cohen Bros. Approximately 5 months later, the decedent's administratrix obtained an order to show cause to conduct discovery for the purpose of suing Cohen Bros. Cohen Bros. notified RLI, which denied coverage based on late notice. Cohen Bros.

retained its own counsel, partially funded by SIF. The underlying litigation eventually settled for $2.5 million. Cohen Bros. sought a declaration that RLI was obligated to defend and indemnify the underlying claims. A New York trial court agreed and the appellate court affirmed.

The appellate court ruled that the delay in notice was excused due to a reasonable, good faith belief that the accident was outside the scope of policy coverage. The court expressly reaffirmed that *Tesler v. Paramount Ins. Co.*, 220 A.D.2d 334 (N.Y. App. Div. 1st Dep't 1995), which held that late notice is excused by reasonable belief of non-liability based on incorrect advice of an insurance agent, remains good law. Additionally, the court ruled that the voluntary payments doctrine did not bar recovery, explaining that by denying coverage and refusing to defend, RLI "excluded itself from any aspect of the [p]laintiff's defense . . . including the negotiation of attorneys' fees . . . and cannot now be heard to complain."

Further, the court addressed the amount of defense costs for which RLI was responsible. RLI argued that the $150 per hour contribution by SIF to the underlying defense acted as a ceiling on defense fees for RLI as well. The court rejected this argument, reasoning that "[a]ny agreement between SIF and plaintiff as to fees has no bearing on RLI's responsibility to provide a defense." However, the court declined to address how defense fees should be allocated between SIF and RLI, noting that such a determination would be based, at least in part, on SIF's policy language.

Antitrust Alert:

Tenth Circuit Dismisses Conspiracy And Monopoly Claims Against Blue Cross And Blue Shield Association

The Tenth Circuit dismissed monopoly, conspiracy and common law tort claims against Blue Cross and Blue Shield Association ("BCBSA"), finding that the complaint failed to sufficiently allege such violations. *Bristow Endeavor Healthcare, LLC v. Blue Cross and Blue Shield Assoc.*, 2017 WL 2350204 (10th Cir. May 31, 2017).

Bristow Endeavor Healthcare, an operator of medical facilities in northeast Oklahoma, entered into an in-network provider agreement with Health Care Service Corporation ("HCSC"), a BCBSA company in Oklahoma for some of its facilities. When Bristow asked HCSC to add a new facility (CORE) to the existing provider agreement, HCSC refused to do so, and the parties were unable to reach a separate agreement as to CORE. Thereafter, Bristow filed suit, alleging that HCSC's refusal to grant CORE in-network status resulted from a conspiracy to restrain trade with Hillcrest Healthcare System and Ardent Health Systems, Bristow's largest competitors. Bristow claimed that the purpose of the conspiracy was to prevent CORE from fully competing in the northeast Oklahoma healthcare market, thereby allowing Hillcrest to maintain and expand its market share in that region. An Oklahoma federal district court dismissed the complaint, and the Tenth Circuit affirmed.

The Tenth Circuit acknowledged that the Sherman Act conspiracy claim was "a reasonably close question" but concluded that the complaint did not plausibly allege a conspiracy. The court explained that while Hillcrest and Ardent may have been motivated to undermine Bristow as a competitor, HCSC would be acting against its own interest if it agreed to reduce competition in the healthcare market. The court rejected Bristow's suggestion that HCSC acted at Hillcrest's behest because it wanted to maintain Hillcrest's business, noting that the complaint did not include specific allegations that Hillcrest possessed market power sufficient to compel HCSC to act against its own interest. The court deemed insufficient allegations that an Ardent representative claimed he could "leverage his relationship

with HCSC to keep CORE out of network," explaining that the complaint lacked details as to any such arrangement or conversation between Ardent and HCSC.

Earth Movement Alert:

Two Courts Rule That Earth Movement Exclusion Unambiguously Bars Coverage

Addressing matters of first impression under West Virginia and Michigan law, two courts ruled that earth movement exclusions unambiguously preclude coverage for rock-related damage, whether caused by natural or man-made events.

In *Erie Ins. Prop. and Cas. Co. v. Chaber*, 2017 WL 2415333 (W. Va. June 1, 2017), Chaber sought property coverage from Erie for damage caused by sliding soil and rocks. Erie denied coverage based on an earth movement exclusion, which applies "regardless of whether any of the above . . . is caused by an act of nature or is otherwise caused." However, Erie agreed to provide coverage for the replacement of broken glass pursuant to an ensuing loss exception, which provides that "if Earth Movement . . . results in fire, explosion, sprinkler leakage, volcanic action, or building glass breakage, we will pay for the 'loss' or damage caused by such perils." A circuit court ruled that Erie was obligated to cover the entire loss. The court reasoned that the policy did not unambiguously exclude damage caused by man-made events and that Chaber could have reasonably expected coverage for the loss at issue. The court further found that the ensuing loss exception was ambiguous and should be construed in favor of coverage. The West Virginia Supreme Court of Appeals reversed.

The court ruled that the exclusionary phrase "caused by an act of nature or is otherwise caused" unambiguously encompasses earth movement-related losses regardless of whether caused by natural or man-made forces. In so ruling, the court noted that other jurisdictions have deemed similar language unambiguous. Having found no ambiguity, the court ruled that the lower court's reliance on Chaber's reasonable expectations was erroneous.

The court also rejected the lower court's ruling as to the ensuing loss exception, explaining that while an ensuing loss provision provides "a narrow exception to the exclusion" for certain losses, it "does not revive or reinstate coverage for losses otherwise unambiguously excluded by the policy." Thus, the court ruled that damages caused by the earth movement were not covered, but that the portion of loss caused by glass breakage was covered by the ensuing loss exception.

The Michigan Court of Appeals, in *Home-Owners Ins. Co. v. Andriacchi*, 2017 WL 2491886 (Mich. Ct. App. June 8, 2017), similarly upheld a denial of coverage pursuant to an earth movement exclusion. There, the exclusion applied to losses or damage caused by "any earth movement (other than sinkhole collapse), such as an earthquake, landslide or earth sinking, rising or shifting." The policyholder argued that the exclusion was ambiguous and should be construed to apply only to earth movement caused by natural events. More specifically, the policyholder claimed that under the doctrine of *ejusdem generis*, the term "earth movement" was constricted by the limiting descriptions following the words "such as." Because the exclusion identified only natural events, Andriacchi argued that the exclusion did not apply to earth movement caused by man-made activities.

The court rejected this argument, finding the exclusion unambiguous on its face. The court explained that the doctrine of *ejusdem generis* (or any other canon of statutory interpretation) is inapplicable where, as here, policy language is clear. The court reasoned that "any earth movement" is all-encompassing and applies to every kind of earth movement, regardless of cause. The court noted that its conclusion is further reinforced by policy language stating that any damage caused by a listed excluded act or event is "excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." As the court noted, other jurisdictions are split as to whether similar exclusionary language is ambiguous.

Discovery Alert:

Texas Supreme Court Rules That Attorney Billing Information Of Party Opposing Attorneys' Fees Is Not Discoverable

The Texas Supreme Court ruled that attorney billing information is protected work-product, and that a party does not waive privilege by challenging the opposing party's fee request if it does not use its own fees as a comparator or seek to recover any portion of its own fees. *In re National Lloyds Ins. Co.*, 2017 WL 2501107 (Tex. June 9, 2017).

In this multi-district litigation, various homeowners sued their insurers and claims adjustors, alleging underpayment of property damage claims arising from hail storms. Among other damages, homeowners sought attorneys' fees incurred in prosecuting their claims. In connection with their fee claim, homeowners sought discovery regarding the insurer's attorney billing information. In arguing that such information was relevant to their own attorneys' fee requests, homeowners noted that the insurer's counsel had previously provided expert testimony stating that an opposing party's fees were relevant in determining a reasonable fee award. The insurers argued that the discovery request was overbroad and sought information that was irrelevant and protected by attorney-client and work-product privilege. The court agreed that the records were protected work-product and granted the insurer's mandamus relief.

The Texas Supreme Court ruled that a request to produce all billing records invades a party's work-product privilege because "cumulatively, billing records constitute a mechanical compilation of information that, at least incidentally, reveals an attorney's strategy and thought processes." Additionally, the court refused to require production of redacted versions of the billing records, noting that redaction would insufficiently mask counsel's thought processes and legal strategies. The court explained that even aggregate fee summaries reveal legal strategy because, for example, a "dramatic increase in mid-litigation spending could imply an upcoming filing or significant research expenditures related to elevated concerns over recent litigation events." The court acknowledged that an opposing party may waive privilege through offensive use of its own billing records, but found that the insurer did not do so here.

Privilege aside, the court also ruled that interrogatories that request hourly rates, total amount billed and total reimbursable expenses were objectionable, where, as here, the opposing party did not use its own billing records as "yardsticks by which to assess the reasonableness of those sought by the [requesting party]." The court explained that "an opposing party's litigation expenditures are not *ipso facto* reasonable or necessary; indeed parties who are not seeking to shift responsibility for their fees may freely choose to spend more or less time or money than would be 'reasonable' or 'necessary' for parties who are."

Finally, the Texas Supreme Court found that the trial court erred in ordering the production of the insurer's billing records pursuant to state discovery rules governing expert witnesses. Under Rule 192.3, a party is entitled to discover facts known by a testifying expert relating to "mental impressions and opinions formed, any bias of the expert witness, and documents provided to or reviewed by the expert in anticipation of testimony." Tex. R. Civ. P. 192.3. However, the party requesting information pursuant to Rule 192.3 must use the specific discovery methods set forth in Rule 195 – disclosures, expert reports and oral depositions. Because homeowners sought discovery of billing information through interrogatories and requests for production, the court ruled that the exception to work-product protection under Rule 192.3 does not apply.

Simpson Thacher

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David J. Woll
+1-212-455-3136
dwoll@stblaw.com

Mary Beth Forshaw
+1-212-455-2846
mforshaw@stblaw.com

Andrew T. Frankel
+1-212-455-3073
afrankel@stblaw.com

Lynn K. Neuner
+1-212-455-2696
lneuner@stblaw.com

Chet A. Kronenberg
+1-310-407-7557
ckronenberg@stblaw.com

Bryce L. Friedman
+1-212-455-2235
bfriedman@stblaw.com

Michael D. Kibler
+1-310-407-7515
mkibler@stblaw.com

Michael J. Garvey
+1-212-455-7358
mgarvey@stblaw.com

Tyler B. Robinson
+44-(0)20-7275-6118
trobinson@stblaw.com

George S. Wang
+1-212-455-2228
gwang@stblaw.com

Deborah L. Stein
+1-310-407-7525
dstein@stblaw.com

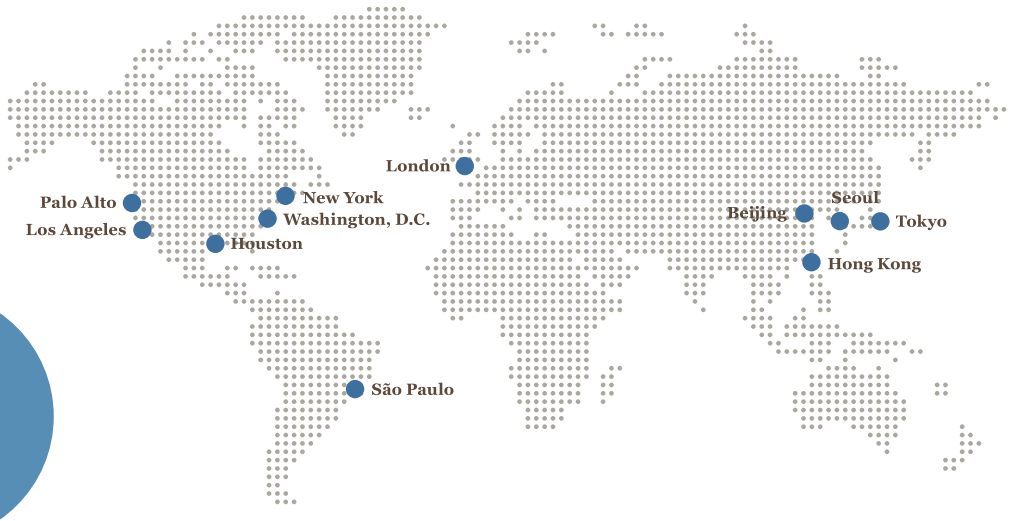
Craig S. Waldman
+1-212-455-2881
cwaldman@stblaw.com

Susannah S. Geltman
+1-212-455-2762
sgeltman@stblaw.com

Elisa Alcabes
+1-212-455-3133
ealcabes@stblaw.com

Summer Craig
+1-212-455-3881
scraig@stblaw.com

This edition of the Insurance Law Alert was prepared by Mary Beth Forshaw mforshaw@stblaw.com /+1-212-455-2846 and Bryce L. Friedman bfriedman@stblaw.com /+1-212-455-2235 with contributions by Karen Cestari kcestari@stblaw.com.



Simpson Thacher Worldwide

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000