SIMPSON THACHER

INSURANCE LAW ALERT

JULY/AUGUST 2012

This Alert addresses decisions relating to an insurer's duty to settle, rescission of a policy based on a policyholder's misrepresentations, late notice, and the "Insured v. Insured" exclusion in a D&O policy. We also discuss several recent decisions regarding the duty to defend, reservation of rights, reimbursement of defense costs, and timing of an insurer's declaratory judgment action regarding coverage. In addition, we summarize two recent Simpson Thacher victories in matters relating to contribution and title insurance. Finally, we highlight a ruling relating to a "no-transfer" clause, and a Fourth Circuit preemption decision. Please "click through" to view articles of interest.

- ***Ninth Circuit Rules on Insurers' Duty to Seek Settlement in Absence of Demand***

  The Ninth Circuit held that California law requires insurance companies to work proactively toward a settlement when liability is clear, even if the underlying claimants have not made a settlement demand. *Yan Fang Du v. Allstate Ins. Co.*, 2012 WL 2086584 (9th Cir. June 11, 2012). *Click here for full article*

- ***New York High Court Rules That Rescission of Policy Based on Named Insured's Misrepresentations Voids Policy as to Additional Insureds***

  The New York Court of Appeals ruled that when a policy is rescinded based on a named policyholder's misrepresentations, there can be no coverage for additional insureds under the policy. *Admiral Ins. Co. v. Joy Contractors, Inc.*, 2012 WL 2092863 (N.Y. June 12, 2012). *Click here for full article*

- ***Michigan Supreme Court Declines to Extend Prejudice Requirement to Notice Provision That Contains Specific Time Period***

  The Michigan Supreme Court ruled that an intermediate appellate court committed reversible error by reading a prejudice requirement into a notice provision where none existed. *Defrain v. State Farm Auto. Ins. Co.*, 2012 WL 1948768 (Mich. May 30, 2012). *Click here for full article*

- ***Simpson Thacher Wins Directed Verdict on Equitable Contribution Claim***

  A federal court in Nevada granted Simpson Thacher's directed verdict motion in an equitable contribution trial, finding that the plaintiff insurers failed to demonstrate that they had paid more than their fair share with respect to

the underlying claims. *Assurance Company of America v. National Fire & Marine Insurance Company*, 2012 WL 2589883 (D. Nev. July 5, 2012). Click here for full article

- ***Seventh Circuit Holds That Insured v. Insured Exclusion Precludes Defense and Indemnity Only as to Claims Brought by Insured Parties***

  The Seventh Circuit held that when an insured company is sued by both insured and non-insured plaintiffs, the D&O insurer must defend and indemnify the claims brought by the non-insured plaintiffs but not the "Insured" plaintiffs. *Miller v. St. Paul Mercury Insurance Company*, 2012 WL 2479552 (7th Cir. June 29, 2012). Click here for full article

- ***Fifth Circuit Rules That Policyholder Which Rejects Insurer's Offer to Defend Is Not Entitled to Defense Cost Reimbursement***

  The Fifth Circuit held that a policyholder was not entitled to reimbursement of the costs of hiring defense counsel after rejection of its insurer's offer to defend subject to a reservation of rights. *Downhole Navigator, L.L.C. v. Nautilus Ins. Co.*, 2012 WL 2477846 (5th Cir. June 29, 2012). Click here for full article

- ***Breach of Duty to Defend Does Not Necessarily Justify Damages in Excess of Policy Limits, Says Sixth Circuit***

  The Sixth Circuit held that when an insurer breaches its duty to defend, it is not automatically subject to damages in excess of policy limits and that extra- contractual damages are appropriate only if they arise naturally from the breach or were contemplated by the parties. *Stryker Corp. v. XL Ins. America*, 681 F.3d 806 (6th Cir. June 5, 2012). Click here for full article

- ***Failure to Issue Reservation of Rights Does Not Waive Defense Based on Coverage Clause, Says Wisconsin Supreme Court***

  The Wisconsin Supreme Court held that an insurer's failure to issue a reservation of rights letter does not waive or estop a defense arising from a coverage clause in an insurance contract. *Maxwell v. Hartford Union High School Dist.*, 814 N.W.2d 484 (Wis. 2012). Click here for full article

- ***Georgia Supreme Court Rules That Insurer Waived Late Notice Defense By Failing to Properly Reserve its Rights***

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- ***Simpson Thacher Wins Second Circuit Affirmance of Dismissal of Class Action Against Title Insurers***

  The Second Circuit affirmed the dismissal of a putative class action against several title insurance companies, including Fidelity National Financial, Inc. and its title insurance operating companies, represented by Simpson Thacher. *Gliano v. Fidelity National Title Ins. Co.*, No. 10-4941 (2d Cir. July 3, 2012). *Click here for full article*

- ***Insurer Did Not Waive Coverage Defenses by Failing to Immediately Seek Declaratory Relief, Says Eleventh Circuit***

  The Eleventh Circuit held that an insurer's delay in filing a declaratory judgment action against its policyholder did not result in a waiver of coverage defenses. *OneBeacon America Ins. Co. v. Catholic Diocese of Savannah*, 2012 WL 1939104 (11th Cir. May 30, 2012). *Click here for full article*

- ***"No Transfer" Clause Does Not Bar Transfer of Coverage for Pre-Acquisition Liabilities, Says New York Appellate Court***

  A New York appellate court held that a "no transfer" provision in an asset purchase agreement does not preclude the transfer of insurance coverage to a successor company for pre-merger product liability claims. *Arrowood Indem. Co. v. Atlantic Mutual Ins. Co.*, 2012 WL 2428344 (N.Y. App. Div. 1st Dep't June 28, 2012). *Click here for full article*

- ***State Law Prohibiting Insurance Dispute Arbitration Does Not "Reverse Preempt" International Treaty Requiring Enforcement of Arbitration Agreements, Says Fourth Circuit***

  The Fourth Circuit held that parties to an international arbitration agreement must arbitrate their insurance coverage dispute despite an otherwise applicable South Carolina statute that forbids arbitration of insurance disputes. *ESAB Grp. Inc. v. Zurich Ins. PLC*, 2012 WL 2697020 (4th Cir. July 9, 2012). *Click here for full article*

- ***STB News Alert***

  Click here for information on Simpson Thacher's recent insurance-related honors.

Bad Faith Alert:

Ninth Circuit Rules on Insurers' Duty to Seek Settlement In Absence of Demand

The Ninth Circuit held that California law requires insurance companies to work proactively toward a settlement when liability is clear, even if the underlying claimants have not made a settlement demand. *Yan Fang Du v. Allstate Ins. Co.*, 2012 WL 2086584 (9th Cir. June 11, 2012).

A party injured in an automobile accident sued the policyholder, seeking to recover damages for his injuries. The claimant obtained a judgment against the policyholder for approximately $4.1 million. Thereafter, the policyholder assigned his claims against Allstate, his insurance company, to the claimant. The claimant sued Allstate, alleging that it had breached the implied covenant of good faith and fair dealing by failing to settle the claims after it became clear that liability would likely exceed policy limits. At trial, the claimant asked the court to instruct the jury that Allstate's failure to attempt to reach prompt settlement was relevant to a finding of bad faith. The court rejected the instruction, reasoning that "an insurer has no duty to initiate settlement discussions in the absence of a settlement demand from the third-party claimant" and that bad faith could be found only if Allstate failed to accept a reasonable settlement demand. The jury ultimately found in Allstate's favor.

On appeal, the Ninth Circuit held that the district court erred in ruling that a breach of the duty of good faith and fair dealing could not be premised on an insurer's failure to effectuate settlement in the absence of a settlement demand. The court stated that "under California law, an insurer has a duty to effectuate settlement where liability is reasonably clear, even in the absence of a settlement demand." However, the court held that the evidentiary record did not support a finding of bad faith, and thus that the district court did not abuse its discretion in ruling that there was no foundation for the claimant's proposed jury instruction. In particular, the Ninth Circuit noted that Allstate had engaged in timely settlement negotiations and that any delays with respect to settlement negotiations were partially attributable to claimant's lack of cooperation.

Additional Insured Alert:

New York High Court Rules ThatRescission of Policy Based on Named Insured's Misrepresentations Voids Policy as to Additional Insureds

The New York Court of Appeals ruled that when a policy is rescinded based on a named policyholder's misrepresentations, there can be no coverage for

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additional insureds under the policy. *Admiral Ins. Co. v. Joy Contractors, Inc.*, 2012 WL 2092863 (N.Y. June 12, 2012).

Joy Contractors, a tower crane operator, notified Admiral, its excess liability insurer, of an accident that resulted in the death and injury of several dozen people. Admiral issued a reservation of rights letter stating that coverage might be unavailable due to inaccuracies in Joy's underwriting submission. In particular, Admiral noted that Joy had represented that it specialized in drywall installation and did not perform exterior work or work at a height greater than two stories when, in fact, Joy had acted as the structural concrete manager for the construction project and had performed work on the building's exterior using a tower crane. Ultimately, Admiral brought suit against Joy and several other entities claiming coverage under the excess policy as "additional insureds." Admiral argued that neither Joy nor the putative additional insureds were entitled to coverage in light of Joy's alleged misrepresentations. Admiral sought rescission or reformation of the policy to such terms as might have been offered if Joy had responded accurately during the underwriting process. The trial court dismissed Admiral's claims against the putative additional insureds, reasoning that Joy's alleged misrepresentations had no effect on coverage provided to the additional insureds. The appellate division modified the ruling on a separate issue, but otherwise affirmed the trial court's decision. The New York Court of Appeals reversed.

The Court of Appeals held that when a policy is voided due to a named insured's misrepresentations, the policy is rescinded as to additional insureds as well. The court reasoned that it would be illogical to allow other entities to enforce a contract that has been declared void. The court stated that "'additional' insureds, by definition, must exist in addition to *something*; namely, the named insureds in a valid existing policy." In so ruling, the court found inapposite two lines of New York precedent: (1) cases in which actions by one insured did not preclude coverage for innocent co-

insureds, but in which, unlike here, the insurer did not seek rescission of the policy; and (2) cases in which "the named insureds' misrepresentations did not deprive the insurer of knowledge of or the opportunity to evaluate the risks for which it was later asked to provide coverage" and where, unlike here, the additional insureds were specifically identified in the policies such that their interests were known to the insurer.

Admiral Insurance provides strong support for insurers seeking to deny coverage to additional insureds following the rescission of a policy as to the named insured. However, given the court's analysis of related precedent, policyholders may argue that the ruling does not apply where additional insureds are specifically named on a policy or where risks posed by the additional insureds are known to the insurer.

Late Notice Alert:

Michigan Supreme Court Declines to Extend Prejudice Requirement to Notice Provision That Contains Specific Time Period

The Michigan Supreme Court ruled that an intermediate appellate court committed reversible

error by reading a prejudice requirement into a notice provision where none existed. *Defrain v. State Farm Auto. Ins. Co.*, 2012 WL 1948768 (Mich. May 30, 2012). The court held that where a notice provision contains a clear and specific time frame in which to provide notice (e.g., "thirty days") that provision is enforceable even in the absence of prejudice to the insurer. In so ruling, the court relied on state law precedent and on Michigan's public policy of enforcing valid contracts as written. The court's ruling leaves intact another line of state precedent which holds that a showing of prejudice is required where the notice provision contains "temporally imprecise terms" such as "immediately" or "within a reasonable time."

Contribution Alert:

Simpson Thacher Wins Directed Verdict on Equitable Contribution Claim

On July 5, 2012, the United States District Court for the District of Nevada entered an Order of Judgment granting Simpson Thacher's directed verdict motion on behalf of client National Fire & Marine Insurance Company following a trial of equitable contribution claims brought by six Zurich-affiliated insurance companies. *Assurance Company of America v. National Fire & Marine Insurance Company*, 2012 WL 2589883 (D. Nev. July 5, 2012). The court granted National Fire's motion from the bench at trial on June 4, 2012. At trial, the plaintiff insurers sought equitable contribution in connection with twenty-six underlying construction defect lawsuits. In finding that the plaintiff insurers failed to satisfy their burden, the court cited to *Scottsdale Insurance Company v. Century Surety Company*, 105 Cal. Rptr. 3d 896, 906 (Cal. Ct. App. 2010) (discussed in our April 2010 Alert), for the proposition that "[a]n insurer can recover equitable contribution only when that insurer has paid more than its fair share; if it has not paid more than its fair share, it cannot recover, even against an insurer who has paid nothing." The court held that the plaintiff insurers failed, among other things, to demonstrate that any of them had paid more than their fair share with respect to the underlying claims, or that National Fire had any obligations under its policies with respect to those claims. Simpson Thacher partners Mary Beth Forshaw and Deborah Stein tried the case for National Fire.

D&O Alert:

Seventh Circuit Holds That Insured v. Insured Exclusion Precludes Defense and Indemnity Only as to Claims Brought by Insured Parties

Insured v. Insured exclusions, which exclude from coverage losses for claims brought by one insured against another insured, are frequently enforced. However, litigation can arise when both insured and non-insured entities jointly file a complaint against an insured company, or where the status of a party as an "Insured" comes into question. Both issues were addressed by the Seventh Circuit in *Miller v. St. Paul Mercury Insurance Company*, 2012 WL 2479552 (7th Cir. June 29, 2012).

The court held that when an insured company is

sued by both insured and non-insured plaintiffs, the D&O insurer must defend and indemnify the claims brought by the non-insured plaintiffs but not those brought by the "Insured" plaintiffs. Relying on Seventh Circuit precedent, the court held that the allocation clause of the policy requires defense and indemnification for losses alleged by non-insured plaintiffs, even if co-plaintiffs fall within the insured v. insured exclusion. Such allocation is based on the "relative legal exposure of the parties to covered and uncovered matters," the court held. In so ruling, the court rejected the notion that the presence of one insured plaintiff "taints the entire suit" so as to eliminate all defense and indemnity obligations under the policy. The court also declined to adopt a "majority rule" where by coverage in this context would be based on the number of claims or the proportion of damages asserted by insured plaintiffs as opposed to non-insured plaintiffs.

The court also held that a trustee who was a former director of the company and who brought suit on behalf of a trust of which the trustee was also a beneficiary was an "Insured" party within the meaning of the exception. The court reasoned that because the former director was the ultimate beneficiary of the plaintiff trust, and as trustee she was suing on behalf of the trust, she fell squarely within the scope of the term "Insured" for purposes of applying the exclusion.

Defense Alerts:

Fifth Circuit Rules That Policyholder Who Rejects Insurer's Offer to Defend Is Not Entitled to Defense Cost Reimbursement

Our June 2011 Alert reported on a Texas district court decision holding that a policyholder was not entitled to be reimbursed for the cost of hiring defense counsel after having rejected its insurer's offer to defend subject to a reservation of rights. *Downhole Navigator, L.L.C. v. Nautilus Ins. Co.*, 2011 WL 4889125 (S.D. Tex. May 9, 2011). Last month, the Fifth Circuit affirmed the ruling. *Downhole Navigator, L.L.C. v. Nautilus Ins. Co.*, 2012 WL 2477846 (5th Cir. June 29, 2012).

Applying Texas law, the Fifth Circuit held that the insurer's reservation of rights did not create a conflict of interest that would justify divesting an insurer of its right to control the policyholder's defense. In particular, the court noted that the facts to be adjudicated in the underlying litigation were not the same as those upon which coverage depended. The court rejected the policyholder's contention that "the prospect that the attorney provided by [the insurer] could develop facts harmful to Downhole's pursuit of coverage" was sufficient to constitute a conflict. Such concerns are unjustified, the court held, in light of appointed counsel's duty of loyalty vis-à-vis the policyholder.

Breach of Duty to Defend Does Not Necessarily Justify Damages in Excess of Policy Limits, Says Sixth Circuit

Applying Michigan law, the Sixth Circuit held that when an insurer breaches its duty to defend, it is not automatically subject to damages in excess of policy limits. Rather, under general principles of contract

interpretation, "damages beyond the value of the contract" are appropriate only if they "arise naturally from the breach or [ ] were in contemplation of the parties at the time the contract was made." *Stryker Corp. v. XL Ins. America*, 681 F.3d 806 (6th Cir. June 5, 2012). In so ruling, the court abrogated prior Sixth Circuit precedent which held that any losses resulting from a breach of the duty to defend were consequential losses and thus would not count towards the limits of liability.

The insurance dispute arose out of litigation against Pfizer and Stryker stemming from the implantation of expired artificial knees. In prior coverage litigation, XL was found liable under an umbrella policy for losses on direct claims against Stryker (the named policyholder) as well as claims against Pfizer for which Stryker was liable pursuant to an asset purchase agreement. The Sixth Circuit affirmed the finding of liability against XL, but remanded the issue of consequential damages to the district court with instructions to "consider what portion, if any, of the total liability for [previous] judgments beyond the $15 million [policy limit] represents consequential damages as defined under Michigan contract law."

The Sixth Circuit issued several other noteworthy rulings relating to damages in excess of policy limits.

Priority of Claims: The court rejected Stryker's argument that XL was obligated to pay direct claims against Stryker prior to making a settlement payment to Pfizer. The court held that because XL entered into a settlement with Pfizer before it was held liable for direct claims against Stryker, Pfizer settlement payments would count against the policy limits. As the court noted, courts in other jurisdictions have similarly held that an insurer may pay claims in any order it chooses.

Defense vs. Indemnification Costs Towards Policy Limits: The court held that Pfizer's defense costs in the underlying tort actions did not count towards XL's policy limits. Because the policy language defined "Insured" in such a manner that encompassed Pfizer, Pfizer's defense costs were *in addition* to policy limits. In so ruling, the court distinguished cases in which the term "Insured" did not include third-party beneficiaries and/or additional insureds. However, the court reached a different conclusion with respect to costs associated with Pfizer's indemnification action against Stryker. Those costs stemmed directly from liability assumed by Stryker under the asset agreement with Pfizer and were thus part of the general grant of coverage and therefore subject to the limits of liability.

Reservation of Rights Alerts:

Failure to Issue Reservation of Rights Does Not Waive Defense Based on Coverage Clause, Says Wisconsin Supreme Court

Reversing an appellate court, the Wisconsin Supreme Court held that an insurer's failure to issue a reservation of rights letter does not waive or estop a defense arising from a coverage clause in an insurance contract. *Maxwell v. Hartford Union High School Dist.*, 814 N.W.2d 484 (Wis. 2012).

A school district turned to its liability insurer for defense against a lawsuit brought by a former employee. The insurer furnished a defense without issuing a reservation of rights letter. After judgment

had been issued against the district, but before damages had been awarded, counsel appointed by the insurer notified the district that although it would continue to provide a defense in the underlying action, it would not provide indemnification for any damages imposed against the district in light of a breach of contract exclusion. After the court imposed damages against the district, the district filed a third-party complaint against the insurer. The complaint sought a declaration of coverage, as well as attorneys' fees and punitive damages. The district argued that because the insurer had provided a defense without issuing a reservation of rights, it was estopped from denying coverage. The trial court granted summary judgment in favor of the insurer as to coverage for the underlying breach of contract claims. The court reasoned that the policy exclusion precluded coverage for the damages against the district and that the insurer's conduct could not create such coverage. The appellate court reversed, finding that the doctrines of waiver and estoppel prevented the insurer from asserting noncoverage after providing a defense without a reservation. The Wisconsin Supreme Court reversed the appellate court decision.

The Wisconsin Supreme Court held that furnishing a defense does not waive or estop reliance on a coverage clause. The court stated:

> Waiver and estoppel cannot be used to supply coverage from the insurer to protect the insured against risks not included in the policy or expressly excluded therefrom, for that would force the insurer to pay a loss for which it has not charged a premium. Moreover, if courts entertained the prospect that insureds could gain unpurchased coverage on account of collateral action by the insurer, unprotected insureds would have obvious incentive to pursue litigation.

Although *Maxwell* represents a victory for insurance companies, insurers are still advised to timely and

clearly communicate all defenses to policyholders in order to avoid the risk of waiving otherwise valid policy defenses. As the court noted, although waiver and estoppel cannot prevent an insurer from invoking a defense based on a *coverage* provision, "providing and assuming full control of a defense *may* be grounds for establishing waiver or estoppel of a *forfeiture* clause [e.g., notice] when the insurer fails to issue a reservation of rights."

Georgia Supreme Court Rules That Insurer Waived Late Notice Defense By Failing to Properly Reserve its Rights

The Georgia Supreme Court ruled that Georgia law does not allow an insurer to both deny a claim outright and attempt to reserve its right to assert a different defense in the future. The court held that a reservation of rights is only available to an insurer which provides a defense. Because the insurer denied coverage on the basis of an Employer Liability Exclusion and refused to defend, the insurer could not subsequently assert a late notice defense. *Hoover v. Maxum Indem. Co.*, 2012 WL 2217040 (Ga. June 18, 2012).

Following a personal injury suit brought by an employee, the insured company turned to Maxum

Indemnity Company, its commercial liability insurer, for defense and coverage. Maxum refused to defend and denied coverage, citing the policy's Employer Liability Exclusion. In its denial letter, Maxum stated that it was reserving the right to assert other coverage defenses, including defenses based on noncompliance with the policy's notice provision. The employee ultimately obtained a judgment against the company and, as assignee of the company's coverage claims, brought suit against Maxum. The trial court held that the employer failed to provide timely notice of the occurrence to Maxum, but that Maxum had breached its duty to defend. The appellate court affirmed the notice ruling, but reversed the decision as to Maxum's duty to defend. The Georgia Supreme Court reversed on both issues.

The Georgia Supreme Court held that (1) Maxum waived its right to assert a defense based on untimely notice because it never disclaimed coverage on that basis, and (2) because Maxum waived the late notice defense, timely notice was not a prerequisite to Maxum's duty to defend. The court explained that the disclaimer language in Maxum's denial letter did not constitute a reservation of rights, as that term is understood in the insurance industry, because a reservation of rights accompanies an agreement to defend, not an outright denial of coverage and defense. Alternatively, the court held that even if the denial letter could be construed as a reservation of rights, it was defective because it did not fairly inform the employer that Maxum intended to pursue a defense based on untimely notice. The court stated that "boilerplate language in the denial letter purporting to reserve the right to assert a myriad of other defenses at a later date did not clearly put [the employer] on notice of Maxum's position." In reaching that conclusion, the court also noted that in it its declaratory judgment action against the employer, Maxum did not raise the untimely notice issue, did not investigate the employer's untimely notice during discovery, and did not raise the issue in its summary judgment motion. The court concluded that these failures constituted a waiver of the defense.

Litigation Alert:

Simpson Thacher Wins Second Circuit Affirmance of Dismissal of Class Action Against Title Insurers

The Second Circuit affirmed the dismissal of a putative class action against several title insurance companies, including Fidelity National Financial, Inc. and its title insurance operating companies, represented by Simpson Thacher. *Gliano v. Fidelity National Title Ins. Co.*, No. 10-4941 (2d Cir. July 3, 2012). The complaint alleged that the title companies violated Section 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA") by paying kickbacks to title agents and other third parties in connection with the sale of title insurance. In 2010, a New York district court dismissed the RESPA claim, finding, among other things, that plaintiffs had failed to state a plausible claim for relief under Section 8(a). The Second Circuit affirmed the ruling. The Second Circuit noted that although the complaint alleged a kickback scheme, "it did so in a wholly conclusory and speculative manner." In particular, the Second Circuit found that the complaint failed to identify specific kickback payments or agreements to refer business, or any connections between the putative class members and the named defendants, as required by Section 8(a). In so ruling, the court noted that RESPA is "not a mechanism for federal courts to regulate the reasonableness of title insurance rates."

Simpson Thacher took the lead in briefing both the district court and the Second Circuit and partner Barry R. Ostrager argued the appeal on behalf of all defendants.

This case is one of several that were commenced in 2008 against title insurance companies in twelve states. All claims have been dismissed or withdrawn and several of the dismissals have been affirmed on appeal.

Waiver Alert:

Insurer Did Not Waive Coverage Defenses by Failing to Immediately Seek Declaratory Relief, Says Eleventh Circuit

The Eleventh Circuit affirmed a Georgia district court ruling that an insurer's delay in filing a declaratory judgment action against its policyholder did not result in a waiver of coverage defenses. *OneBeacon America Ins. Co. v. Catholic Diocese of Savannah*, 2012 WL 1939104 (11th Cir. May 30, 2012).

Georgia courts have held that under certain circumstances, an insurer waives its coverage defenses by failing to immediately seek declaratory relief. In recent years, however, Georgia courts have, as the district court noted, "softened this stance" and focused the waiver inquiry on whether the policyholder suffered prejudice as a result of a delay in the filing of a declaratory judgment action. Here, the Eleventh Circuit agreed with the district court that the policyholder failed to establish prejudice sufficient to justify a finding of waiver, noting that the insurer had provided a defense in the underlying suit prior to initiating the declaratory judgment action.

Ruling on a separate issue, the Eleventh Circuit also reinforced Georgia law on the issue of late notice/prejudice. The court held that under well-established state law, notice provisions that are express conditions precedent to coverage are valid and enforceable, and that a failure to comply with such provisions results in a forfeiture of coverage and defense. In this context, the court also held that the burden of showing justification for a delay in notice rests with the policyholder and that the policyholder's twenty-one month delay was unreasonable as a matter of law. Finally, the court ruled under Georgia law, an insurer need not show prejudice resulting from a delay in late notice in order to deny coverage on that basis.

Successor Liability Alert:

"No Transfer" Clause Does Not Bar Transfer of Coverage for Pre-Acquisition Liabilities, Says New York Appellate Court

A New York appellate court held that a no transfer provision in an asset purchase agreement does not preclude the transfer of insurance coverage to a successor company for pre-merger product liability claims. *Arrowood Indem. Co. v. Atlantic Mutual Ins. Co.*, 2012 WL 2428344 (N.Y. App. Div. 1st Dep't June 28, 2012). The court reasoned that although insurers have an interest in protecting themselves against liabilities that they did not agree to insure, "once the insured against loss has occurred, there is no issue of an insurer having to insure against additional risk." The court rejected the insurer's contention that because the underlying suits were not brought until after the asset purchase, no "chose in action" existed that could have been assigned to the acquiring company.

ARBITRATION/PREEMPTION ALERT:

State Law Prohibiting Insurance Dispute Arbitration Does Not "Reverse Preempt" International Treaty Requiring Enforcement of Arbitration Agreements, Says Fourth Circuit

Addressing a complex preemption issue, the Fourth Circuit held that parties to an international arbitration agreement must arbitrate their coverage dispute despite an otherwise applicable South Carolina statute that forbids insurance dispute arbitration. Although state statutes governing the business of insurance typically "reverse preempt" federal law pursuant to the McCarran-Ferguson Act, the Fourth Circuit held that such reverse preemption does not extend to non-domestic (i.e., international) treaties. *ESAB Grp. Inc. v. Zurich Ins. PLC*, 2012 WL 2697020 (4th Cir. July 9, 2012).

A South Carolina-based manufacturer sought defense and indemnity from its insurers after being named as a defendant in product liability suits. In the coverage litigation that ensued, a threshold issue was whether South Carolina's statutory prohibition of insurance-related arbitration trumps the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (an international treaty which obligates the enforcement of foreign arbitration agreements), or alternatively, whether the Convention preempts the state statute. The Fourth Circuit concluded that McCarran-Ferguson Act was not intended to "permit state law to vitiate international agreements entered into by the United States." Two other federal circuit courts that have addressed the issue have reached conflicting decisions. *Compare Stephens v. American International Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) (holding that state law which precludes insurance dispute arbitration reverse preempts the Convention) *with Safety Nat'l Cas. Corp. v. Certain*

Underwriters at Lloyd's, London, 587 F.3d 714 (5th Cir. 2009) (en banc), *cert. denied*, 131 S. Ct. 65 (2010) (rejecting reverse preemption and reasoning that the McCarran-Ferguson Act applies only to federal statutes, not treaties such as the Convention). Notably, the decision leaves intact precedent holding that South Carolina law invalidating arbitration agreements in insurance policies reverse preempts the Federal Arbitration Act (which governs *domestic* arbitration). *See Cox v. Woodmen of the World Ins. Co.*, 556 S.E.2d 397 (S.C. Ct. App. 2001).

STB NEWS ALERT

Simpson Thacher received the Award for Excellence in Insurance, conferred by *Chambers & Partners* at its annual U.S.-based awards ceremony held on June 7, 2012 in New York City. This marks the second time the Firm's Insurance Practice has received this Award. *Chambers & Partners* describe Simpson Thacher 's Insurance Practice as, "the gold standard for representing insurance companies across the USA in bet-the-company cases."

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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"The biggest and most complex insurance and reinsurance disputes are regularly entrusted to this insurance industry giant."

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