Simpson Thacher

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"If you have a major issue, an exceptionally high value or critical claim, Simpson is where you turn."

– The Legal 500
(quoting a client)

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Pollution Exclusion Does Not Necessarily Bar Coverage For Injury Claims Arising Out Of California Wildfire Debris, Says Ninth Circuit

HOLDING

The Ninth Circuit ruled that a general liability policy potentially covered claims alleging injuries caused by exposure to airborne wildfire debris, notwithstanding a pollution exclusion, and that the insurer had a duty to defend the underlying suit. *Wesco Ins. Co. v. Brad Ingram Constr.*, 2024 U.S. App. LEXIS 1488 (9th Cir. Jan. 23, 2024).

BACKGROUND

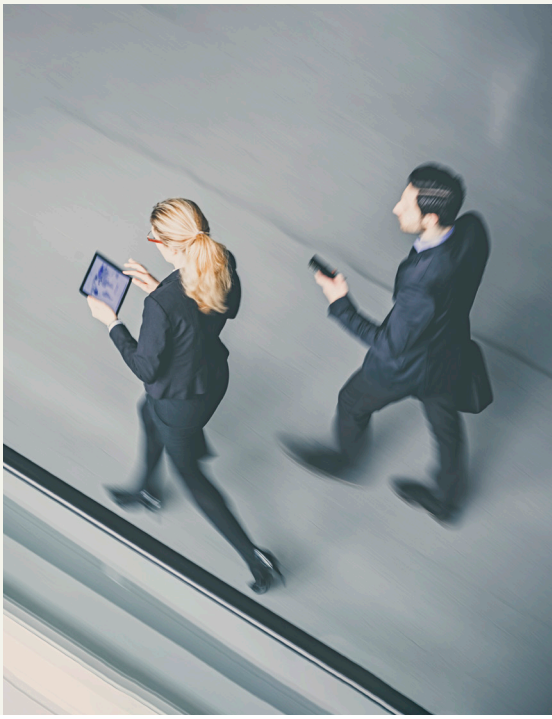
The underlying suit alleged injuries as a result of exposure to "clouds of toxic dust" formed by California wildfires. According to the complaint, the dust, consisting of "ash, debris, metal, concrete, and contaminated soil," was "stirred up" during the cleanup process. The district court ruled that the insurer had no duty to defend the suit based on a pollution exclusion that applied to injuries or damage "which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." The Ninth Circuit reversed.

DECISION

The Ninth Circuit reasoned that under California law, the question of whether a pollution exclusion applies to underlying claims turns primarily on two factors: the nature of the injurious substance and the mechanism of exposure. The Ninth Circuit explained that while wildfire debris may be a "pollutant," the "mechanism of exposure described in the complaint does not clearly constitute an event commonly thought of as pollution." More specifically, the court reasoned that the stirring up of wildfire-related dust during loading and dumping operations at a waste facility does not, as a matter of law, fall within the scope of "environmental pollution" so as to relieve the insurer of its defense obligations. In so ruling, the court noted the absence of California precedent relating to "dust created or disbursed by a naturally occurring event" and the broad scope of an insurer's duty to defend.

COMMENTS

Because the court was ruling on the insurer's duty to defend, rather than its indemnity obligations, it did not reach the question of whether the pollution exclusion would ultimately bar coverage for the underlying claims. And as the dissenting opinion emphasized, the underlying claims appear to fall squarely within the scope of the exclusion. In particular, California courts have recognized that "natural materials" such as rocks and dirt, may be deemed pollutants in certain contexts. *See Ortega Rock Quarry v. Golden Eagle Ins. Corp.*, 46 Cal. Rptr. 3d 517 (Ct. App. 2006). Further, the dust at issue was classified as "toxic" and located in a heavily regulated cleanup site that required contractors to be certified for "hazardous substance removal." The dissent also noted that the claims alleged a "release" of the toxic dust during the cleanup process, rejecting the notion that a release requires an escape from some sort of structure or protective barrier.



Ohio Supreme Court Rules That Tort Choice-Of-Law Rules Govern Bad Faith Claims Against Insurer

HOLDING

The Ohio Supreme Court ruled that tort choice-of-law rules govern bad faith claims against an insurer, notwithstanding the contractual nature of the relationship between the parties. *Scott Fetzer Co. v. Am. Home Assur. Co.*, 2023 Ohio LEXIS 2163 (Nov. 1, 2023).

BACKGROUND

The coverage dispute arose out of environmental cleanup operations at two Superfund sites in Michigan. The Scott Fetzer Company had acquired a manufacturing facility located on one of the sites when it merged with the facility's previous operator, an Indiana company. Fetzer sought coverage under various general liability and umbrella policies for environmental claims. When the insurers denied coverage, Fetzer filed suit, alleging breach of contract and bad faith. The court bifurcated the bad faith claim, and a discovery dispute arose in that proceeding as to the production of certain allegedly privileged documents.

Fetzer argued that under Ohio law, an insurer may not withhold documents relating to bad faith on the basis of attorney-client privilege. In response, the insurer claimed that under Ohio's choice-of-law rules, the discovery dispute was governed by either Michigan or Indiana law. The insurer further argued that Michigan does not recognize a cause of action for bad faith and that Indiana law would not allow discovery of privileged material to establish bad faith.

An administrative judge ruled that Ohio law governed the discovery dispute and ordered production of certain documents. An appellate court affirmed. The appellate court reasoned that bad faith was a tort, and was thus governed by Section 145 of the Restatement 2d of Conflict of Laws (the section that applies to tort claims). The criteria in Section 145 focus on the place of the alleged injury of the tort, which in this case was Ohio. The Ohio Supreme Court affirmed.

DECISION

The Ohio Supreme Court rejected the insurer's assertion that the bad faith claim was subject to the choice-of-law criteria set forth in Restatement Section 188 (governing "an issue in contract") and Section 193 (governing disputes over the "validity of a contract of fire, surety or casualty insurance and the rights created thereby"). Under those Sections, the location of the subject matter of the contract and the place of contracting, here Michigan and Indiana respectively, are paramount. The court reasoned that a badfaith claim does not concern the "validity" of a contract and that an insurer's duty to act in good faith is not one of the "rights created thereby."

Further, the court rejected the insurer's assertion that the "justified expectations" of the parties mitigated in favor of applying Section 193. The court explained that the justified expectations of the parties is important in choice-of-law disputes arising out of contractual obligations because contracting parties reasonably rely on the principal location of the insured risk as a significant factor in anticipating governing law. In contrast, the justified expectations of the parties is less important in negligence and tort cases, in which a defendant allegedly acts with a conscious disregard for the legal consequences of its conduct and would not likely contemplate governing law.

COMMENTS

In arguing that contract-based choice-of-law principles should apply to the bad faith claim, the insurer emphasized that a badfaith claim can only be litigated by the parties to the insurance contract. The court acknowledged this fact, but reasoned that a bad faith claim "is not rooted in any particular text of the contract" but rather "arises by operation of law."

Reversing District Court, Sixth Circuit Rules That Policyholder's Settlement Of Bankruptcy Fraudulent Transfer Proceeding Is Not "Uninsurable" Under Ohio Law

HOLDING

The Sixth Circuit ruled that a bank's settlement payment in connection with a bankruptcy fraudulent transfer proceeding was not an uninsurable loss under Ohio law and was not otherwise excluded by a policy provision. *Huntington Nat'l Bank v. AIG Specialty Ins. Co.*, 2024 U.S. App. LEXIS 2369 (6th Cir. Feb. 1, 2024).

BACKGROUND

AIG issued a professional liability policy to Huntington National Bank. The policy defined "Loss" as "damages, judgments, settlements and Defense Costs," but an endorsement ("Endorsement 8") modified that definition to exclude various fines, penalties, punitive damages or "matters that may be deemed uninsurable under the law." Another endorsement ("Endorsement 7"), which related to Huntington's "Lending Acts," stated that AIG "shall not be liable to make any payment for Loss in connection with any Claim or Claims made against any Insured: for the principal and/or interest of any unrepaid, unrecoverable, or outstanding credit."

The policy became implicated when Huntington unwittingly became the bank for a company involved in a Ponzi scheme. After the fraud was discovered and the company declared bankruptcy, the trustees of the company filed adversary proceedings against Huntington, alleging fraudulent transfers in connection with its banking services. Huntington argued that the transfers were not recoverable because it accepted them in good faith. Those proceedings resulted in several findings, including that Huntington was a "transferee" of certain loan repayments and that Huntington's affirmative defense of good faith ended on a certain date, after which the trustee was entitled to recover loan repayments. As to loan repayments during another time period, which remained in dispute and turned on Huntington's knowledge or lack thereof of the voidability of the transfers, the parties reached a settlement without any admission of liability or wrongdoing on the part of Huntington.

AIG disclaimed coverage on the basis of Endorsements 7 and 8. Huntington sued, alleging breach of contract and bad faith. An Ohio district court granted AIG's summary judgment motion, ruling that Huntington's claim was uninsurable under Ohio law and that in any event, coverage was barred by Endorsement 7. The Sixth Circuit reversed.

DECISION

The Sixth Circuit ruled that Huntington's claim was insurable under Ohio law. The court noted the absence of controlling Ohio precedent as to whether a claim for settlement of a bankruptcy fraudulent transfer action is uninsurable, but noted that appellate court decisions indicated that what is uninsurable under Ohio law "is quite narrow" and limited to two categories: punitive damages and intentional torts.

Applying this framework, the Sixth Circuit concluded that Huntington's settlement payment was not akin to punitive damages and was not in response to an intentional act. Rather, the claims against Huntington turned on whether the bank was a "transferee" under federal bankruptcy law. Further, the court emphasized that "no showing of intentional malice by the transferee is required under the fraudulent transfer provisions of the bankruptcy code, meaning that an order to return funds is not a 'punishment in

any traditional sense.'" In short, the court held that liability under fraudulent conveyance statutes "is not tantamount to the type of culpable conduct that Ohio courts have held precludes insurance recovery."

Additionally, the court ruled that Endorsement 7 was ambiguous and must be resolved in favor of coverage. Huntington argued that under a plain meaning interpretation, the endorsement did not apply because the settlement payment was not for credit unrepaid, unrecoverable, or outstanding, but rather "for a settlement based on wrongful acts as understood within the policy." In contrast, AIG argued that Huntington's insurance claim was essentially an attempt to obtain recovery for loan payments it had been forced to return as a result of the bankruptcy proceeding settlement. The Sixth Circuit deemed both interpretations reasonable and construed the endorsement in favor of coverage.

COMMENTS

The decision is notable in several respects. First, the Sixth Circuit ruled that AIG bore the burden of proving that Huntington's claims were "uninsurable under the law" because that phrase was contained in an endorsement that constituted an exclusion. The court rejected AIG's contention that the endorsement modified the coverage provision defining "Loss" and was thus part of the initial grant of coverage, for which Huntington would bear the burden of proof.

Second, the court deemed the phrase "uninsurable as a matter of law" unambiguous and declined to consider extrinsic evidence in this context. The court expressly rejected Sixth Circuit cases that have allowed the consideration of extrinsic evidence to interpret policy terms absent ambiguity.

Finally, in holding that Huntington's claims were not uninsurable under the law, the court emphasized the distinction between claims arising out of intentional and malicious conduct (which would be uninsurable) and claims arising as a result of Huntington's failure to establish good faith as an affirmative defense in the bankruptcy proceedings. The court stated that whether Huntington genuinely continued to believe that the transfers were legitimate receivables "is not tantamount to an intent to injure, malice, ill will, or other similar culpability." The court went a step further, noting that even if Huntington suspected or had a reasonable basis to know that the loan repayments would harm future creditors, it "did not desire that result," and thus did not possess the level of intent necessary to establish uninsurability.

New York Court Of Appeals Rules That Presence Of COVID-19 Virus At Insured Property And Resulting Business Closures Do Not Constitute "Direct Physical Loss Or Damage" Under Property Policy

HOLDING

The New York Court of Appeals ruled that allegations of the COVID-19 virus at insured property locations and the resulting business closures and accommodations resulting from the virus do not state a claim for "direct physical loss or damage" under a property policy. *Consolidated Rest. Operations, Inc. v. Westport Ins. Corp.*, 2024 N.Y. LEXIS 66 (N.Y. Feb. 15, 2024).

BACKGROUND

Consolidated Restaurant Operations, an owner and operator of restaurants, sought coverage from Westport Insurance Corporation under an all-risk commercial property policy for business losses incurred during the COVID-19 pandemic. When Westport denied coverage, Consolidated sued, seeking a declaration of coverage and alleging breach of contract. A New York trial court granted Westport's motion to dismiss, finding that Consolidated could not establish "direct physical loss or damage" to its property, as required by the policy. An intermediate appellate court affirmed, ruling that "direct physical loss or damage" requires a showing of "actual, demonstrable physical harm" and that the pleadings failed to allege such harm. In particular, the appellate court noted that Consolidated did not identify any physical change or transformation of insured property. The New York Court of Appeals affirmed.

DECISION

The New York Court of Appeals rejected Consolidated's assertion that "direct physical loss or damage" encompasses scenarios in which a physical event impairs the functionality of insured property or renders it fully or partially unusable for its intended purpose. Deeming this interpretation "untenable," the court explained that "it would collapse coverage for 'direct physical loss' into coverage for 'loss of use.'" The court further noted that other policy provisions—such as the "Time Element" and "Period of Liability" clauses—supported this conclusion. Those provisions referred to "direct physical loss" and the "repairing and replacing" of property, respectively, reinforcing the principle that the policy requires more than mere loss of use of insured property.

Consolidated argued that even if the policy requires physical alteration to property, its allegations satisfied this condition. Rejecting this assertion, the court explained that the complaint lacked allegations as to how the presence of the virus affected the physical integrity of property or gave rise to any need to repair or replace insured property.

Because the court ruled that the policy did not cover Consolidated's claims in the first place, it did not reach the question of whether policy exclusions were applicable.

COMMENTS

The court noted that decisions are split as to whether "persistent contamination" or "total uninhabitability" could satisfy the "direct physical loss" requirement. However, the court explained that it need not decide that question because Consolidated failed to allege either of those scenarios. Rather, the complaint alleged a suspension and curtailment of operations and the necessity of remediation efforts—none of which rise to the level of uninhabitability.

As to the overall conclusion that COVID-19-related business losses are not within the scope of commercial property insurance, the decision aligns with the overwhelming majority of decisions across jurisdictions.

London Court Dismisses Reinsurers' Appeals Of Arbitration Awards For Indemnity Of COVID-19-Related Business Losses

HOLDING

The High Court of England and Wales ruled that arbitration tribunals correctly held that ceding insurers were entitled to indemnity under excess-of-loss reinsurance policies for business interruption losses resulting from the COVID-19 pandemic, finding that an infectious disease outbreak constituted a "catastrophe" under the policy language. *Markel International Ins. Co. Ltd. v. General Reinsurance AG*, No. CL-2023-000132 (Business and Property Courts of England and Wales, Commercial Court Feb. 9, 2024); *Unipolsai Assicurazioni SPA v. Covéa Ins. PLC*, No. CL-2023-000494 (Business and Property Courts of England and Wales, Commercial Court Feb. 9, 2024).

BACKGROUND

In two reinsurance arbitration proceedings, tribunals ruled in favor of the ceding insurers, Covéa and Markel, which had issued direct policies to childcare businesses that sustained economic losses in the wake of the COVID-19 pandemic.

In the Covéa proceeding, the tribunal ruled that the exponential increase in COVID-19 infections in the U.K. during the first three weeks in March 2020 amounted to "a disaster of sudden onset such as to qualify as a catastrophe." The Covéa tribunal also addressed the proper interpretation of an "Hours Clause," which provided indemnity for "individual losses" during certain specific durations of time. It concluded that reference to "individual loss" in that provision meant "a loss sustained by an original insured which occurs as and when a covered peril strikes or affects insured premises or property." The tribunal further held that "individual loss" occurred when the nurseries were closed on March 20, 2020, "with loss which the insured continues to sustain afterwards being aggregated with the loss sustained during the 168 hour period."

In the Markel arbitration, Markel initially argued that the relevant catastrophe was the COVID-19 outbreak, but subsequently took the position that the government's decision to close all childcare centers in March 2020 was the operative catastrophe. The tribunal concluded that the government order may be deemed a catastrophe, emphasizing that the order "cannot be viewed separately from the pandemic which demanded (however controversially) its response." As to the Hours Clause in that reinsurance policy, the tribunal held that coverage was limited to individual losses which occurred during the 168 hour period specified in the policy.

The reinsurers' appeals raised two primary issues: (1) whether the losses for which the ceding insurers sought indemnity "arose out of and were directly occasioned by" a catastrophe under the reinsurance policies; and (2) whether the "Hours Clauses" in the reinsurance policies,

which "confined the right to indemnity to 'individual losses' within a set period, had the effect that the reinsurances only responded to payments in respect of the closure of the insured's premises during the stipulated period." The court answered the first question in the affirmative and the second question in the negative.

DECISION

The court ruled that the cedents' claims for indemnity under the reinsurance policies "arose out of and were directly occasioned by one catastrophe." The court rejected the reinsurers' assertions that a catastrophe requires physical damage to property, as well as a "sudden or violent event or happening," finding a lack of support in case law or dictionary definitions for such an interpretation.

The reinsurers also argued that even if there had been a catastrophe for purposes of reinsurance coverage, only business interruption costs incurred during the 168 hours stipulated by the relevant section of the "Hours Clause" could be relied upon in seeking indemnity. The court rejected this contention as well, deeming it inconsistent with the overall language and intent of that provision.

COMMENTS

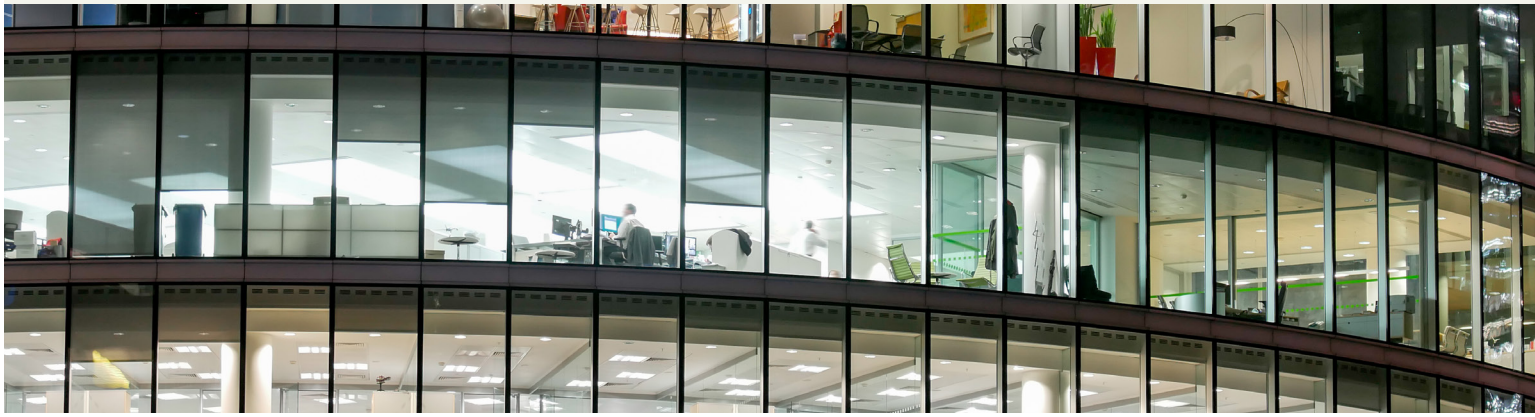
In its discussion of whether the losses arose from a "catastrophe," the court also addressed a more nuanced argument. The reinsurers argued that a catastrophe is a type of "occurrence" or "event" and must therefore satisfy the "unities" of "time, place and way which occurrences or events must ordinarily satisfy." The court deemed this argument "both the easiest and most difficult of the issues" raised on appeal.

The court easily concluded the unities of time and place need not be satisfied in this case because neither reinsurance policy used the term "Loss Occurrence" or "Event" as a standalone term. Further, the court noted that overall policy language suggested an intent to give a broad definition of "catastrophe"—one that the parties conceded would include events such as bush fires that develop in a variety of locations over several weeks.

However, the court acknowledged the difficulty of distinguishing between a

> catastrophe properly so-called, which is an appropriate basis for aggregating individual losses when seeking indemnity under a property catastrophe excess of loss policy, and a series of discrete losses which share some common point of ancestry, but the adverse effect of which so far as a direct insurer is concerned are properly the subject of stop-loss protection.

The court noted that it need not answer that more challenging query because in the present case, the elements of a catastrophe were clearly satisfied. The court observed that in other cases, the answer to that question is "likely to be heavily dependent on the commercial and contractual context in which it arises."



Retrocessionaire May Assert Legal Malpractice Claim Against Insured's Counsel Under Theory Of Equitable Subrogation, Says New York Appellate Court

HOLDING

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BACKGROUND

The dispute arose out of a personal injury matter, in which the defendant attorneys were retained to represent Tower B, the owner of a work site, and its insurers. The injured party was an employee of Rite-Way, a subcontractor hired by Tower B. Counsel for Tower B filed a third-party complaint against Rite-Way, alleging breach of contract for failure to procure the contractually required insurance, and for common law and contractual indemnification and contribution, among other claims. During the pendency of that case, counsel discontinued the third-party action against Rite-Way without authorization from Tower B or its insurers. The court ultimately rendered a finding of liability against Tower B. Before the damages portion of the trial commenced, Tower B settled the suit for $4.6 million.

Tower B was insured under a primary policy, which was reinsured by ACE INA. Century and ACE INA then entered into a retrocessional agreement, pursuant to which Century accepted 100% pro rata quota share reinsurance (retrocession) of ACE INA's interest and liabilities with respect to certain insurance policies, including the Tower B policy. As a result of this arrangement, Century was contractually obligated to fund a portion of the settlement on behalf of Tower B.

Century paid $2.8 million of the settlement and then filed a legal malpractice suit as equitable and contractual subrogee of Tower B. Century argued that counsel was negligent in voluntarily discontinuing the third-party action. Counsel moved to dismiss the suit, arguing that Century lacked standing to assert claims on behalf of Tower B and could not assert direct claims because it lacked privity with counsel. A trial court granted the motion for lack of standing. The appellate court affirmed in part and reversed in part.

DECISION

The appellate court held that the trial court properly concluded that Century lacked standing to assert a direct malpractice claim based on the absence of privity or "near privity" (a doctrine that recognizes a type of limited privity based on specific statements or conduct for a particular purpose). However, the appellate court explained that even without privity, a party may have standing to sue under contractual or equitable subrogation.

The court concluded that the malpractice claim could proceed based on equitable subrogation, noting that New York law recognizes "the fairness of the proposition that an insurer who has been compelled by his contract to pay to or on behalf of the insured claims for damages ought to be reimbursed by the party whose fault has caused such damages . . . ."

The court distinguished a New York appellate decision holding that a third-party administrator for a primary insurer lacked standing to assert a legal malpractice claim as equitable subrogee. In that case, the third-party administrator did not have any contractual obligation to indemnify the underlying claims, whereas here, Century alleged that it was contractually obligated to pay (and did pay) a portion of the settlement on behalf of Tower B.

COMMENTS

In addressing this matter of first impression, the court noted that New York appellate courts have allowed an excess insurer, as equitable subrogee of the insured, to file suit against an insured's attorney for malpractice.

Further, the court expressly rejected the reasoning of another New York appellate decision, *Reliance Ins. Co. v. Aerodyne Engrs.*, 204 A.D.2d 944 (App. Div. 3d Dep't 1994). In *Reliance*, the court held that because a reinsurer had no contractual obligation directly to the insured, it had no subrogation rights. The *Century* court explained that in *Reliance*, the Third Department relied on statements derived from a New York trial court decision that did not involve subrogation rights, and that in any event the holding in *Reliance* "goes against long established New York law that '[t]he right of subrogation is founded upon principles of equity and not in contract' and 'does not depend upon privity.'"

Simpson Thacher News

Simpson Thacher was named an Insurance Practice Group of the Year for 2023 by *Law360*. The Firm was recognized for its work successfully guiding clients through some of the most high-profile insurance-related litigation matters of the past year.

Bryce Friedman and Karen Cestari served as Contributing Editors of the 2024 edition of *Lexology Panoramic: Insurance Litigation* and also authored the publication's United States chapter. The chapter, which was formatted as a Q&A, highlights various areas of insurance litigation, including preliminary and jurisdictional considerations, the interpretation of insurance contracts and notice to insurance companies, among other topics. It additionally summarized emerging insurance litigation trends and an outlook for 2024.

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.

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

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

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

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

Laura Lin
+1-650-251-5160
laura.lin@stblaw.com

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

Joshua Polster
+1-212-455-2266
joshua.polster@stblaw.com

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

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

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

Matthew C. Penny
+1-212-455-2152
matthew.penny@stblaw.com

Sarah E. Phillips
+1-212-455-2891
sarah.phillips@stblaw.com

Abigail W. Williams
+1-202-636-5569
abigail.williams@stblaw.com

This edition of the
Insurance Law Alert was prepared by
Bryce L. Friedman / +1-212-455-2235
bfriedman@stblaw.com
Sarah E. Phillips / +1-212-455-2891
sarah.phillips@stblaw.com and
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

Brussels
Square de Meeus 1, Floor 7
B-1000 Brussels
Belgium
+32-472-99-42-26

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

ASIA

Beijing
3901 China World Tower A
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

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