Simpson Thacher

Insurance Law Alert

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Reversing a Texas district court decision, the Fifth Circuit ruled that a credit card data breach constitutes a "publication" that triggers an insurer's duty to defend. *Landry's Inc. v. Ins. Co. of the State of Pa.*, 2021 WL 3075937 (5th Cir. July 21, 2021). (Click here for full article)

Eighth Circuit Affirms Dismissal Of Business Interruption Loss Coverage Suit

In one of the first federal appellate rulings on the issue, the Eighth Circuit affirmed an Iowa federal district court's dismissal of an oral surgeon's lawsuit seeking business interruption coverage for COVID-19-related losses. *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2021 WL 2753874 (8th Cir. July 2, 2021). (Click here for full article)

"[Simpson Thacher's] expertise ranges from direct insurance coverage of virtually all kinds, through to reinsurance matters and cases relating to insurance companies' business practices."

–Chambers New York 2021

Insurer Must Cover Damages Stemming From Incorporation Of Insured's Contaminated Ingredient Into Third-Party's Product, Says North Carolina Court

A North Carolina federal district court granted a policyholder's summary judgment motion, ruling that a general liability policy covered damages resulting from the incorporation of the insured's contaminated ingredient into a pet food company's product. *Penn Nat'l Sec. Ins. Co. v. LinkOne SRC, LLC*, 2021 WL 2345164 (E.D.N.C. June 8, 2021). (Click here for full article)

Hawaii Court Rules That Policyholder May Recover Employee Dishonesty Coverage Under Multiple Successive Policies

A Hawaii federal district court ruled that a company was entitled to recover the $250,000 per-occurrence sublimit for each of five successive policies for losses stemming from an employee's theft over a twenty-year period. *Arc in Hawaii v. DB Ins. Co., Ltd.*, 2021 WL 2481672 (D. Haw. June 17, 2021). (Click here for full article)

Sixth Circuit Rules That Pollution Exclusion Bars Coverage For Criminal Claims Alleging Submission Of Fraudulent Dust Samples

The Sixth Circuit ruled that a pollution exclusion barred coverage for a criminal investigation and charges against a company and its executives stemming from the fraudulent submission of dust samples to a federal agency. *Barber v. Arch Ins. Co.*, 2021 WL 2828021 (6th Cir. July 7, 2021). (Click here for full article)

Missouri Appellate Court Rules That Methamphetamine Is A Contaminant Under Exclusion In Homeowner's Policy

A Missouri appellate court ruled that a homeowner's insurer had no duty to pay for the costs to remove methamphetamine contamination because the policy did not cover the costs of complying with an ordinance that requires the insured to remove pollutants. *Vogelsang v. Travelers Home and Marine Ins. Co.*, 2021 WL 3086223 (Mo. App. Ct. June 29, 2021). (Click here for full article)

Resolving Conflict Between District Courts, Second Circuit Rules That Defense Costs Are Subject To Reinsurance Limits

The Second Circuit ruled that facultative reinsurance certificates issued by two reinsurers provided indemnity for defense costs within policy limits, not in addition to them. *Utica Mut. Ins. Co. v. Munich Reins. Am., Inc.*, 2021 WL 3197017 (2d Cir. July 29, 2021). (Click here for full article)

Jury Says Reinsurer Must Reimburse Cedent For Underlying Asbestos Settlement, Finding No Evidence Of Bad Faith In Underlying Allocation

In a dispute relating to several facultative reinsurance contracts, a federal jury in New York awarded the ceding insurer approximately $11 million, finding that it did not act in bad faith or improperly allocate underlying asbestos settlement payments to the reinsured policies. *Utica Mut. Ins. Co. v. Clearwater Ins. Co.*, No. 6:13-cv-1178 (N.D.N.Y. July 8, 2021). (Click here for full article)

Eleventh Circuit Rules That Innocent Insured Provision Applies To Both Notice And Reporting Provisions

The Eleventh Circuit ruled that an innocent insured provision applies not only when the principal insured fails to give timely notice of a claim under a claims-made-and-reported policy, but also when the principal insured fails to comply with an extended reporting period provision. *Maxum Indem. Co. v. Colliers Int'l-Atlanta, LLC*, 2021 WL 2434350 (11th Cir. June 15, 2021). (Click here for full article)

Tenth Circuit Says Utah Law Does Not Require Defending Insurer To Settle For Policy Limits Where Coverage Is Debated And Declaratory Judgment Action Is Pending

The Tenth Circuit ruled that an insurer defending under a reservation of rights has no duty to accept a policy limits settlement offer where the insurer has filed a declaratory judgment action disputing coverage and the court ultimately finds none. *Owners Ins. Co. v. Dockstader*, 2021 WL 2662251 (10th Cir. June 29, 2021). (Click here for full article)

Fourth Circuit Affirms That Insurer's Rejection Of Settlement Demands Did Not Violate State Law Duty To Act In Good Faith

The Fourth Circuit ruled that an insurer did not engage in bad faith when it rejected two time-limited settlement demands. *Columbia Ins. Co. v. Waymer*, 2021 WL 2556586 (4th Cir. June 22, 2021). (Click here for full article)

STB News Alert

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Cyber Alert:

Fifth Circuit Rules That Data Breach Was A "Publication" That Violates Right Of Privacy Under Insurance Policy

Reversing a Texas district court decision, the Fifth Circuit ruled that a credit card data breach constitutes a "publication" that triggers an insurer's duty to defend. *Landry's Inc. v. Ins. Co. of the State of Pa.*, 2021 WL 3075937 (5th Cir. July 21, 2021).

The policyholder sought coverage for assessments imposed in connection with a data breach that compromised the personal data of millions of credit card holders. The insurer argued that "personal and advertising injury" coverage was unavailable because there was no "publication" of material that violated a person's right of privacy, as required by the policy. A Texas federal district court agreed and dismissed the suit. The district court reasoned that the hacker's accessing of data, without more, did not constitute a "publication" and that the damages sought were not "privacy" damages because the suit was brought by a bank and processing company based on the policyholder's alleged failure to follow industry cybersecurity standards, rather than consumers whose personal data was improperly obtained.

The Fifth Circuit reversed, holding that under Texas's "eight-corners rule" for determining an insurer's duty to defend, the underlying complaint alleged claims potentially within the policy's coverage. The court reasoned that the policy's use of "publication in any manner" provided "the broadest possible definition" of publication. Applying that interpretation, the court concluded that the underlying complaint sufficiently alleged publication. First, the complaint alleged that the policyholder exposed customers' credit card data to hackers as it was routed through the company's computer system. Second, the complaint alleged that hackers used that credit card data to make fraudulent purchases. The court held that "[b]oth disclosures expos[ed] or present[ed]" personal information, and that "either one standing alone would constitute the sort of 'publication' required by the Policy."

Additionally, the Fifth Circuit ruled that the underlying claims alleged injury arising out of a violation of privacy. The court explained that "arising out of" extends the scope of coverage beyond violations of privacy per se to "all injuries that *arise out of* such violations." (Emphasis in original).

COVID-19 Alert:

Eighth Circuit Affirms Dismissal Of Business Interruption Loss Coverage Suit

In one of the first federal appellate rulings on the issue, the Eighth Circuit affirmed an Iowa federal district court's dismissal of an oral surgeon's lawsuit seeking business interruption coverage for COVID-19-related losses. *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2021 WL 2753874 (8th Cir. July 2, 2021).

The policyholder sought coverage for business losses incurred during state-mandated shutdowns and restrictions aimed at slowing the spread of COVID-19. Cincinnati denied coverage based on the lack of "physical loss" or "physical damage," as required by the policy.

The Eighth Circuit ruled that an inability to use property fully as intended does not constitute a physical loss, emphasizing that "there must be some physicality to the loss or damage of property—*e.g.*, a physical alteration, physical contamination or physical destruction." The court reasoned that the "period of restoration" policy provision supported this interpretation because only property that has "suffered physical loss or physical damage requires restoration." In so ruling, the court cited case law in which courts have found no "physical loss or damage" for business losses stemming from a power outage or trade embargo.

The Eighth Circuit's ruling accords with the overwhelming majority of Iowa state and federal decisions (as well as those of jurisdictions across the country) holding that the COVID-19 pandemic and related government restrictions do not constitute direct physical loss or damage for purposes of first-party insurance coverage.

Coverage Alerts:

Insurer Must Cover Damages Stemming From Incorporation Of Insured's Contaminated Ingredient Into Third-Party's Product, Says North Carolina Court

A North Carolina federal district court granted a policyholder's summary judgment motion, ruling that a general liability policy covered damages resulting from the incorporation of the insured's contaminated ingredient into a pet food company's product. *Penn Nat'l Sec. Ins. Co. v. LinkOne SRC, LLC*, 2021 WL 2345164 (E.D.N.C. June 8, 2021).

LinkOne, a company that provides fresh and frozen ingredients to pet food manufacturers, discovered that a cleaning brush was left in a tanker truck that was subsequently filled with LinkOne's product and delivered to a pet food manufacturer. Based on the contamination, the pet food company shut down its production line and destroyed the tainted product. LinkOne reimbursed the company and sought coverage from Penn National. The insurer denied the claim based on the lack of "property damage" and several policy exclusions. In ensuing litigation, the court granted LinkOne's summary judgment motion.

The court ruled that the damages the pet company incurred from its production shutdown and product recall were "because of property damage," defined as "physical injury to tangible property, including all resulting loss of use of that property . . . or loss of use of tangible property that is not physically injured." The court rejected Penn National's contention that the only property damaged was LinkOne's own property, which was excluded under the policy. The court acknowledged case law in other jurisdictions finding no coverage for the incorporation of the policyholder's contaminated ingredient into a third-party's product, but deemed those decisions unpersuasive and not controlling.

The court also ruled that coverage was not barred by a product recall exclusion. The court noted that the damages sought were not for "goods or products . . . manufactured, sold, handled, distributed or disposed of by" LinkOne, as required by the exclusionary language, because it was the pet food company, rather than LinkOne, that manufacturer and disposed of the final product. In addition, the court held that damages were not excluded by an "impaired property" provision, which applied to property that "can be restored to use" by removal or replacement of LinkOne's product.

Hawaii Court Rules That Policyholder May Recover Employee Dishonesty Coverage Under Multiple Successive Policies

A Hawaii federal district court ruled that a company was entitled to recover the $250,000 per-occurrence sublimit for each of five successive policies for losses stemming from an employee's theft over a twenty-year period. *Arc in Hawaii v. DB Ins. Co., Ltd.*, 2021 WL 2481672 (D. Haw. June 17, 2021).

The insured discovered that its accountant had engaged in numerous incidents of theft and forgery from 1998 through 2017, resulting in nearly $7 million in losses. The company sought coverage under Forgery and Employee Dishonesty provisions in commercial property policies. DB Insurance argued that it fulfilled its obligation by paying a single limit of $250,000 under the Employee Dishonesty provision and that it had no coverage obligation under the Forgery provision.

The court ruled that coverage under the Forgery provision was triggered and that a Criminal Acts Exclusion did not bar coverage. The court explained that the exclusion appeared in the general policy, whereas the grant of forgery coverage was issued in a separate "Enhancement Endorsement" and that under state law, specific provisions preempt general provisions where the two conflict.

In addition, the court rejected DB Insurance's contention that it was obligated to pay only a single policy sublimit under the Employee Dishonesty provision. DB Insurance argued that payment under successive policies was prohibited by a "one occurrence provision," which stated that "All loss or damage: Caused by the same person or persons; or Involving a single act or series of related acts: is considered one occurrence." The court rejected this argument, finding the policy language ambiguous as to whether an "occurrence" can extend beyond a policy period. The court also rejected the contention that a non-cumulation provision limited the insurer's obligation to provide coverage under successively-issued policies, finding the provision "temporally ambiguous" as to whether it applies across successive policies.

However, the court granted DB Insurance's motion to dismiss the bad faith and punitive damages claims, emphasizing that the issues in dispute related to ambiguous provisions and unsettled questions of law.

Pollution Exclusion Alerts:

Sixth Circuit Rules That Pollution Exclusion Bars Coverage For Criminal Claims Alleging Submission Of Fraudulent Dust Samples

Our November 2020 Alert reported on a Kentucky district court decision holding that a pollution exclusion barred coverage for a criminal investigation and charges against a company and its executives stemming from the fraudulent submission of dust samples to a federal agency. *Barber v. Arch Ins. Co.*, 2020 WL 6087951 (W.D. Ky. Oct. 15, 2020). This month, the Sixth Circuit affirmed. *Barber v. Arch Ins. Co.*, 2021 WL 2828021 (6th Cir. July 7, 2021).

A criminal action alleged that Armstrong and its employees submitted fraudulent dust samples to the Mine Safety and Health Administration. Arch denied coverage, arguing that a pollution exclusion barred coverage. The district court agreed and ruled in the insurer's favor and the Sixth Circuit affirmed.

The Sixth Circuit rejected Armstrong's assertion that coal dust is not a "contaminant or irritant" where, as here, it is confined inside a mine "where it is supposed to be," rather than dispersed into the environment. In so ruling, the court noted that coal dust levels in mines are strictly monitored by regulatory agencies and that coal dust inhalation can result in bodily harm.

In addition, the court rejected Armstrong's contention that the exclusion was inapplicable because the criminal charges did not "arise from" and were not "based on" or "attributable to any direction, request, or voluntary decision to test for, abate, monitor, clean up, remove, contain, treat, detoxify or neutralize Pollutants," as required by the exclusion. More specifically, Armstrong argued that "arising from" requires causality and that the criminal charges were caused by an alleged conspiracy rather than Armstrong's duty to regulate coal dust. The court stated:

> Absent the . . . regulations, the employees would not have had to monitor or submit samples at all, and therefore would not have conspired to commit fraud . . . . Accordingly, the criminal proceedings arose from a direction to test for or monitor a pollutant, and the pollution exclusion bars coverage for the criminal proceedings.

Missouri Appellate Court Rules That Methamphetamine Is A Contaminant Under Exclusion In Homeowner's Policy

A Missouri appellate court ruled that a homeowner's insurer had no duty to pay for the costs to remove methamphetamine contamination because the policy did not cover the costs of complying with an ordinance that requires the insured to remove

pollutants. *Vogelsang v. Travelers Home and Marine Ins. Co.*, 2021 WL 3086223 (Mo. App. Ct. June 29, 2021).

After police discovered methamphetamine at the policyholder's residence, a local agency issued an order to vacate, which required testing and remediation prior to any reoccupation of the home. Travelers refused to pay those expenses, citing a provision that excluded coverage for "the costs to comply with any ordinance or law which requires an 'insured' or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, pollutants." A trial court granted Travelers' summary judgment motion and the appellate court affirmed.

The appellate court ruled that methamphetamine is a pollutant, which the policy defined to include any "contaminant." Acknowledging that at least one Missouri appellate court has held that a different toxic vapor, carbon monoxide, is not a pollutant for insurance coverage purposes, the court concluded that methamphetamine falls within the ordinary meaning of contaminant because it makes the house "unfit for use by the introduction of unwholesome or undesirable elements." The court further held that the order to vacate required removal of the methamphetamine, rejecting the homeowner's contention that removal was required only if she sought to reoccupy her home, and that she retained the right not to do so. The court deemed that assertion "patently unreasonable."

Reinsurance Alerts:

Resolving Conflict Between District Courts, Second Circuit Rules That Defense Costs Are Subject To Reinsurance Limits

The Second Circuit ruled that facultative reinsurance certificates issued by Munich and Century reinsured defense costs within limits, not in addition to them. *Utica Mut. Ins. Co. v. Munich Reins. Am., Inc.*, 2021 WL 3197017 (2d Cir. July 29, 2021).

Utica sought reinsurance from Munich and Century for losses paid to its insured for asbestos-related claims. Disputes as to the existence and scope of coverage under certain certificates resulted in two separate lawsuits in New York federal district court. In one suit, the court ruled in the reinsurer's favor, finding that Utica's defense costs were subject to policy limits. In the other suit, a different judge ruled that defense costs were in addition to policy limits. The Second Circuit, hearing the appeals in tandem, ruled that defense costs eroded policy limits and were not supplemental to them.

Because the reinsurance coverage "followed form" to Utica's umbrella policy, the central issue in dispute concerned the application of Utica's umbrella policy. Utica acknowledged that the umbrella policy made defense costs subject to policy limits, but argued that the policy was modified by an endorsement that allowed defense costs to be in addition to limits. The Second Circuit rejected this assertion, explaining that the endorsement, which expressly applied to "any occurrence not covered by" the primary policy, was unambiguous and referred only to scenarios in which the umbrella policy "dropped down" to provide primary coverage in the first instance because the primary policy did not cover the particular claims. The court explained that the endorsement did not apply where, as here, the primary policy provided coverage and umbrella policy was triggered by virtue of exhaustion of the primary policy limits.

In addition, the court deemed unpersuasive Utica's assertion that the facultative certificates required the reinsurers to reimburse the disputed defense costs,

regardless of Utica's own obligations under its umbrella policy. Utica claimed that it was entitled to bill the reinsurers for defense costs in addition to policy limits because the certificates bound the reinsurer to pay all "expenses incurred" by Utica. The court held that Utica's construction "violates the contractual intent of facultative reinsurance" which connects a reinsurer's liability to the cedent's liability under the operative policy. More specifically, the court explained that "incur" means "to become liable or subject to" and thus requires a legal liability to pay. Under the follow form clauses, the reinsurers' liability is tied to coverage under Utica's umbrella policy. The court stated: "[t]he only 'expenses incurred' that the reinsurers must reimburse are those that Utica is liable to pay under the 1973 umbrella policy (or good faith, reasonable settlements of disputes affecting that policy and within its terms)."

Finally, the court ruled that Century was entitled to a new trial on its bad faith counterclaim against Utica. The counterclaim alleged that Utica violated its duty of good faith by improperly billing Century for defense costs in addition to limits, among other things. The district court had instructed the jury that an essential element of the bad faith counterclaim was a finding that Century fulfilled its obligations under the reinsurance certificate and that "this element is in dispute." The Second Circuit deemed these instructions erroneous, explaining "there is no actual dispute whether Century did all it was obligated to do under the 1973 certificate. As a matter of law, Century is not obligated under the certificate to pay defense in addition to limits—the only pertinent issue at trial regarding Century's obligations."

Jury Says Reinsurer Must Reimburse Cedent For Underlying Asbestos Settlement, Finding No Evidence Of Bad Faith In Underlying Allocation

In a dispute relating to several facultative reinsurance contracts issued by Clearwater Insurance Company, a federal jury in New York awarded Utica Mutual Insurance Company approximately $11 million, finding that Utica did not act in bad faith or improperly allocate underlying asbestos settlement payments to the reinsured policies. *Utica Mut. Ins. Co. v. Clearwater Ins. Co.*, No. 6:13-cv-1178 (N.D.N.Y. July 8, 2021).

The jury also concluded that the underlying primary policies contained aggregate limits and that Utica had paid up to those limits.

In a prior ruling in this case, the Second Circuit ruled that the reinsurance certificates were expense-supplemental and thus required Clearwater to reimburse Utica for expenses in addition to the stated limit of liability. *See* October 2018 Alert. In that decision, the Second Circuit also ruled that neither the reinsurance certificates nor certain contracts through which Clearwater participated as part of a pool of reinsurers imposed a follow the settlements obligation. The court therefore concluded that Clearwater's indemnity obligations must be based on Utica's proven liability under its umbrella policies.

Notice Alert:

Eleventh Circuit Rules That Innocent Insured Provision Applies To Both Notice And Reporting Provisions

Reversing a Georgia district court decision, the Eleventh Circuit ruled that an innocent insured provision applies not only when the principal insured fails to give timely notice of a claim under a claims-made-and-reported policy, but also when the principal insured fails to comply with an extended reporting period provision. *Maxum Indem. Co. v. Colliers Int'l-Atlanta, LLC*, 2021 WL 2434350 (11th Cir. June 15, 2021).

When a company and its executive officer were sued, the company promptly provided notice of the claim to Maxum Indemnity, which issued a reservation of rights. The executive asked the company for any applicable insurance policies, but the

company failed to provide the Maxum policy. Several months later, the executive learned about the Maxum policy and requested coverage. In response, Maxum sought a declaration it had no duty to provide coverage to the executive based on a failure (of both the company and executive) to comply with the policy's reporting provision. A Georgia district court granted Maxum's summary judgment motion, holding that an innocent insured provision did not apply to violations of the reporting provision.

The Eleventh Circuit reversed, ruling that the innocent insured provision unambiguously applies to violations of both the policy's notice provision and its extended reporting period provision. The court noted that the innocent insured provision applies when coverage "would be excluded, suspended or lost . . . [b]ecause of noncompliance with any condition relating to the giving of notice to [Maxum] with respect to which any other 'insured' shall be in default solely because of the failure to give such notice," so long as the innocent insured complies with such condition "promptly after obtaining knowledge of the failure of any other "insured" to comply therewith." Maxum argued that the provision is limited to violations of the notice provision because it refers only to "giving of notice" and makes no mention of "reporting." Rejecting this contention, the court held that both provisions operate in unison in providing instructions and timeframe for "the transfer of information."

Settlement Alerts:

Tenth Circuit Says Utah Law Does Not Require Defending Insurer To Settle For Policy Limits Where Coverage Is Debated And Declaratory Judgment Action Is Pending

Affirming a Utah district court decision, the Tenth Circuit ruled that an insurer defending under a reservation of rights has no duty to accept a policy limits settlement offer where the insurer has filed a declaratory judgment action disputing coverage and the court ultimately finds none. *Owners Ins. Co. v. Dockstader*, 2021 WL 2662251 (10th Cir. June 29, 2021).

A policyholder sought coverage under his homeowner's policy for civil claims arising out of an assault and battery. The insurer agreed to defend under a reservation of rights and sought a declaration that its policy did not cover the underlying conduct. Thereafter, the underlying claimant made a policy limits settlement demand, which the insurer conditionally accepted upon a finding of coverage in the then-pending declaratory judgment action. The claimant then made a second offer to settle for policy limits, and the insurer reiterated its position that it would pay policy limits if the declaratory judgment action resulted in a finding of coverage. When the claimant made a third offer with the same terms, the insurer declined to respond.

The Tenth Circuit rejected the assertion that Utah law requires a defending insurer to accept a reasonable policy limits settlement offer when a declaratory judgment action as to coverage is pending, regardless of whether there is ultimately coverage under the policy, noting the absence of authority supporting that proposition. The court noted that the insurer was obligated to continue defending until the coverage issue was resolved, but rejected the notion that the duty to defend includes an absolute duty to settle even where the declaratory judgment action results in a finding of no coverage.

The dissenting opinion argued that an insurer's duty to accept a settlement while awaiting a coverage ruling in a declaratory judgment action should turn on whether the insurer acted reasonably under the circumstances that existed at the time of the settlement offers, regardless of a subsequent finding of no coverage. Rejecting this proposition, the Tenth Circuit stated:

If we follow the dissent's logic to its natural conclusion, an insurer would have to pay an uncovered claim so long as a third-party claimant made a settlement offer before a district court rendered a decision about coverage. The dissent's approach would undermine Utah law by making the insurer's right to seek a declaratory action illusory.

Fourth Circuit Affirms That Insurer's Rejection Of Settlement Demands Did Not Violate State Law Duty To Act In Good Faith

The Fourth Circuit ruled that an insurer did not engage in bad faith when it rejected two time-limited settlement demands. *Columbia Ins. Co. v. Waymer*, 2021 WL 2556586 (4th Cir. June 22, 2021).

A driver insured by Columbia Insurance struck another vehicle, seriously injuring both occupants. Shortly after the accident, counsel for the injured parties made a ten-day settlement demand for the $1 million policy limit. Although Columbia Insurance had set a reserve on the claim for $1 million in light of the severity of the accident, it rejected the offer based on the absence of medical records substantiating the extent of the claimants' injuries. Columbia Insurance sought and received authorization to access hospital records, but was unable to obtain documentation within the ten-day period, which expired without action.

A few months later, after receiving medical bills and records, Columbia Insurance offered to pay policy limits. The claimants rejected the offer and responded with a second demand, which alleged a violation of good faith and noted the possibility of tort recovery for all damages, even those exceeding policy limits. The offer, which included a fifteen-day deadline, proposed two options. One option contemplated litigation only on the bad faith claim, with damages limited to either $1 million or $3.5 million depending on outcome. The second contemplated litigation as to both liability and bad faith, and bound Columbia Insurance to a jury damage award, without any right to appeal that verdict as excessive. Columbia Insurance rejected both offers.

A jury ultimately awarded the claimants $6.5 million. Columbia Insurance paid its policy limit and filed suit, seeking a declaration that its refusal to accept the first demand did not constitute bad faith under South Carolina law. The district court granted the insurer's summary judgment motion, and the Fourth Circuit affirmed.

The Fourth Circuit noted that while this "was likely a policy limits case" from the start, the ten-day deadline in the first demand did not afford Columbia Insurance sufficient time to validate the extent of damages. The court noted the absence of South Carolina precedent on whether a lack of time to investigate constitutes an objectively reasonable basis for refusing a policy limits settlement demand, but predicted that the South Carolina Supreme Court would find that an insurer must be afforded reasonable time to evaluate the risk of an excess judgment before accepting a settlement demand.

Additionally, the court concluded that the insurer did not act in bad faith in refusing the second settlement demand, which included "non-traditional" terms set by the claimants, including "the waiver of significant legal rights." Addressing this matter of first impression under South Carolina law, the court deemed persuasive Florida state law holding that an insurer's refusal to agree to such "unorthodox" settlement demands does not constitute bad faith.

STB News Alert

Susannah Geltman and Joshua Polster were among five Simpson Thacher partners named to *Benchmark Litigation*'s sixth annual "40 & Under Hot List." The publication honors the most notable up-and-coming litigation attorneys in the U.S. under the age of 40 and is based on extensive research and feedback from peers and clients.

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

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