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Insurance Law Alert

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In This Issue

Florida Supreme Court Rules That Insurer Has Standing To Bring Malpractice Suit Against Counsel Retained To Represent Insured

The Supreme Court of Florida ruled that an insurer has standing through a contractual subrogation provision to maintain a malpractice action against counsel hired to represent the insured where the insurer has a duty to defend. *Arch Ins. Co. v. Kubicki Draper, LLP*, 2021 WL 2232083 (Fla. June 3, 2021). (Click here for full article)

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A New Hampshire trial court ruled that a pollution exclusion bars coverage for business interruption claims arising out of COVID-19-related state orders, but deemed a microorganism exclusion ambiguous. *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Cos.*, No. 217-2020-CV-00309 (N.H. Super. Ct. June 15, 2021). (Click here for full article)

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A New York appellate court affirmed a trial court's dismissal of claims brought by an original insured against reinsurers, ruling that the original insured was not entitled to bring direct suit against the reinsurers because the reinsurance policies did not contain a "cut through" provision allowing such claims. *Wells Fargo Bank, N.A. v. Lloyd's Syndicate AGM 2488*, 144 N.Y.S.3d 590 (N.Y. App. Div. 1st Dep't June 1, 2021). (Click here for full article)

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A Florida appellate court ruled that an insurer had no duty to indemnify an underlying civil rights judgment against police officers because the operative occurrence did not happen during the relevant policy periods. *Certain Underwriters at Lloyd's, London Subscribing to Policy No. J046137 v. Pierson*, 2021 WL 2213291 (Fla. Dist. Ct. App. June 2, 2021). (Click here for full article)

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Applying Florida law, the Eleventh Circuit ruled an "invasion of privacy" exclusion precludes coverage for claims alleging violations of the Telephone Consumer Protection Act of 1991. *Horn v. Liberty Ins. Underwriters, Inc.*, 2021 WL 2200959 (11th Cir. June 1, 2021). (Click here for full article)

Fifth Circuit To Rule On Whether Data Breach Was A "Publication" That Violates A Person's Right Of Privacy Under Insurance Policy

The Fifth Circuit will rule on whether a credit card data breach constitutes a "publication" that would trigger an insurer's duty to defend a $20 million lawsuit filed by a bank and credit card processing company. *Landry's Inc. v. Ins. Co. of the State of Pa.*, No. 19-20430 (5th Cir. Oral Arg. June 10, 2021). (Click here for full article)

Where Insurer Is "Real Party-In-Interest," Pro Rata Allocation Of Asbestos Settlements Is Not Warranted, Says New York Court

A New York trial court declined to allocate underlying asbestos settlements on a pro rata basis, finding that the insurer, as the "real party-in-interest" after the insured company dissolved, was responsible for indemnification of all settlements. *Liberty Mutual Ins. Co. v. Jenkins Bros.*, No. 651980/2018 (N.Y. Sup. Ct. New York Cnty. June 16, 2021). (Click here for full article)

Standing Alert:

Florida Supreme Court Rules That Insurer Has Standing To Bring Malpractice Suit Against Counsel Retained To Represent Insured

Answering a certified question, the Supreme Court of Florida ruled that an insurer has standing through a contractual subrogation provision to maintain a malpractice action against counsel hired to represent the insured where the insurer has a duty to defend. *Arch Ins. Co. v. Kubicki Draper, LLP*, 2021 WL 2232083 (Fla. June 3, 2021).

Arch Insurance Company hired counsel to defend its insured in an underlying action. After the suit settled for policy limits, Arch sued the law firm for professional negligence, claiming that the law firm's delay in asserting a statute of limitations defense resulted in an unnecessarily large settlement. A Florida trial court granted the law firm's summary judgment motion, finding that Arch lacked standing to sue and that there was no privity between Arch and the law firm. An appellate court affirmed, stating: "where nothing indicates that the law firm was in privity with the insurer, or that the insurer was an intended third-party beneficiary of the relationship between the law firm and the insured, we are unwilling to expand the field of privity exceptions to apply to this case." *See* Feb. 2019 Alert.

This month, the Supreme Court quashed the appellate decision and ruled that Arch had standing by virtue of the policy's subrogation provision. The provision stated that Arch "shall be subrogated to all your rights of recovery therefor against any person, organization, or entity." The court held that this provision included claims for legal malpractice against counsel retained to defend the insured. In so ruling, the court rejected the law firm's argument that public policy prohibits assignment of legal malpractice claims. The court noted that while there is a public interest in preventing fraudulent claim assignments, that concern is not implicated here, where "the subrogated claim originates by contract from the insured to the insurer, the same entity who hired the lawyer in the first instance."

Because the court's ruling was based on the subrogation provision, it did not reach the issue of whether an insurer is a third-party beneficiary of the attorney-client relationship between the law firm and insured.

COVID-19 Alerts:

Small Minority Of Courts Allow COVID-19 Coverage Claims To Proceed Notwithstanding Virus Exclusions

The vast majority of courts have continued to dismiss policyholder suits seeking coverage for business losses incurred during the COVID-19 pandemic and related government shutdowns. However, a few courts have concluded that the allegations at issue sufficiently allege claims for coverage.

In *Seifert v. IMT Ins. Co.*, 2021 WL 2228158 (D. Minn. June 2, 2021), a Minnesota federal district court declined to dismiss a salon's claim for coverage under a business income policy provision. The policy covered loss of business income caused by "direct physical loss of or damage to property." The court reasoned that physical loss "of" property is distinct from physical loss "to" property and that the former includes a property owner's temporary inability to occupy or use property as intended. The court concluded that the salon owner plausibly alleged coverage under this provision because he claimed that executive orders aimed to stop the spread of COVID-19 forced his businesses to close. However, the court dismissed the salon owner's civil authority coverage claims based on the absence of allegations that any nearby properties were damaged, as required by the policy.

In addition, the court ruled that coverage was not precluded by a virus exclusion, which applied to damage caused by a

"virus, bacterium or other microorganism," "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." The court explained that the salon owner alleged a "single cause of loss: the executive orders." The court thus concluded that "the policies' virus exclusion is intended to preclude coverage only when there has been some direct or indirect contamination of the business premises, not whenever a virus is circulating in a community and a government acts to curb its spread by means of executive orders of general applicability."

The applicability of a virus exclusion was also at issue in *Atwells Realty Corp. v. Scottsdale Ins. Co.*, 2021 WL 2396584 (R.I. Super. Ct. June 4, 2021). There, a Rhode Island trial court declined to dismiss a civil authority coverage claim, finding that issues of fact existed as to whether the virus exclusion barred coverage for that claim. The exclusion applied to "loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease." The court reasoned that civil authority coverage was not necessarily precluded by the exclusion because the underlying complaint alleged that the loss was caused by executive orders, not the virus itself, and because the complaint did not allege the presence of the virus on insured property.

These rulings stand in contrast to the weight of decisions issued in recent months holding that a virus exclusion precludes coverage for business interruption and civil authority claims arising out of COVID-19 executive orders. *See, e.g., Spring House Tavern, Inc. v. American Fire & Cas. Co.*, 2021 WL 2473939 (E.D. Pa. June 16, 2021); *Hartford Fire Ins. Co. v. Moda, LLC*, 2021 WL 2474216 (Conn. Super. Ct. June 15, 2021); *Soundview Cinemas, Inc. v. Great American Ins. Grp.*, 142 N.Y.S.3d 724 (N.Y. Sup. Ct. 2021). The Seventh Circuit is poised to rule on this issue in *Mashallah Inc. v. West Bend Mutual Ins. Co.*, No. 21-1507 (7th Cir. Oral Arg. June 2, 2021).

Minnesota Court Rejects Policyholder's Contention That COVID-19 Is A Covered "Pollution Condition" Under Policy

A Minnesota federal district court dismissed a healthcare provider's COVID-19-related coverage suit, finding that the COVID-19 virus is not a "pollution condition" under the policy. *Essentia Health v. ACE American Ins. Co.*, 2021 WL 2117241 (D. Minn. May 25, 2021).

After state orders required Essentia to suspend non-essential medical services, the company sought insurance coverage for the $59 million it allegedly lost in revenue. The Premises Pollution Liability Policy covered loss resulting from "[f]irst-party claims arising out of . . . 1) a 'pollution condition' on, at, under or migrating from a 'covered location'; [or] 2) an 'indoor environmental condition' at a 'covered location.'" Essentia argued that COVID-19 is a pollution condition because it is a "contaminant" or "irritant." ACE denied coverage and, in ensuing litigation, moved to dismiss the complaint.

The court granted ACE's motion, ruling that the virus was not a "pollution condition" under the policy. The court noted that while "[i]t may be reasonable . . . to understand the definition of 'pollution condition'—in isolation—to encompass viruses," that "understanding becomes unreasonable" in light of other policy provisions. In particular, the court explained that the policy defined "indoor environmental condition" to include viruses and bacteria, but specified that coverage for such losses was limited to first-party remediation costs and did not encompass business interruption losses. The court reasoned that inclusion of "virus" in the indoor environmental definition, but not the pollution condition definition, indicated the parties' intent to limit coverage for virus-related losses to first-party remediation costs. The court declined to consider Essentia's "reasonable expectation" or estoppel arguments, noting that where, as here, policy language is unambiguous, consideration of extrinsic evidence is not warranted.

Reinsurance Alert:

New Hampshire Court Rules That Pollution Exclusion Bars Coverage For COVID-19-Related Claims, But That Microorganism Exclusion Is Ambiguous

A New Hampshire trial court ruled that a pollution exclusion bars coverage for business interruption claims arising out of COVID-19-related state orders, but deemed a microorganism exclusion ambiguous. *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Cos.*, No. 217-2020-CV-00309 (N.H. Super. Ct. June 15, 2021).

A group of hotels sought a declaration that they are entitled to insurance coverage for business losses related to the spread of COVID-19. Ruling on the parties' cross-motions for summary judgment, the court held that a pollution exclusion, defined to include "bacteria, fungi, mold, mildew, virus or hazardous substances," precluded coverage. The court rejected the hotels' assertion that the exclusion was ambiguous as to claims arising out of COVID-19 because the terms "escape," "release," "discharge" and "dispersal" are terms of art that pertain to environmental waste. The court explained that the plain text of the exclusion applies to viruses and that, in any event, COVID-19 is "dispersed" through coughing, talking and other behavior.

However, the court ruled that a microorganism exclusion that applied to loss arising out of or relating to "mold, mildew, fungus, spores or other microorganisms" was ambiguous as to whether it encompassed a virus. The court also ruled that allegations of property contamination by the COVID-19 virus satisfy the policies' "loss or damage" or "direct physical loss of or damage to property" requirements. In so ruling, the court rejected the insurers' contention that loss or damage to property must be incapable of remediation or result in dispossession. In concluding that the spread of COVID-19 to insured properties satisfied the requisite "distinct and demonstrable change" standard under New Hampshire law, the court reasoned that "property contaminated with SARS-CoV-2 is 'distinct' from uncontaminated property" and that infection of property is "'demonstrable' through a series of means, including laboratory testing."

New York Appellate Court Rules That Without "Cut Through" Clause, Original Insured Cannot Bring Suit Directly Against Reinsurers

A New York appellate court affirmed a trial court's dismissal of claims brought by an original insured against reinsurers. *Wells Fargo Bank, N.A. v. Lloyd's Syndicate AGM 2488*, 144 N.Y.S.3d 590 (N.Y. App. Div. 1st Dep't June 1, 2021). The appellate court held that the original insured was not entitled to bring direct suit against the reinsurers because the reinsurance policies did not contain a "cut through" provision allowing such claims. The appellate court stated that "the motion court correctly decided that plaintiff did not have standing because its interpretation of the contract would lead to an absurd result and is contrary to the parties' reasonable expectations."

The decision in *Wells Fargo* reflects the well-established legal principle that a reinsurance agreement is a contract of indemnity between a ceding insurer and a reinsurer, and does not create privity of contract between the original insured and the reinsurer. Courts have recognized an exception to this general rule where the reinsurance contract includes an express "cut through" provision granting the original insured a direct right of action against the reinsurer. However, case law in this context indicates that specific and clear wording is required in such clauses in order to be valid and enforceable. *See Jurupa Valley Spectrum, LLC v. National Indem. Co.*, 555 F.3d 87 (2d Cir. 2009).

Assignment Alert:

New York Court Rules That Insurance Policies Were Properly Assigned To Successor Company

A New York trial court ruled that an assignment of insurance policies to a successor company was valid notwithstanding an anti-assignment clause because the liabilities at issue occurred prior to the assignment. *Certain Underwriters at Lloyd's London v. AT&T, Corp.*, 2021 WL 2003166 (N.Y. Sup. Ct. May 19, 2021).

In 1996, AT&T executed a Separation and Distribution Agreement ("SDA") that divided the company into three separate businesses, one of which is currently known as Nokia. When Nokia was sued in asbestos-related lawsuits allegedly arising out of the operations of AT&T, Nokia sought coverage under policies issued to AT&T prior to the transaction. Nokia argued that it was assigned the right to coverage under those policies in the SDA. The court agreed and granted Nokia's summary judgment motion.

The SDA assigned AT&T's "assets" to Nokia, defined to include "all rights under insurance policies and all rights in the nature of insurance, indemnification or contribution." The court ruled that this provision evidenced the parties' intention to give Nokia the right to avail itself of coverage under the policies for liabilities assumed from AT&T as part of the transaction.

The court rejected the insurers' contention that an anti-assignment clause in the policies precluded assignment of the policies without the insurers' consent. Although New York follows the majority rule that an anti-assignment provision is not valid as to transfers that are made after the insured-against loss occurs, the insurers argued that the assignment was nonetheless invalid because Nokia had not demonstrated that any covered losses occurred prior to the SDA's assignment of insurance rights. Rejecting this argument, the court emphasized that any loss for which Nokia would seek coverage necessarily preceded the assignment because the policies only covered "occurrences" during the policy periods, and all policies expired prior to the SDA.

The court acknowledged that in some instances, an anti-assignment clause may bar pre-assignment claims, but concluded that such circumstances were not presented here. In particular, the court rejected the insurers' assertion that a post-loss assignment would "unduly increase the risk borne by the insurer[s]" because the insurers would be responsible for the defense costs of both AT&T and Nokia. The court stated that "[t]he prospect of incurring additional defense costs . . . is not the kind of increase[d] risk that compels enforcement of an otherwise ineffective anti-assignment clause."

Coverage Alert:

Florida Appellate Court Reverses Ruling Requiring Insurer To Indemnify Civil Rights Judgment Against Officers

A Florida appellate court ruled that an insurer had no duty to indemnify an underlying civil rights judgment against police officers because the operative occurrence did not happen during the relevant policy periods. *Certain Underwriters at Lloyd's, London Subscribing to Policy No. J046137 v. Pierson*, 2021 WL 2213291 (Fla. Dist. Ct. App. June 2, 2021).

Two police officers were found liable for misconduct in a suit brought by a wrongfully incarcerated man. The officers sued their insurers for failing to indemnify the $7 million judgment. Although the officers' misconduct in obtaining a forced confession occurred prior to the inception of the first policy period, the officers argued that coverage was available pursuant to a policy provision covering "damage direct or consequential . . . on account of personal injury . . . suffered or alleged to have been suffered by any person(s) . . . arising out of any occurrence . . . happening during the period of insurance." A Florida trial court agreed and ruled in the officers' favor. The trial court held that coverage under the policies was triggered because the claimant's damages (*i.e.*, his wrongful incarceration) extended into the policy periods, even though the policies were not in effect when the officers' misconduct occurred.

The appellate court reversed, ruling that coverage was not available because the officers' misconduct did not occur during the policy periods. The court stated: "the fact that [the claimant] suffered the consequences of the Officers' wrongful conduct throughout his incarceration, including while the subject policies were in effect, is irrelevant for purposes of determining whether the Insurer has a duty to indemnify." The court also deemed irrelevant the fact that the claimant was ultimately exonerated during the policy period.

By contrast, in a case presenting different policy language ("injury or damage that . . . happens while this agreement is in effect" or "an event . . . which results in personal injury, bodily injury or property damage sustained, during the policy period"), the Fifth Circuit ruled that insurers were obligated to defend a municipality in a civil rights suit arising out of coerced confessions and fabricated evidence, notwithstanding that the arrests and convictions occurred before the relevant policies incepted. *See* June 2019 Alert.

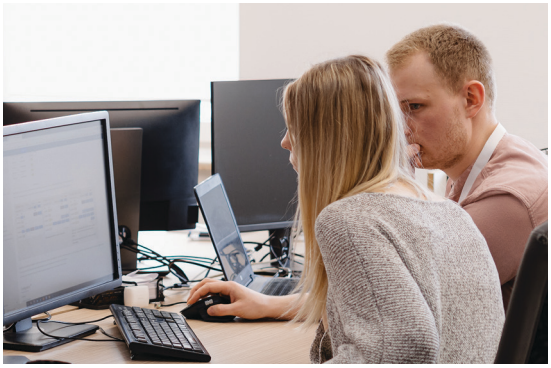
Right To Privacy Alerts:

Eleventh Circuit Rules That "Invasion Of Privacy" Exclusion Bars Coverage For TCPA Class Action Suit

Applying Florida law, the Eleventh Circuit ruled an "invasion of privacy" exclusion precludes coverage for claims alleging violations of the Telephone Consumer Protection Act of 1991 ("TCPA"). *Horn v. Liberty Ins. Underwriters, Inc.*, 2021 WL 2200959 (11th Cir. June 1, 2021).

A class of consumers sued iCan Benefit Group, alleging that the company invaded their privacy by sending unsolicited text messages to their cellphones without their consent, in violation of the TCPA. Liberty refused to defend the suit on the basis of a policy exclusion that applied to loss "arising out of . . . invasion of privacy." Thereafter, the underlying suit settled for approximately $60 million. The settlement amount was not allocated between "actual" versus "statutory" damages, or between harms that arose from invasion of privacy as opposed to nuisance, annoyance or property damage.

A Florida federal district court granted Liberty's summary judgment motion, ruling that the invasion of privacy exclusion barred coverage for the entire underlying action. Alternatively, the court ruled that even if only some of the settled losses were precluded by the exclusion, iCan's failure to allocate the underlying settlement into covered and uncovered losses precluded recovery for any covered loss. The Eleventh Circuit affirmed.



Plaintiffs argued that the exclusion was ambiguous because (1) it listed several common law tort causes of action, but not statutory causes of action, such as the TCPA, and (2) a different exclusion in the policy listed several federal statutes, but not the TCPA. The court rejected both assertions. First, the court explained that "arising out of" is interpreted broadly under Florida law to mean "originating from" or "having a connection with." As such, the court declined to limit the exclusion to common law invasion of privacy tort claims. Second, the court deemed the language in the other policy exclusion irrelevant, stating that "neither party has argued this other exclusion applies," and "we are not persuaded by an argument that, because one exclusion does not apply, another applicable exclusion is somehow rendered ambiguous."

As discussed in our September 2017 Alert, the Ninth Circuit similarly ruled that an invasion of privacy exclusion barred coverage for statutory TCPA claims. *L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795 (9th Cir. 2017). In that case, the court ruled that "a TCPA claim is, by its nature, an invasion of privacy claim." Here, the Eleventh Circuit declined to address whether TCPA claims are per se

invasion of privacy claims, and instead based its ruling on "the broad qualifying language" in the exclusion.

Fifth Circuit To Rule On Whether Data Breach Was A "Publication" That Violates A Person's Right Of Privacy Under Insurance Policy

The Fifth Circuit will rule on whether a credit card data breach constitutes a "publication" that would trigger an insurer's duty to defend a $20 million lawsuit filed by a bank and credit card processing company. *Landry's Inc. v. Ins. Co. of the State of Pa.*, No. 19-20430 (5th Cir. Oral Arg. June 10, 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 denied coverage, arguing that "personal and advertising injury" coverage was unavailable because there was no "publication" of material that violates a person's right of privacy, as required by the policy.

A Texas federal district court agreed and dismissed the suit against the insurer. *Landry's, Inc. v. Ins. Co. of the State of Pa.*, 2019 WL 3080917 (S.D. Tex. May 23, 2019). The court reasoned that the accessing of data by a hacker, without more, does not constitute a "publication." In addition, the court explained that the damages sought were not "privacy" damages because the suit against the policyholder 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.

This month, the Fifth Circuit heard oral argument relating to whether the hackers' act of accessing the private consumer data was a "publication." We will keep you posted on developments in this matter.

Allocation Alert:

Where Insurer Is "Real Party-In-Interest," Pro Rata Allocation Of Asbestos Settlements Is Not Warranted, Says New York Court

A New York trial court declined to allocate underlying asbestos settlements on a pro rata basis, finding that the insurer, as the "real party-in-interest" after the insured company dissolved, was responsible for indemnification of all settlements. *Liberty Mutual Ins. Co. v. Jenkins Bros.*, No. 651980/2018 (N.Y. Sup. Ct. New York Cnty. June 16, 2021).

Jenkins Bros., a company that manufactured asbestos-containing products, filed for bankruptcy in 1989 and was dissolved in 2004. Thereafter, when underlying claimants brought suit against Jenkins Bros., Liberty Mutual was ordered to accept service on the company's behalf and was declared the "real party-in-interest." Liberty initially funded 100% of the settlements it negotiated on behalf of Jenkins Bros. However, in 2014, Liberty took the position that it was not responsible for indemnifying payments allocated to "orphan share" periods—periods in which Liberty's policies did not cover the underlying claims.

The court ruled that under the "unique facts and circumstances of this case," Liberty, as the real party-in-interest, was obligated to fund all settlements, including those allocated to orphan share periods. The court rejected Liberty's assertion that it was the real party-in-interest solely for the purpose of service of process, emphasizing that Liberty's prior conduct in negotiating all settlements evidenced its understanding that it "stood in the shoes of . . . Jenkins Bros., in all relevant and meaningful ways." The court also observed that "pro rata allocation is not appropriate where, as is the case here, the allocation . . . is between the insurer and the tort victims," rather than the insurer and policyholder.

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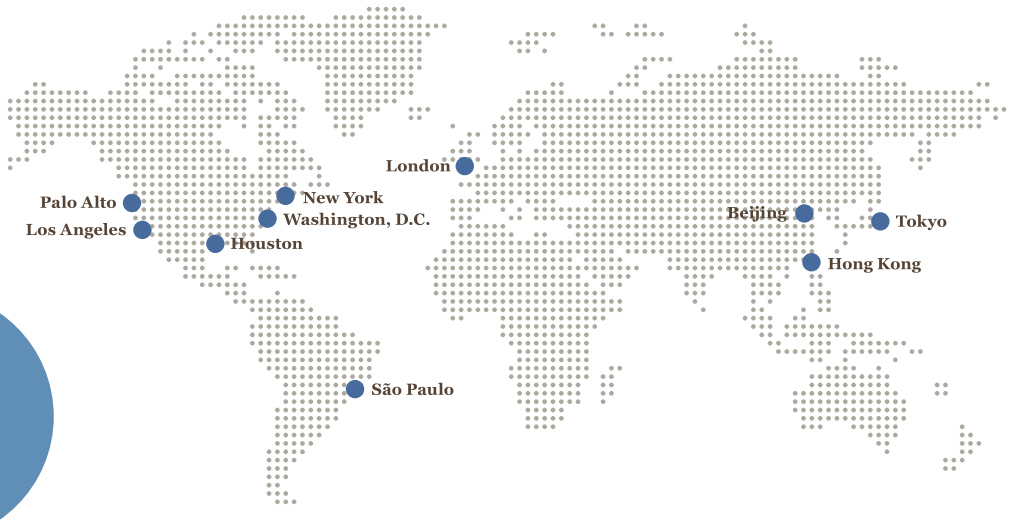

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