Simpson Thacher

Insurance Law Alert

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The Delaware Supreme Court ruled that a Related Claim provision barred coverage for a later-filed securities class action because the suit was based on facts and wrongful acts that were "the same as or related to" those alleged in a prior class action. *First Solar, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2022 WL 792158 (Del. Mar. 16, 2022). (Click here for full article)

Delaware Supreme Court Rules That Insurers Need Not Cover Costs Of Defending Appraisal Suit

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The Ohio Supreme Court will address whether a policyholder is entitled to insurance coverage for ransomware-related losses. *EMOI Services LLS v. Owners Ins. Co.*, No. 2021-1529 (Ohio Mar. 1, 2022). (Click here for full article)

Russian War In Ukraine May Implicate War Exclusion In Cyber-Related Coverage Claims

Business interruption losses resulting from cyberattacks perpetrated by Russian actors may give rise to coverage litigation involving a war exclusion, among other issues. (Click here for full article)

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The Fourth Circuit ruled that "physical loss or damage" is unambiguous and encompasses only losses caused by "material destruction or material harm to the covered property." *Uncork and Create LLC v. Cincinnati Ins. Co.*, 2022 WL 662986 (4th Cir. Mar. 7, 2022). (Click here for full article)

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A Minnesota district court dismissed a health care organization's COVID-19-related coverage suit, finding that neither government orders nor allegations of actual viral presence on property sufficiently alleged "direct physical loss of or damage" to property, as required by the policy. *HealthPartners, Inc. v. Am. Guar. & Liab. Ins. Co.*, 2022 WL 597518 (D. Minn. Feb. 28, 2022). (Click here for full article)

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A Mississippi district court dismissed restaurants' breach of contract and bad faith suit, ruling that a policy endorsement did not provide coverage for business losses allegedly caused by the COVID-19 virus and related executive shutdown orders. *University Management, Inc. v. State Auto Prop. & Cas. Ins. Co.*, 2022 WL 805879 (N.D. Miss. Mar. 15, 2022). (Click here for full article)

Policy Exclusions Do Not Relieve Insurer Of Duty To Defend BIPA Suit, Says Illinois Court

An Illinois district court ruled that several policy exclusions were ambiguous and that an insurer was therefore obligated to defend a suit alleging violations of the Biometric Information Privacy Act. *Citizens Ins. Co. of Am. v. Thermoflex Waukegan, LLC*, 2022 WL 602534 (N.D. Ill. Mar. 1, 2022). (Click here for full article)

Sixth Circuit Rules That Filed-Rate Doctrine Precludes Suit Against Insurer

Affirming a Kentucky district court decision, the Sixth Circuit ruled that the filed-rate doctrine required dismissal of a policyholder's claims against its workers' compensation insurer. *Granite State Ins. Co. v. Star Mine Servs., Inc.*, 2022 WL 776461 (6th Cir. Mar. 15, 2022). (Click here for full article)

New York Governor Amends Comprehensive Insurance Disclosure Act

Last month, New York Governor Kathy Hochul eased certain requirements under the Comprehensive Insurance Disclosure Act, which requires litigation defendants to share detailed insurance coverage information. (Click here for full article)

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D&O Alerts:

Delaware Supreme Court Rules That Related Claim Provision Bars Coverage For Securities Class Action

The Delaware Supreme Court ruled that a Related Claim provision barred coverage for a later-filed securities class action because the suit was based on facts and wrongful acts that were "the same as or related to" those alleged in a prior class action. *First Solar, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2022 WL 792158 (Del. Mar. 16, 2022).

Stockholders of First Solar filed a class action lawsuit in 2012 alleging that the company violated federal securities laws by making false or misleading public disclosures. National Union provided coverage under a claims-made policy in effect from 2011-2012. In 2015, a second set of stockholders brought suit, alleging violations of the same federal securities laws, as well as Arizona statutory and common law causes of action. A National Union policy in effect from 2014-2015 excluded coverage for any "Related Claims," defined as "a Claim alleging, arising out of, based upon or attributable to any facts or Wrongful Acts that are the same as or related to those that were . . . alleged in a Claim made against an Insured." After First Solar exhausted coverage under its 2011-2012 policies, it sought coverage for the later-filed action under the 2014-2015 policies.

A Delaware trial court ruled that coverage for the second action was barred by the Related Claim provision. Applying a "fundamentally identical" standard for determining relatedness, the trial court concluded that the two suits stemmed from the same underlying conduct and alleged violations against the same defendants in an overlapping time period.

The Delaware Supreme Court affirmed, but held that the trial court erred in applying a "fundamentally identical" test. Instead, the court explained that the plain language of the policy requires an evaluation of whether a later-filed suit raises claims that "arise out of, are based upon or attributable to any facts or Wrongful Acts that are the same as or related to" those in a prior action. The court held that this standard was met because the second action was based on the same types of misrepresentations made during the same time frame, involved the same overall legal theory, and shared common facts with the first action. The court rejected First Solar's assertion that the first action centered on "historical performance" representations, while the second action involved predictions and "forward-looking statements," explaining that such differences were not meaningful. Similarly, the court deemed it irrelevant that the types of damages sought in each action were different.

The court distinguished *Pfizer Inc. v. Arch Ins. Co.*, 2019 WL 3306043 (Del. Super. July 23, 2019) (discussed in our July/August 2019 Alert), which held that two complaints were not sufficiently related. The court emphasized that while the two actions in *Pfizer* arose out of the same drug, they involved substantially different omissions and misrepresentations and relied on different evidence.

Finally, the court noted that in a different matter, First Solar filed a "Motion to Transfer Related Case," which conceded that the two actions were nearly identical.

Delaware Supreme Court Rules That Insurers Need Not Cover Costs Of Defending Appraisal Suit

The Delaware Supreme Court affirmed a lower court decision holding that insurers were not obligated to pay the costs of defending an appraisal action because that suit did not seek compensation "for a wrongful act." *Jarden LLC v. Ace American Ins. Co.*, 2022 WL 618962 (Del. Mar. 3, 2022).

Jarden entered into a merger agreement that was approved by a majority of its shareholders. However, a group of dissenting shareholders filed an appraisal action, arguing that Jarden should have negotiated a higher

per-share price. A trial court ultimately found that the fair market value of the share was less than that provided in the merger, but determined that the merger negotiation process was flawed. As a result, Jarden was ordered to pay to the shareholders the fair value of the shares as well as $38 million in interest accumulated during the course of litigation. Jarden's insurers refused to pay the costs of Jarden's defense or the interest payment, arguing that even if the appraisal action was a covered securities claim, there was still no coverage because the policies require underlying claims to seek redress "for a Wrongful Act."

A Delaware trial court agreed and ruled in the insurers' favor. The court held that the appraisal action did not seek redress for any conduct by Jarden, reasoning that "in order for a claim to be '*for*' a wrongful act, it must 'seek redress in response to, or as requital of,' that act." The court noted that this conclusion is the logical extension of the Delaware Supreme Court's ruling in *In re Solera Ins. Coverage Appeals*, 2020 WL 6280593 (Del. Oct. 23, 2020) (discussed in our November 2020 Alert), which upheld a coverage denial for an appraisal claim based on different policy language. The court observed that "evidence of a flawed negotiation process" bears on the "reliability of the negotiated deal price," but is not a necessary element of an appraisal action.

Finally, the trial court noted that even if the appraisal action was a claim "for a Wrongful Act," it did not arise out of an act committed before the run-off date. The court agreed with the insurers that the act that conferred the appraisal litigation rights was the execution of the merger, which did not close until after the run-off date. The court deemed it irrelevant that the dissenting shareholders lodged appraisal demands prior to the run-off date.

In a summary opinion issued this month, the Delaware Supreme Court affirmed the trial court ruling in full.

Cyber Alerts:

Ohio Supreme Court Set To Rule On Whether Ransomware Attack Triggers Insurance Coverage

Our November 2021 Alert reported on an Ohio appellate court decision which held that issues of fact existed as to whether a ransomware attack on a policyholder's computer system triggered coverage under a business owner's policy. *EMOI Services, LLC v. Owners Ins. Co.*, 180 N.E.3d 683 (Ohio Ct. App. 2021). When EMOI was the victim of a ransomware attack, it paid the hacker and then sought coverage from Owners. The insurer denied coverage, noting that a Data Compromise endorsement explicitly precluded coverage for ransomware payments and that an Electronic Equipment endorsement did not apply because it required "direct physical loss or damage." A trial court agreed and dismissed the suit. The trial court reasoned that there was no physical loss because, even assuming that EMOI's software was damaged while it was encrypted by the hackers, it became fully functional once the ransom payment was made.

An appellate court reversed, noting that the Electronic Equipment endorsement covered "direct physical loss of or damage to 'media'" and defined "media" as "materials on which information is recorded such as film, magnetic tape, paper tape, disks, drums, and cards," including "computer software and reproduction of data contained on covered media." Viewing the evidence in a light most favorable to EMOI, the appellate court ruled that computer servers may be "media" under the policy because they "constituted materials on which EMOI's information was recorded." The appellate court also ruled that EMOI had raised an issue of fact as to whether its software incurred "direct physical damage" because the record established that portions of the software remained unusable even after decryption.

This month, the Ohio Supreme Court agreed to review the appellate court decision. We will keep you apprised of developments in this matter.

Russian War In Ukraine May Implicate War Exclusion In Cyber-Related Coverage Claims

Recent events in Ukraine have heightened awareness of potential cyberattacks perpetrated by Russian actors. Resulting business interruption losses from any such cyberattacks may give rise to coverage litigation involving a war exclusion, among other issues. Outcomes in such litigation will be driven primarily by specific exclusionary language, which may differ significantly across policies.

As discussed in our January 2022 Alert, a New Jersey trial court recently ruled that a war exclusion in an all risk policy did not bar coverage for claims arising out of a malware attack. *Merck & Co., Inc. v. ACE American Ins. Co.*, No. UNN-L-2682-18 (N.J. Super. Ct. Jan. 13, 2022). There, Merck's insurers argued that the evidence established that the Russian government was responsible for the cyberattack and therefore coverage was barred by an exclusion that applied to:

> Loss or damage caused by hostile or warlike action in time of peace or war, including action in hindering, combating, or defending against an actual, impending, or expected attack: a) by an government or sovereign power (de jure or de facto) or by any authority maintaining or using military, naval or air forces; b) or by military, naval, or air forces; c) or by an agent of such government, power, authority or forces.

Rejecting this assertion, the court noted that decisions interpreting war-related exclusions have construed "war" to mean the use of armed forces in conflicts between nations and have deemed such exclusions to be inapplicable to scenarios not directly linked to military conflict. In so ruling, the court noted that the exclusion did not include any language indicating that it was intended to encompass cyberattacks. An interlocutory appeal of the decision is currently pending.

However, the parameters of war exclusions have rarely been tested in coverage litigation. In scenarios presenting different policy language and a factual record linking cyber-related losses to Russia's current military actions, a war exclusion may be deemed applicable to bar coverage.

COVID-19 Alerts:

Affirming Dismissal Of Policyholder's Suit, Fourth Circuit Rules That Physical Loss Requires Material Destruction Or Harm To Covered Property

The Fourth Circuit ruled that "physical loss or damage" is unambiguous and encompasses only losses caused by "material destruction or material harm to the covered property." Applying this standard, the court concluded that the policyholder did not suffer physical loss or damage resulting from the COVID-19 pandemic or related government orders. *Uncork and Create LLC v. Cincinnati Ins. Co.*, 2022 WL 662986 (4th Cir. Mar. 7, 2022).

The policyholder sought business interruption coverage in the wake of government ordered shutdowns. Cincinnati denied coverage based on the absence of "direct physical loss or damage" to property. Thereafter, the policyholder filed a class action complaint, seeking a declaration that the policy provided coverage. A West Virginia district court granted Cincinnati's motion to dismiss, ruling that neither the virus itself nor the closure orders caused physical loss or damage. As discussed in our November 2020 Alert, the district court distinguished West Virginia precedent in which physical loss or damage was found notwithstanding the lack of physical alteration to insured property, explaining that in that case, a nearby rock fall made insured property uninhabitable due to physical threat, whereas here, the virus

and government orders had no effect on the policyholder's physical premises. This month, the Fourth Circuit affirmed.

The Fourth Circuit held that the plain meaning of the terms "physical loss" and "physical damage" requires material destruction or harm, and that the "need to repair, rebuild, replace, or expend time securing a new, permanent property is a pre-condition for coverage of lost business income and other expenses." The court concluded that this requirement was not met here, emphasizing that the policyholder continued using its property during the relevant time period, albeit with certain limitations.

Minnesota Court Dismisses COVID-19 Coverage, Finding No Coverage Under Business Interruption, Civil Authority Or Contamination Provisions

A Minnesota district court dismissed a health care organization's COVID-19-related coverage suit, finding that neither government orders nor allegations of actual viral presence on property sufficiently alleged "direct physical loss of or damage" to property, as required by the policy. *HealthPartners, Inc. v. Am. Guar. & Liab. Ins. Co.*, 2022 WL 597518 (D. Minn. Feb. 28, 2022).

When government orders required HealthPartners to limit its medical services, it sought coverage for lost business revenue. American Guarantee paid for losses incurred at three fitness centers that were required to close during the relevant time period, but denied HealthPartners' claim relating to other alleged losses. The court granted American Guarantee's motion to dismiss HealthPartners' coverage suit, issuing the following noteworthy holdings:

Government Orders: The court ruled that government orders do not constitute "direct physical loss of or damage to" property. Citing *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021) (discussed in our July/August 2021 Alert), the court held that a policyholder's loss of use of property is not a physical loss for purposes of insurance coverage.

Direct Loss "of" Property: The court rejected HealthPartners' assertion that policy language requiring "direct loss of" property is distinguishable from "direct loss to" property, such that a loss of use of property due to government orders is potentially covered. The court acknowledged that a different Minnesota district court held that "direct physical loss of" property is plausibly alleged when a policyholder alleges that government orders resulted in complete business closure, *see Seifert v. IMT Ins. Co.*, 542 F. Supp. 3d 874 (D. Minn. 2021) (discussed in our June 2021 Alert), but noted that here, HealthPartners did not plausibly allege a closure of its facilities.

Contamination as Direct Physical Loss: The court held that allegations of actual presence of the virus at insured property is not sufficient to allege direct physical loss of or damage to property. Distinguishing cases involving asbestos or pesticide contamination, the court explained that "HealthPartners has not plausibly alleged that something about its covered property has fundamentally changed in a way that cannot be undone." Further, the court emphasized that COVID-19 is a threat to people, not insured property.

Civil Authority Coverage: The court ruled that civil authority coverage was unavailable because (1) there was no physical loss of or damage to property located near HealthPartners' facilities; and (2) the government orders only temporarily restricted the use of facilities and did not prohibit access.

Communicable Disease Coverage: The policy covered loss due to a suspension in business activities caused by "an authorized governmental agency enforcing any law or ordinance regulating communicable disease and that such portions of the location are declared uninhabitable due to the threat of the spread of communicable disease, prohibiting access to those portions of the location." The court concluded that this

provision was inapplicable because the government orders did not declare any insured property uninhabitable.

Dismissing Suit, Mississippi Court Rules That Endorsement Requires Premises-Specific Exposure To Virus

A Mississippi district court dismissed restaurants' breach of contract and bad faith suit, ruling that a policy endorsement did not provide coverage for business losses allegedly caused by the COVID-19 virus and related executive shutdown orders. *University Management, Inc. v. State Auto Prop. & Cas. Ins. Co.*, 2022 WL 805879 (N.D. Miss. Mar. 15, 2022).

Several restaurants and bars sought coverage under a "Limited Extension for Food-Borne Illness" endorsement. The endorsement covered loss caused by the "suspension of your 'operations' at the described premises due to the order of a civil authority; or adverse public communications or media reports, resulting from the actual or alleged . . . [e]xposure of the described premises to a contagious or infectious disease." The insurer denied coverage, arguing that there was no suspension of operations due to exposure to a disease and that the executive orders were not prompted by conditions at the insured premises. The court agreed and dismissed the suit.

The court concluded that the endorsement was unambiguous and required a causal link between the suspension of operations at the insured premises and actual or alleged exposure at those specific premises to a contagious or infectious disease. No such causation existed here, the court explained, because the policyholders failed to allege or provide evidence of contamination at their specific locations. The court deemed it insufficient that media reports and executive orders referred to the spread of COVID-19 throughout the entire restaurant industry, stating: "The express language of the Executive Orders directly contradicts UMI's position because it addresses the suspension of in-person dining, among other activities, due to 'the risk' of the spread of COVID-19, making no mention of any actual presence of COVID-19 in every location throughout Mississippi, let alone UMI's operations specifically."

Privacy Alert:

Policy Exclusions Do Not Relieve Insurer Of Duty To Defend BIPA Suit, Says Illinois Court

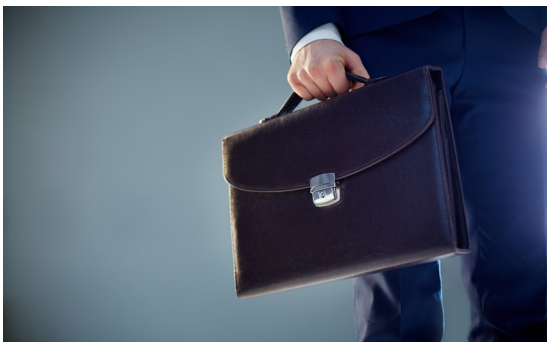
An Illinois district court ruled that several policy exclusions were ambiguous and that an insurer was therefore obligated to defend a suit alleging violations of the Biometric Information Privacy Act ("BIPA"). *Citizens Ins. Co. of Am. v. Thermoflex Waukegan, LLC*, 2022 WL 602534 (N.D. Ill. Mar. 1, 2022).

Thermoflex sought coverage for a suit alleging that it violated the BIPA by collecting employees' handprint data. The policy provided personal and advertising injury coverage for claims arising out of "[o]ral or written publication[s], in any manner, of material that violates a person's right of privacy." The insurer argued that it had no duty to defend or indemnify the BIPA claims because of three policy exclusions. The court disagreed and ruled in Thermoflex's favor.

First, the court ruled that an Employment-Related Practices Exclusion did not unambiguously bar coverage. The exclusion applied to "[e]mployment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution." The insurers argued that the phrase "such as" indicates that the list of acts in the exclusion is not exhaustive and extends to the underlying privacy claims. In contrast, Thermoflex contended that the underlying BIPA claims are entirely different in nature from the employment practices listed in the exclusion. The court deemed the exclusion ambiguous. Notably, a different Illinois district court interpreted a similar exclusion to bar coverage for BIPA claims, *see*

Am. Family Mutual Ins. Co., S.I. v. Caremel, Inc., 2022 WL 79868 (N.D. Ill. Jan. 7, 2022), finding that a BIPA violation is of "the same nature" as the practices listed in the exclusion because they all reflect actions that cause harm to employees. The *Thermoflex* court disagreed with that reasoning, explaining that such an interpretation is contrary to the rule requiring policy exclusions to be read narrowly.

Second, the court deemed a Recording and Distribution Exclusion ambiguous. The exclusion listed several specific statutes (such as the TCPA, the CAN-SPAM Act of 2003, and the FCRA), along with a catch-all provision that applied to "[a]ny federal, state or local statute, ordinance or regulation" that "addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information."



Relying on the Illinois Supreme Court's decision in *W. Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 2021 WL 2005464 (Ill. May 20, 2021) (discussed in our May 2021 Alert), the court ruled that BIPA claims did not unambiguously fall within the catch-all provision of this exclusion. As the *Krishna* court noted, BIPA is not a statute "of the same kind" as those listed since it does not regulate methods of communication. The court acknowledged that the exclusionary language at issue here was somewhat broader in scope than the exclusionary language presented in *Krishna* but expressed uncertainty as to whether that added breadth was sufficient to bar coverage.

Finally, the court concluded that an Access or Disclosure Exclusion did not relieve the insurer of its duty to defend. The exclusion applied to claims "arising out of any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information." The court reasoned that handprints do not share the attributes of the other types of personal information listed in the exclusion. In so ruling, the court noted that BIPA statutory language itself distinguishes between biometric identifiers and "confidential and sensitive information."

The court declined to rule on whether the insurer was obligated to indemnify the underlying claims, finding the issue to be unripe before the insured has been held liable.

Filed-Rate Alert:

Sixth Circuit Rules That Filed-Rate Doctrine Precludes Suit Against Insurer

Affirming a Kentucky district court decision, the Sixth Circuit ruled that the filed-rate doctrine required dismissal of a policyholder's claims against its workers' compensation insurer. *Granite State Ins. Co. v. Star Mine Servs., Inc.*, 2022 WL 776461 (6th Cir. Mar. 15, 2022).

Granite State issued workers' compensation coverage to Star Mine Services. In connection with that coverage, Granite State annually audited Star Mine's payroll records, upon which it would calculate annual premiums. In 2018, Granite State adjusted its estimated premium halfway through the year to reflect underestimations in payroll from the prior year. Star Mine refused to pay the difference and the policy was ultimately cancelled. In a final bill, Granite State sought payment for the premium difference, as well as an "audit noncompliance surcharge" (which was twice the estimated annual premium) based on Star Mine's refusal to participate in a final audit. When Star Mine again failed to remit payment, Granite State filed suit. Ruling on the parties' cross-motions for summary judgment, the district court held that the filed-rate doctrine precluded review of the audit noncompliance surcharge and the total amount of damages due.

The Sixth Circuit affirmed, ruling that the filed-rate doctrine barred review of Star

Mine's challenge to the audit noncompliance charge because that charge was part of both the policy and an industry manual filed with state regulators. The court rejected Star Mine's contention that the surcharge was not a "rate," noting that the filed-rate doctrine applies broadly to all charges, tariffs and rates that are part of a contract's "terms of service." Star Mine also argued that the filed-rate doctrine did not apply because Star Mine was challenging the enforceability of the charge, not its reasonableness. Rejecting this assertion, the court explained that "distinguishing between legality and reasonableness does little to help Star Mine" because, under Kentucky precedent, the filed-rate doctrine bars challenges that attack the legality of approved rates.

Regulatory Alert:

New York Governor Amends Comprehensive Insurance Disclosure Act

Last December, New York Governor Kathy Hochul signed the Comprehensive Insurance Disclosure Act, which requires litigation defendants to share detailed insurance coverage information. Critics of the Act argued that it placed an unreasonable burden on defendants because it required information to be provided within 60 days of answering a complaint and encompassed not only insurance policy information, but also contact information for adjusters, insurance applications and certifications as to the accuracy of disclosures.

Last month, Governor Hochul signed amendments to the Act which eased some of the original requirements. Among other things, the amendments lengthen the deadlines for disclosures on new lawsuits from 60 days to 90 days and clarify that the disclosure requirements apply only to new suits, not existing suits. In addition, the amendments specify that certain detailed information, such as insurance adjuster phone numbers and insurance policy applications, need not be disclosed.

STB News Alerts

Simpson Thacher's Insurance Practice was again named Practice Group of the Year at Euromoney's *Benchmark Litigation* 2022 Awards Dinner. This is the ninth time the Firm has received the Insurance Firm of the Year award.

In addition, the Firm was also shortlisted for the Securities Firm of the Year award. Mary Beth Forshaw, Head of Simpson Thacher's Insurance and Reinsurance Practice, and Litigation Partner Andy Frankel were both shortlisted as Insurance Litigators of the Year, and Jon Youngwood, Global Co-Chair of Simpson Thacher's Litigation Department, was shortlisted as Securities Litigator of the Year.

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.

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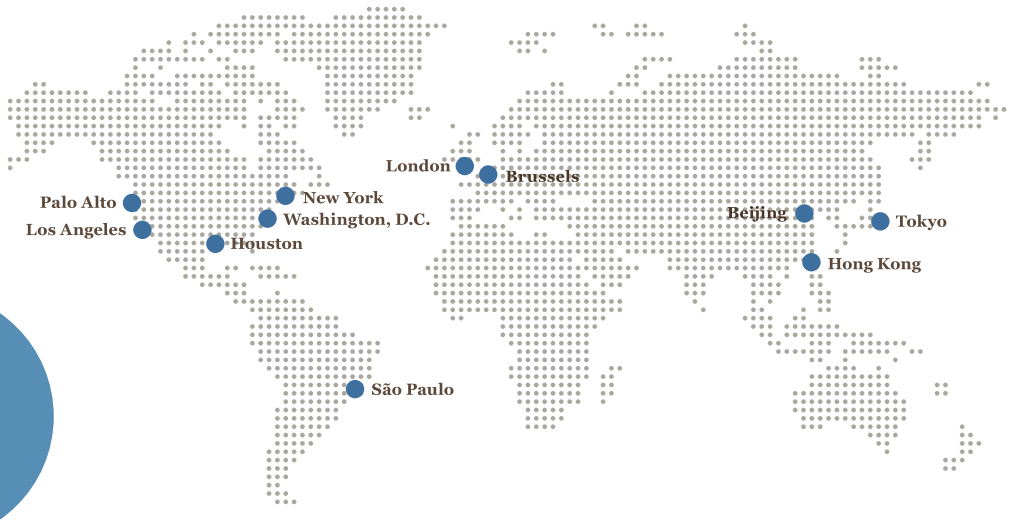

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