Simpson Thacher

Insurance Law Alert

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(quoting a client)

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An insurer that repeatedly reserved its rights under a capacity exclusion in its Directors and Officers ("D&O") policy was not estopped from denying coverage and did not forfeit any contractual rights by declining to participate in a settlement involving excluded claims. *Mist Pharms., LLC v. Berkley Ins. Co.*, 2026 N.J. LEXIS 397 (N.J. May 11, 2026). (Click here for full article)

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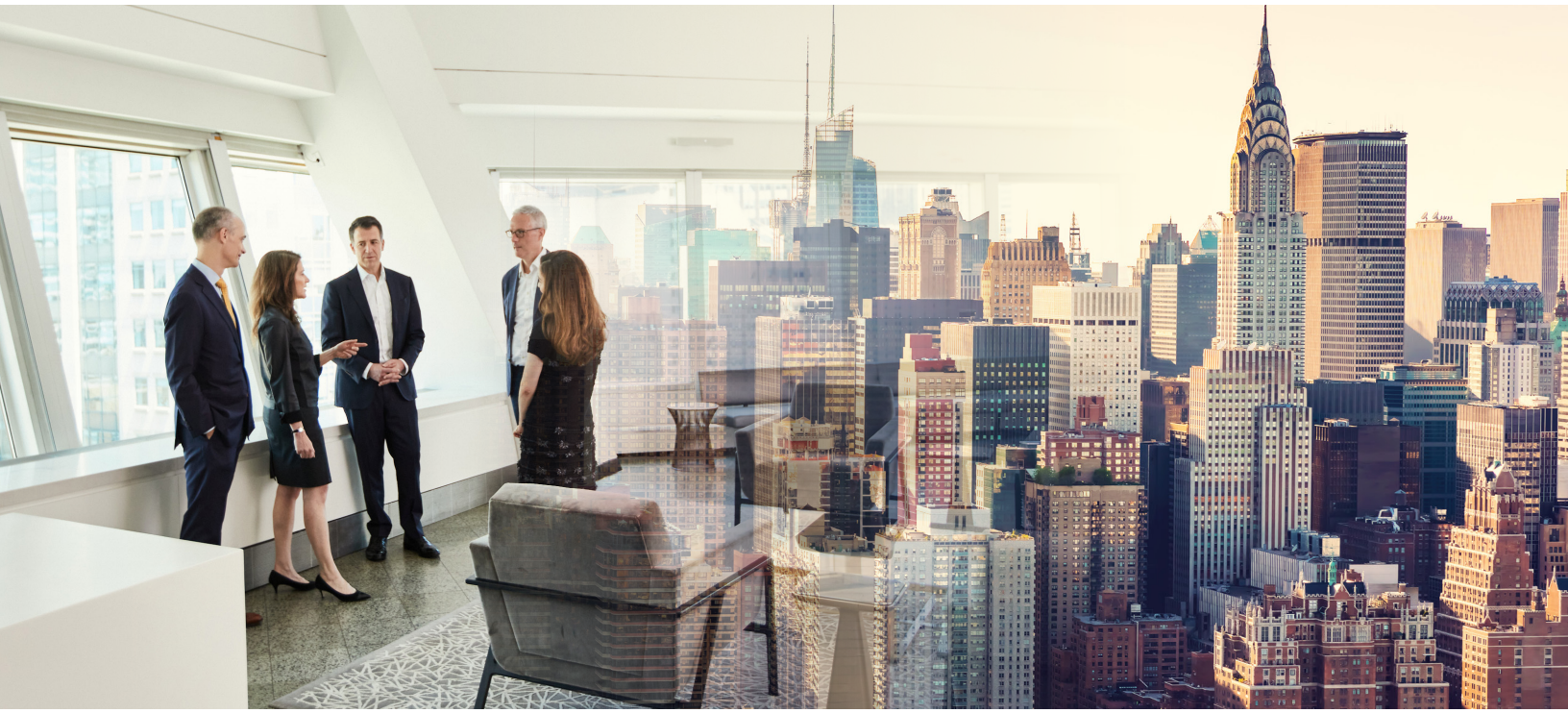
A New York federal court dismissed with prejudice a public adjuster's challenge to an anti-public adjuster ("APA") endorsement, holding that the insurers' enforcement of the clause constituted a lawful exercise of contractual rights and did not support claims for tortious interference, restraint of trade, or prima facie tort. *Barbato v. Interstate Fire & Cas. Co.*, 2026 U.S. Dist. LEXIS 108285 (S.D.N.Y. May 15, 2026). (Click here for full article)

UK Supreme Court Holds Covid-19 Furlough Payments Are Deductible Under Business Interruption Savings Clauses

The UK Supreme Court held that furlough payments received under the Coronavirus Job Retention Scheme ("CJRS") may be deducted when calculating sums payable under business interruption policies' savings clauses because the payments reduced the policyholders' employment costs and did so "in consequence of" the insured peril. *Gatwick Inv. Ltd and others v Liberty Mut. Ins. Eur. SE; Bath Racecourse Co. Ltd and others v Liberty Mut. Ins. Eur. SE and others* [2026] UKSC 14 (22 April 2026). (Click here for full article)



District Court Holds "Honorable Engagement" Clause Forecloses Manifest Disregard Challenge To Arbitration Award

HOLDING

A federal district court denied a motion to vacate a reinsurance arbitration award, holding that the "manifest disregard" standard was not satisfied because the arbitration panel was not required to strictly apply New York law in light of the parties' "honorable engagement" clause. *Tyson Int'l Ltd., v. Partner Reinsurance Eur. SE*, 2026 U.S. Dist. LEXIS 70721 (S.D.N.Y. Mar. 31, 2026).

BACKGROUND

Tyson International Co., Ltd. ("TICL"), the wholly-owned captive insurer of Tyson Foods, Inc., sought recovery under a reinsurance agreement issued by Partner Reinsurance Europe SE ("PartnerRe") following a 2021 fire at a Tyson plant. The plant had been substantially undervalued on the underlying policy due to an error misidentifying the plant's age, resulting in a stated insured value of approximately $72 million, despite an estimated net loss ranging from $306 million to $493 million.

PartnerRe commenced an arbitration seeking rescission of the reinsurance agreement based on the valuation error. TICL, in turn, sought $22.5 million from PartnerRe as its purported share of the loss under the reinsurance agreement. The arbitration panel declined to rescind the agreement and awarded TICL only $1.62 million. In so doing, the panel characterized the undervaluation not as a mere mistake, but as the "result of poor strategic business decisions," and concluded that the valuation methodology was "at least negligent, if not grossly negligent or reckless."

TICL petitioned the New York federal court to vacate the award. TICL argued that the panel manifestly disregarded the law by (1) failing to apply New York's scienter requirement for recission, (2) disregarding the plain language of the contract's "Unintentional Errors & Omissions" clause, which excuses "any unintentional or inadvertent omission, error, or incorrect valuation," and (3) effectively rewriting the contract to impose an average or co-insurance clause penalizing TICL for the undervaluation error. TICL further argued that, although the panel purported not to rescind the contract, the minimal award effectively accomplished the same result. PartnerRe cross-moved to confirm the award.

DECISION

The district court denied TICL's motion and confirmed the arbitration award. The court stated that vacatur for manifest disregard of the law is available only in narrow circumstances, requiring a showing that "(1) the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable, and (2) the arbitrator knew about the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it."

The court concluded that TICL could not satisfy this standard because the arbitration panel was not obligated to strictly apply New York law in the first instance. Central to the court's analysis was the agreement's "honorable engagement" clause, which provided:

> The Panel shall interpret this Agreement [the parties' reinsurance contract] as an honorable engagement rather than as merely a legal obligation and shall make its decision considering the custom and practice of the applicable insurance and reinsurance business . . .

The court explained that such clauses are broadly construed and afford reinsurance arbitrators substantial discretion to resolve disputes based on industry custom and practice, rather than strict legal formalism. The court further noted that the contract did not provide that New York law—or any other jurisdiction's law—would be binding on the panel. Instead, the panel was permitted to consider New York substantive law only to the extent it chose to do so.

Against that backdrop, the court rejected TICL's arguments that the panel manifestly disregarded New York law, misapplied the Unintentional Errors & Omissions clause, or improperly rewrote the contract to add a co-insurance or average clause. Emphasizing the broad authority conferred by the honorable engagement clause, the court held that it could not second-guess the panel's contractual interpretation or application of industry custom and practice. The court therefore denied TICL's motion to vacate and granted PartnerRe's cross-motion to confirm the award.

COMMENTS

The decision reinforces the substantial deference courts afford reinsurance arbitrators' determinations, particularly where the parties' agreement contains an "honorable engagement" clause. Such clauses permit arbitrators to rely on industry custom and practice rather than strict legal rules or traditional principles of contract interpretation.

Ninth Circuit Reverses Aggregate Limits Ruling In Environmental Coverage Case

HOLDING

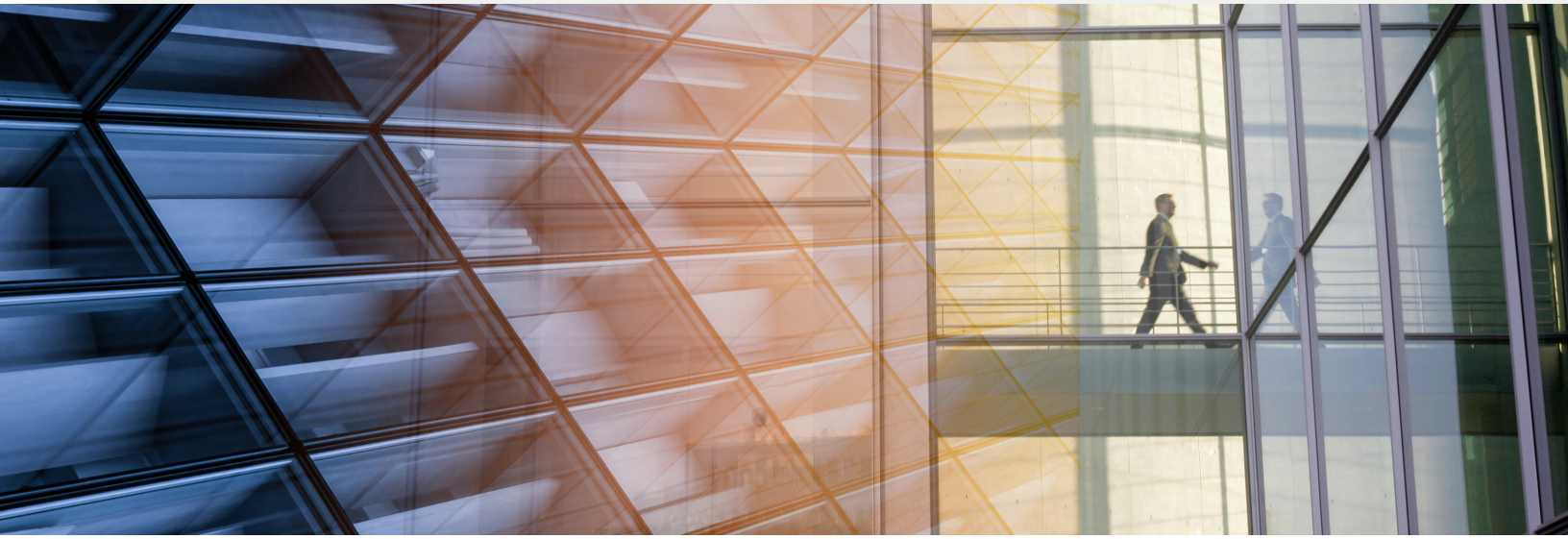
In a case involving ongoing environmental remediation efforts, the Ninth Circuit held that annual aggregate limits in umbrella policies were ambiguous and did not apply to property damage. *Cnty. of San Bernardino v. Ins. Co. of Pa.*, 2026 U.S. App. LEXIS 11589 (9th Cir. Apr. 23, 2026).

BACKGROUND

The dispute involved environmental clean-up on land owned by the County of San Bernardino. In 1990, the California Regional Water Quality Control Board found hazardous trichloroethylene in drinking water downgradient of the site and directed the County to investigate and remediate the contamination. The County sought coverage from the Insurance Company of the State of Pennsylvania ("ICSOP"), which issued a series of umbrella policies to the County for the relevant period of 1966-1975.

At issue was whether ICSOP's maximum total exposure over the nine-year policy period was capped at $81 million, or could reach $162 million, based on the County's contention that 18 separate occurrences occurred during the period. The policies define an "occurrence" as an accident or continuous or repeated exposure to conditions resulting in personal injury, property damage, or advertising liability. Item 2(a) of the policies caps ICSOP's coverage for any single occurrence at $9 million, while Item 2(b) set a $9 million annual aggregate "where applicable." The dispute centered on the "Limit of Liability" section, which states that ICSOP will pay only up to Item 2(a), subject to Item 2(b), "separately in respect of Product Liability and . . . Personal Injury . . . by Occupational Disease."

ICSOP argued that Item 2(b) established a generally applicable annual aggregate unless the policy expressly states otherwise. The County countered that "where applicable" in 2(b) restricts the annual aggregate, such that it only applies for occupational injuries and products liability. The district court sided with ICSOP, and the County appealed.



DECISION

The Ninth Circuit reversed. The court concluded that both parties' interpretations were reasonable, but "neither is obvious nor compelling." Having found the policies ambiguous, the court turned to extrinsic evidence. The County presented evidence that pre-1980s liability policies generally did not have aggregate limits, along with ICSOP memoranda, a report to reinsurers, and an internal loss-run document stating no annual aggregate limits applied. The Ninth Circuit found this evidence reinforced the conclusion that the policies were genuinely ambiguous.

In support of its position, ICSOP relied on *Garamendi v. Mission Insurance Co.,* 31 Cal. Rptr. 3d 395 (Cal. Ct. App. 2005), in which a California appellate court construed similar aggregate language as creating a general aggregate limit. The Ninth Circuit declined to follow *Garamendi*, concluding that it could not retroactively apply *Garamendi*'s construction to policies issued before the decision and that the case involved materially different circumstances and potentially different policy language.

Resolving the ambiguity in favor of the insured, the Ninth Circuit concluded that the policies do not specify an aggregate limit for property damage. The court reversed the district court's judgment and remanded for further proceedings, including with respect to number of occurrences.

COMMENTS

The Ninth Circuit noted that, historically, standard form CGL policies relied on the concept of an "occurrence" to limit liability and did not foresee environmental- or asbestos-related tort litigation. "This was a standard form policy, drafted in an era when the industry did not anticipate the consequences of not specifying the aggregate limits for umbrella and excess policies." Notably, the policies at issue did not include pollution exclusions.

Second Circuit Holds Insurer Owes A Duty To Defend PFAS Environmental Claim Based On Potentially Covered Source Of Contamination

HOLDING

The Second Circuit affirmed a district court ruling that insurers owed a duty to defend a PFAS-related environmental contamination claim asserted against an airport operator, holding that the claim potentially fell within an exception to the policies' pollution exclusion for contamination resulting from aircraft crashes or emergencies. The court further held the policies' "Combined Claims" provision did not permit the insurer to subdivide a single regulatory environmental claim into covered and uncovered portions based on different alleged causes of contamination. *Town of Harrietstown v. Westchester Fire Ins. Co.*, 2026 U.S. App. LEXIS 12834 (2d Cir. May 4, 2026).

BACKGROUND

The Town of Harrietstown (the "Town") owns and operates the Adirondack Regional Airport in upstate New York. The insurers issued a series of Airport Owners and Operators General Liability policies covering the period from 2000 through 2021. The policies contained a broad pollution exclusion barring coverage for "claims directly or indirectly occasioned by, happening through or in consequence of . . . pollution and contamination of any kind whatsoever," unless the pollution was "caused by or resulting in a crash fire explosion or collision or a recorded in-flight emergency causing abnormal aircraft operation." The policies also contained a "Combined Claims" provision, stating that the insurers would not be required to defend "a claim or claims covered by the policy when combined with any claims excluded" by the pollution exclusion, but would reimburse the covered portions of defense costs and damages allocable to covered claims.

The claim arose after the New York State Department of Environmental Conservation ("NYSDEC") detected PFAS contamination at the airport. The PFAS contamination was allegedly linked to the airport's use and storage of aqueous film-forming foam ("AFFF"), which had been used both in training exercises and in connection with aircraft crashes and emergency incidents. In November 2020, NYSDEC issued a potentially responsible party ("PRP") letter asserting that the Town could be responsible for investigation and remediation costs associated with the contamination.

The insurers investigated the claim and sought information concerning the airport's historical use of AFFF, including whether contamination arose from crash-related events or from excluded routine training and storage activities. The insurers initially agreed to defend under a reservation of rights. In 2024, however, they withdrew their defense, asserting that the NYSDEC matter involved pollution and contamination subject to the pollution exclusion. The insurers contended that, because the contamination allegedly resulted from both covered and uncovered causes, the matter constituted a "Combined Claim." Under the insurers' interpretation, they had no duty to defend the overall claim and were obligated

only to reimburse those defense costs and remediation expenses ultimately proven to be attributable to covered crash-related contamination.

The Town filed suit seeking a declaration that the insurers owed a duty to defend. As we reported in our November 2025 PFAS Update, the district court granted summary judgment in the Town's favor on the duty-to-defend issue. The insurers appealed.

DECISION

The Second Circuit affirmed. The court focused on whether the policies' "Combined Claims" provision permitted a single environmental claim to be allocated into covered and uncovered portions based on differing contamination sources.

The insurers argued that the provision implemented a reimbursement framework under which environmental cleanup demands involving both covered and uncovered pollution sources could be treated as "Combined Claims," thereby limiting the insurers' reimbursement obligations to covered amounts rather than a full defense obligation.

The court concluded that the policies' language did not support that interpretation. Looking to dictionary definitions and the structure of the policies' wording, the court held that "Combined Claims" referred to the joinder of distinct covered and uncovered claims—not a single claim allegedly arising from multiple alleged causes. According to the court, the NYSDEC PRP letter asserted a single claim seeking remediation of contamination at the airport, even if that contamination may have resulted from both covered emergency uses and uncovered routine uses of AFFF.

The court further held that the insurers owed a duty to defend because there was at least a reasonable possibility that some portion of the contamination resulted from crash-related or emergency uses of AFFF, which potentially fell within the exception to the pollution exclusion. The court therefore concluded that the insurers were obligated to defend the Town unless and until they could establish with certainty that the claim fell entirely outside of coverage.

COMMENTS

The decision highlights a common issue in environmental coverage disputes: regulators often assert broad remediation demands involving multiple potential contamination sources, some covered and others uncovered, without allocating among them. The insurers sought to use the "Combined Claims" provision to allocate defense and remediation obligations between covered and uncovered sources of contamination. The Second Circuit rejected that approach based on specific policy wording, holding that the provision applied only to separate covered and uncovered "claims," not to a single claim involving multiple alleged causes of contamination.

New Jersey Supreme Court Confirms Capacity Exclusion Bars D&O Coverage

HOLDING

An insurer that repeatedly reserved its rights under a capacity exclusion in its Directors and Officers ("D&O") policy was not estopped from denying coverage and did not forfeit any contractual rights by declining to participate in a settlement involving excluded claims. *Mist Pharms., LLC v. Berkley Ins. Co.*, 2026 N.J. LEXIS 397 (N.J. May 11, 2026).

BACKGROUND

A suit was brought against Mist Pharmaceuticals, Joseph Krivulka, Akrimax Pharmaceuticals, and other entities alleging that Krivulka, who served on the board of both Mist and Akrimax, engaged in self-dealing and fraud by assigning various entities, including Mist, to serve as middlemen between Akrimax and other drug companies for personal gain.

Mist was insured under a D&O policy issued by Berkley Insurance Company. The policy contained an exclusion that barred coverage for claims "based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any Wrongful Act of an Insured Person serving in their capacity as director, officer, trustee, employee, member or governor of any other entity other than an Insured Entity" (the "Capacity Exclusion"). When Mist sought coverage for the suit, Berkley initially defended under a reservation of rights citing the Capacity Exclusion. Five years later, Berkley withdrew from the defense and refused to participate in a $12 million settlement. Berkley repeatedly reserved its rights under the Capacity Exclusion and other policy provisions in the five years before the settlement.

The trial court entered judgment for Mist, requiring coverage up to the remaining policy limit. As reported in our August 2024 Alert, the appellate court reversed, holding that Berkley's withholding of consent was reasonable because the settlement involved multiple entities not insured under the policy and because Berkley timely cited the exclusion as a defense to coverage.

DECISION

In a 5-2 ruling, the New Jersey Supreme Court affirmed the appellate court's judgment as modified. Before the court were two principal questions: (1) the extent to which the Capacity Exclusion applied to the underlying claims; and (2) whether the insurer forfeited the right to withhold consent or decline to contribute to settlement by refusing to participate in the settlement of claims it contended were excluded from coverage.

As to the first question, the majority held that the underlying suit fell squarely within the Capacity Exclusion. Emphasizing the exclusion's broad and disjunctive wording, the majority explained that the phrase "in any way involving" did not require a causal nexus between the excluded conduct and the alleged harm. The majority concluded that coverage was precluded because the underlying allegations "in any way involved" Wrongful Acts committed by Krivulka in his capacity as a director, member, or manager of Akrimax, which was not an insured entity under

the policy. Although some allegations also involved the insured Mist, the majority determined that all the alleged misconduct related to Krivulka's role with an uninsured entity and therefore fell within the exclusion.

As to the second question, the majority held that Berkley did not act in bad faith or forfeit any contractual rights by declining to participate in the settlement of claims it claimed were excluded from coverage. Distinguishing *Fireman's Fund Ins. Co. v. Security Ins. Co.*, 367 A.2d 864 (N.J. 1976), where the insurer had acted in bad faith and breached its policy obligations, the majority determined that Berkley's invocation of the exclusion to bar coverage did not constitute bad faith. Because no covered claim existed, Berkley had no obligation to contribute to the settlement and did not forfeit any contractual rights by declining to participate in the settlement of uncovered claims.

The majority likewise rejected Mist's reliance on *Griggs v. Bertram*, 443 A.2d 163 (N.J. 1982), which held that an insurer may be estopped from denying coverage following an unreasonable delay in disclaiming coverage. The majority found *Griggs* inapplicable because Berkley reserved its rights and consistently communicated its coverage position throughout the underlying litigation. As a result, Mist could not establish justifiable reliance on any purported commitment by Berkley to cover the underlying claims or fund the settlement.

Justice Fasciale, joined by Justice Hoffman, dissented. The dissent reasoned that Berkley had represented for years that at least partial coverage was available and therefore should have been estopped from later disclaiming coverage entirely. The dissent also viewed the Capacity Exclusion as, at best, ambiguous in "dual capacity" situations where the alleged misconduct involved both insured and uninsured capacities and would have construed the ambiguity in favor of the insured.

COMMENTS

The decision reinforces that New Jersey courts will enforce broad exclusionary language as written, including "in any way involving" formulations commonly found in D&O policies. The majority's analysis also confirms that insurers do not waive or forfeit coverage defenses by defending under a reservation of rights, declining to fund uncovered settlements, or refining their coverage positions as the factual record develops—particularly where the insurer has consistently reserved its rights and no coverage exists.

New York Federal Court Dismisses Tort And Antitrust Challenge To Anti-Public Adjuster Clause

HOLDING

A New York federal court dismissed with prejudice a public adjuster's challenge to an anti-public adjuster ("APA") endorsement, holding that the insurers' enforcement of the clause constituted a lawful exercise of contractual rights and did not support claims for tortious interference, restraint of trade, or prima facie tort. *Barbato v. Interstate Fire & Cas. Co.*, 2026 U.S. Dist. LEXIS 108285 (S.D.N.Y. May 15, 2026).

BACKGROUND

The insurers subscribed to a property policy covering a New York City apartment building that included an APA clause providing that the insured would "not hire, engage, retain, contract with, or otherwise utilize the services of a public adjuster." After a fire loss, the insured retained North Jersey Public Adjusters Inc. ("NJPA"), prompting the insurers to invoke the APA clause and demand termination of the engagement. The insured subsequently canceled its contract with NJPA, depriving NJPA of a contingent fee tied to the insurance recovery. NJPA then sued the insurers asserting various tort and antitrust theories challenging the enforceability of the endorsement.

DECISION

The court dismissed all claims with prejudice, holding that the insurers' enforcement of the APA clause constituted a lawful exercise of contractual rights.

As to the tortious interference with contractual relations claim, the court explained that NJPA failed to allege the type of "wrongful means" required under New York law, such as physical violence, fraud, misrepresentation, or economic pressure. The court emphasized that the insurers' conduct amounted to nothing more than enforcement of their contractual rights under the policy and therefore could not constitute independently wrongful conduct. The court likewise rejected NJPA's tortious interference with prospective economic advantage claim because the complaint failed to identify specific prospective business relationships or facts plausibly showing that the insurers acted solely to harm NJPA or employed unlawful means.

The court also dismissed NJPA's allegations under the Donnelley Act, New York's antitrust statute, prohibiting "any contract, agreement, or arrangement, that forms a monopoly or restrains competition in trade." The court found that NJPA failed to adequately plead a relevant geographic or product market and offered no supporting factual allegations regarding competition, substitute products, or cross-elasticity of demand.

In addition, the court rejected NJPA's prima facie tort claim, holding that the enforcement of the APA clause reflected legitimate business and contractual interests rather than the "disinterested malevolence" required under New York law. The court noted that in New York, "motives other than disinterested malevolence, such as profit, self-interest, or business advantage will defeat a prima facie tort claim."

Because NJPA failed to plead any viable substantive claim, the court dismissed the related individual and class claims for declaratory judgment as well.

COMMENTS

This decision provides support for insurers seeking to enforce anti-public adjuster endorsements and underscores the difficulty of transforming ordinary contract enforcement into actionable tort or antitrust claims. The court repeatedly emphasized that involving and enforcing contractual rights, without more, does not constitute "wrongful means" under New York tort law.

UK Supreme Court Holds Covid-19 Furlough Payments Are Deductible Under Business Interruption Savings Clauses

HOLDING

The UK Supreme Court held that furlough payments received under the Coronavirus Job Retention Scheme ("CJRS") may be deducted when calculating sums payable under business interruption policies' savings clauses because the payments reduced the policyholders' employment costs and did so "in consequence of" the insured peril. *Gatwick Inv. Ltd and others v Liberty Mut. Ins. Eur. SE; Bath Racecourse Co. Ltd and others v Liberty Mut. Ins. Eur. SE and others* [2026] UKSC 14 (22 April 2026).

BACKGROUND

The appeals arose from business interruption claims brought by hotel, racecourse, and other leisure-sector policyholders for losses suffered during Covid-19. The relevant policies contained savings clauses (based on the Association of British Insurers' standard wording) requiring deductions from payments under the policies for charges or expenses that ceased or were reduced "in consequence of" the insured peril. The policyholders received CJRS payments after furloughing employees, and it was agreed that absent those payments, the policyholders would have made some employees redundant, thereby saving on employment costs. The insurers argued that the CJRS payments reduced the employment costs recoverable under the policies.

The High Court and Court of Appeal both held that the insurers were entitled to credit for the CJRS payments. The policyholders appealed, arguing that the savings clauses did not apply because (1) employment costs had not been "reduced" where employers remained obliged to pay employees before reimbursement, and (2) the CJRS payments were not received "in consequence of" the insured peril because CJRS eligibility did not depend on proof of the insured peril, and, in any event, the payments were collateral benefits of a gratuitous, benevolent, or voluntary character.

DECISION

The Supreme Court dismissed the appeals. Interpreting the policy as a reasonable person in the position of the parties would (and who, the court observed would not in most cases be a "pedantic lawyer"), the court held that the savings clauses were concerned with the economic outcome for the policyholders' businesses and were engaged where employment expenses were incurred and then reimbursed. The court explained that the evident purpose of the clauses was to prevent over-indemnification and rejected the policyholders' argument that no "saving" occurred merely because the businesses remained legally liable to pay wages before reimbursement. The court described the policyholders' interpretation, which would have allowed them both to obtain the benefit of the CJRS payments *and* recover full unreduced employment costs from insurers, as both "perverse" and "wholly uncommercial."

The court further rejected the policyholders' causation argument. Relying on its earlier decision in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1; [2021] AC 649, the court held that the same causation principles governing coverage applied equally in the context of the savings clauses. Finally, the court rejected the argument that CJRS payments constituted collateral or gratuitous benefits that should not be deducted from recoveries. The court held that the payments were a legal entitlement created by the Government and that there was no indication that the Government intended the payments to benefit policyholders to the exclusion of insurers.

COMMENTS

In addition to being another significant UK Covid-19 business interruption decision, the decision confirms key principles relating to loss quantification in insurance policies which will be relevant in future cases across all areas of insurance. The court confirmed that "it is both permissible and correct to take into account the indemnity nature of a contract of insurance when construing it" where "a clause relating to the quantification of loss has more than one possible meaning" and that as a general matter, any payments made to an insured by a party "in respect of the subject matter of the insured loss, even if made voluntarily or gratuitously, will diminish the loss and enure to the benefit of the insurer" unless the intention of the third party making the payment was to benefit only the insured.

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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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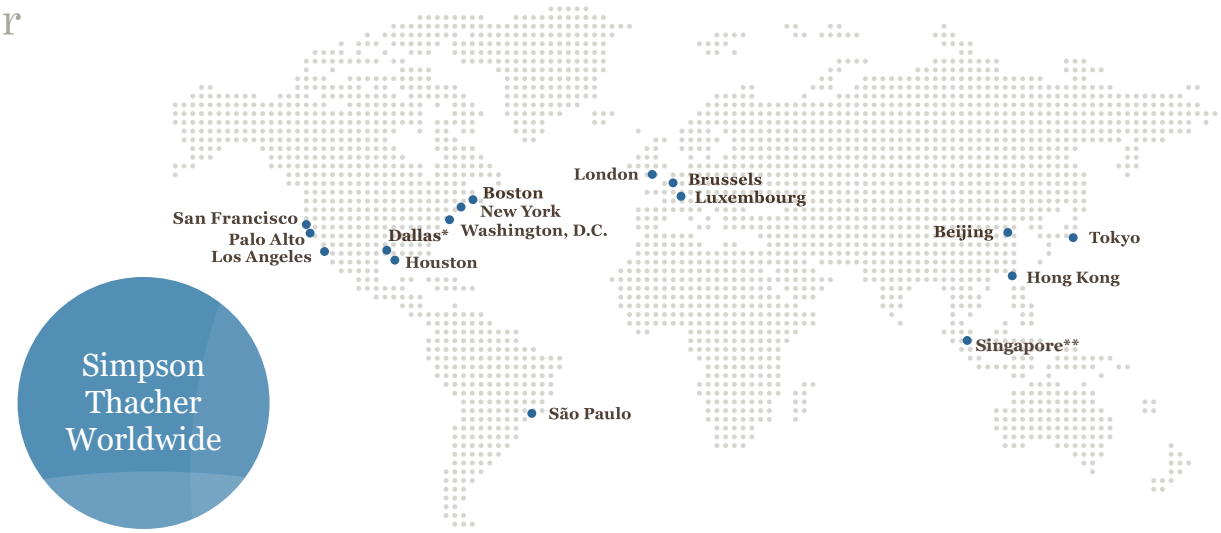

** In February 2026, Simpson Thacher announced plans to expand its presence in Texas with an office in Dallas.*

*** In April 2026, Simpson Thacher announced plans to expand its presence in Asia with an office in Singapore.*

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