Simpson Thacher

Insurance Law Alert

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"It is a top-notch firm and we have had victory after victory with them. They are incredibly strategic, great writers and responsive."

– *Chambers USA* 2025 (quoting a client)

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Simpson Thacher News

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Sixth Circuit Rules That Collateral Estoppel Precludes Cedent From Litigating Reinsurance Issue Based On Prior Arbitration With A Different Reinsurer

HOLDING

A Michigan district court correctly dismissed a cedent's suit against a reinsurer seeking a declaration as to defense costs because the cedent had already litigated and lost the same issue in arbitration with a different reinsurer. *Amerisure Mut. Ins. Co. v. Swiss Reinsurance Am. Corp.*, 2025 U.S. App. LEXIS 29098 (6th Cir. Nov. 4, 2025).

BACKGROUND

Amerisure purchased facultative reinsurance from Swiss Re and non-party Allstate to help cover primary and umbrella policies that Amerisure issued to Armstrong, a building material manufacturer. When thousands of claimants sued Armstrong for asbestos-related injuries, Amerisure paid for Armstrong's defense and losses. Importantly, Amerisure paid for Armstrong's defense costs under umbrella policies in addition to (rather than within) the umbrella policy limits.

When Amerisure sought reimbursement from its reinsurers for the defense costs, the reinsurers refused, arguing that because the umbrella policies did not contractually obligate Amerisure to cover those costs, the payments were not covered by the facultative certificates. In an arbitration between Amerisure and non-party Allstate, the panel ruled that the umbrella policies only required Amerisure to pay defense costs within limits and therefore that Allstate was not liable for above-limit payments. Amerisure sought and received judicial confirmation of the award, which it deemed favorable overall notwithstanding the defense cost issue.

Thereafter, Amerisure filed a complaint against Swiss Re, seeking a declaration that it was entitled to recover defense costs based on the same umbrella policies at issue in the Allstate arbitration. A Michigan district court granted Swiss Re's summary judgment motion, ruling that collateral estoppel precluded Amerisure from litigating the defense cost issue again. The Sixth Circuit affirmed.

DECISION

Applying Michigan and federal law governing estoppel, which the court deemed to be substantially the same, the Sixth Circuit held that the relevant issue was "actually litigated" in arbitration and that Amerisure had a "full and fair opportunity" to litigate the issue.

Amerisure argued that the defense cost issue was not actually litigated in the Allstate arbitration because the arbitration panel did not specifically address it in its interim or final award. The Sixth Circuit

rejected this assertion, explaining that Amerisure presented the argument before the panel and that, in any event, an arbitration award need not explicitly address an issue for preclusion to apply. Rather, "[s]o long as the arbitration record supports the conclusion that the arbitration panel's decision necessarily decided an issue, we may apply collateral estoppel."

The Sixth Circuit also concluded that the issue was "fully and fairly" litigated during arbitration. In so ruling, the court rejected Amerisure's contention that it was unable to obtain judicial review of the arbitration award because the certificates provided that the panel's decision was final and binding. The court emphasized that Amerisure agreed to an arbitration process that lacked appellate review and alternatively, that Amerisure could have moved to vacate the award.

Finally, while the court agreed with Amerisure that mutuality of estoppel was lacking because Swiss Re was not a party to the Allstate arbitration, it concluded that the lack of mutuality was not outcome determinative. The court explained that mutuality is not required where, as here, estoppel is asserted defensively (*i.e.*, by a defendant against a plaintiff who was a party in the prior action).

COMMENTS

The Sixth Circuit expressly declined to find, as a matter of first impression, that limited opportunities for appellate review in arbitration render it inherently unfair to give preclusive power to arbitration awards. While the court acknowledged the distinctions between arbitration and judicial proceedings, including the "honorable engagement" clause in most arbitration agreements, it deemed the two processes "substantially similar" for purposes of estoppel.

Kentucky Court Rules On Number-Of-Occurrences Issue, Scope Of Exclusionary Language, And Appropriate Trigger For Progressive Injury Claims

HOLDING

The manufacture of a product containing toxic ingredients, which allegedly resulted in progressive bodily injuries, constitutes a single occurrence under liability policies. Additionally, coverage under applicable policies is based on a continuous trigger approach, and coverage is not barred by a "damage first occurring" exclusion. *Wild Flavors, Inc. v. Wausau Underwriters Ins. Co.*, 2025 U.S. Dist. LEXIS 206720 (E.D. Ky. Oct. 20, 2025).

BACKGROUND

The coverage dispute arose out of various suits filed since 2005 against WILD based on its manufacture and distribution of food flavoring products containing allegedly toxic chemicals. Several of WILD's insurers agreed to defend the suits and indemnify subsequent settlements, but Wausau denied coverage. WILD sued Wausau and other insurers, seeking a declaration of coverage and alleging breach of contract and bad faith. Various parties cross-moved for summary judgment, which the court granted in part and denied in part.

DECISION

First, the court concluded that the underlying claims arose from a single "occurrence," defined by the policies as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." The court explained that under Kentucky's cause-based approach, the manufacture of the food flavorings was the operative event, rather than each shipment of the product. The court noted that exposure to toxic ingredients "is more similar to asbestos cases than a distributor forwarding products it did not manufacture, or a mis-shipment of an otherwise normal product."

Second, the court ruled that a "damage occurring first" exclusion, which applied to bodily injury that "*first occurred prior to the effective date of this policy*," did not bar coverage. The court deemed the exclusion ambiguous in the context of the claimants' progressive pulmonary injury issues. The court distinguished decisions in which courts applied similar exclusions, noting that the policy language in those exclusionary provisions was more expansive than that presented here.

Finally, the court adopted a continuous trigger test to determine which policies were implicated by the underlying claims. While the court noted that under Kentucky law, the trigger of coverage turns on the specific facts of each case, it concluded that the progressive nature of the pulmonary disease at issue warranted application of a continuous trigger.

COMMENTS

The majority of jurisdictions have endorsed a cause-based test for determining the number of occurrences. However, as the court observed, this standard can result in "diametrically opposite results," even in the context of similar factual scenarios. The ruling posits a possible, partial explanation for this inconsistency: Some courts require proximate causation while others apply a "liability event" method, which focuses on the more immediate event that gives rise to the insured's liability. The *WILD Flavors* court endorsed the former, focusing on the "proximate, uninterrupted, and continuing cause which resulted in all injuries and damage." (Citations omitted).

Eleventh Circuit Rules That Insured's Failure To Provide Notice Absolves Insurer From Duty To Defend Or Indemnify

HOLDING

A policyholder that failed to provide notice of a pollution condition to its insurer within the policy's seven-day period is not entitled to defense or indemnity because it was unable to rebut the presumption of prejudice under Florida law. *L. Squared Indus., Inc. v. Nautilus Ins. Co.*, 2025 U.S. App. LEXIS 26839 (11th Cir. Oct. 15, 2025).

BACKGROUND

An underground storage tank owned by L Squared accidentally released petroleum. After incurring cleanup and defense costs from that incident, L Squared sought indemnification from Nautilus under a surplus lines policy. Nautilus denied coverage based on L Squared's failure to comply with a seven-day notice provision relating to "pollution conditions which may result in a claim or any action or proceeding to impose an obligation on the insured for cleanup costs."

In ensuing litigation, a Florida district court granted Nautilus' summary judgment motion based on late notice since L Squared failed to provide notice for eight months following its investigation of contamination stemming from the petroleum leak. The Eleventh Circuit affirmed.

DECISION

The claims-made-and-reported policy included two notice provisions. One required claims to be made during the policy period, and the other required notification of a potential claim within seven days. L Squared notified Nautilus of the pollution conditions in April 2019, within the July 2018-July 2019 policy period, but failed to inform Nautilus of the pollution condition within seven days of receiving a contamination report from an environmental consulting company it had retained. The central issue was whether the breach of the seven-day provision resulted in a lack of coverage. The court concluded that it did.

The court held that a breach of the time-specific notice provision does not automatically forfeit coverage. Rather, it predicted that Florida courts would apply a notice-prejudice rule where, as here, the insured provided notice within the policy period but did not provide notice within the specified seven-day time frame.

Under Florida law, prejudice is presumed when a policyholder breaches a notice provision but may be rebutted by a showing that the insurer has not been prejudiced. The court concluded that L Squared failed to offer evidence to create an issue of fact as to the absence of prejudice to Nautilus.

COMMENTS

In addressing this matter of first impression under Florida law, the Eleventh Circuit noted that the majority of courts to address this issue have concluded that when a policyholder provides notice within the policy period of a claims-made policy and breaches only a time-specific or "as soon as practicable" provision, a showing of prejudice is required. Importantly, however, there is a near unanimous consensus among courts that a showing of prejudice is not required when the insured fails to provide notice within the policy period.

Georgia Court Rules That Stormwater—Even If Uncontaminated—Constitutes A Pollutant Within Meaning Of Pollution Exclusion In Liability Policies

HOLDING

A policyholder is not entitled to insurance coverage for claims alleging damage caused by the flooding of water stemming from retention ponds because stormwater is an "irritant" or "contaminant" under the policies' pollution exclusions. *Auto-Owners Ins. Co. v. Tabby Place Homeowners Ass'n*, 2025 U.S. Dist. LEXIS 171624 (S.D. Ga. Sept. 3, 2025).

BACKGROUND

A residential subdivision contained a drainage system that utilized storm pipes and retention ponds to collect stormwater runoff. Property owners adjacent to the subdivision sued the Homeowners Association ("HOA") of the subdivision, alleging that its design and use of the ponds and maintenance systems resulted in flooding and damage to their property. More specifically, the complaint alleged that the infiltration of storm water into the ground through the retention ponds caused high groundwater levels and consequential flooding. The flooding allegedly resulted in sewage site problems and the discharge of sediments and other materials onto the claimants' property.

Auto-Owners, the HOA's liability insurer, agreed to defend pursuant to a reservation of rights. Thereafter, Auto-Owners sought a declaration that it had no duty to defend or indemnify the underlying claims. Both parties moved for summary judgment and the court ruled in Auto-Owner's favor.

DECISION

The court ruled that coverage was barred by a pollution exclusion that applied to property damage "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of" pollutants. Pollutant, in turn, was defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The court agreed with Auto-Owners that allegations about flooding, ponding water, excess water and runoff involve "pollutants."

While the definition of "pollutant" did not expressly include stormwater or groundwater, the court concluded that both were contaminants or irritants under the exclusion. With respect to stormwater, the court held that even if uncontaminated, stormwater is a pollutant. As to rising groundwater, the court stated:

> The Court finds no meaningful distinction in the fact that the stormwater here is allegedly infiltrating through the ground and thus increasing the amount of groundwater on the adjacent properties, rather than there being a direct stormwater runoff onto the adjacent properties. It is ultimately the stormwater – a "pollutant" under Georgia law – creating the damage giving rise to the Underlying Action. Courts applying Georgia law have held that unambiguous language in pollution exclusions such as the ones here exclude all pollutants and do not exclude pollutants based on their source or location.

COMMENTS

Courts in other jurisdictions have similarly concluded that stormwater and/or runoff water are pollutants within the scope of pollution exclusions. Additionally, while the origin of flooding or other water-related events may be relevant in the context of first-party policies (which often distinguish between covered and uncovered sources of water damage—*e.g.*, interior pipe versus outdoor elements), the source of pollutants is typically irrelevant in applying a pollution exclusion in a third-party liability policy.

Second Circuit Rules That Losses Stemming From Seizure Of Oil Cargo Arose Out Of An "Insurrection" For Purposes Of Reinsurance Coverage

HOLDING

A New York district court did not err in ruling that oil cargo losses were caused by an "insurrection" under applicable policies and in providing jury instructions that included a but-for causation standard. *CITGO Petroleum Corp. v. Ascot Underwriting Ltd.*, 2025 U.S. App. LEXIS 28170 (2d Cir. Oct. 28, 2025).

BACKGROUND

The coverage dispute arose after a cargo of crude oil purchased by CITGO was seized by Venezuelan authorities. Over the course of nine months during 2018 and 2019, the cargo vessel remained at a Venezuelan port, unable to obtain clearance for departure. Eventually, an armed Venezuelan military vessel boarded the cargo ship and ordered return of the cargo. The cargo was ultimately removed and returned to Venezuela's state-owned oil company.

According to the district court's opinion in this case, those events were set in motion by a series of political events in Venezuela relating to the rightful head of government. In 2019, President Trump issued a statement recognizing Juan Guaido as the interim president of Venezuela and former Secretary Pompeo declared that Nicolas Maduro, who had served as interim president following Hugo Chavez's death, did not have "legal authority" as president of Venezuela. These announcements came after several years of political unrest and incidents of violence between opposing groups supporting either Maduro or Guaido as the legitimate leader of Venezuela.

As these events unfolded, CITGO provided a notice of circumstances and a notice of potential claim to its reinsurers and requested reimbursement of the amounts incurred by CITGO in attempting to prevent the loss of cargo. The reinsurers denied coverage and CITGO sued, alleging breach of contract and alleging damages exceeding $40 million.

The parties cross-moved for summary judgment and the district court ruled in CITGO's favor. The district court concluded that an "insurrection" had occurred for the purposes of coverage under the policy's Institute War Clause, which covered risks "arising from" insurrection, among other things. In particular, the court held that the political conditions leading up to the seizure constituted an insurrection. In reaching that conclusion, the district court took judicial notice of the statements by President Trump

and Secretary Pompeo as reflecting the official United States' position on the legitimate government of Venezuela.

The case ultimately proceeded to trial on causation and damages. The district court provided a jury instruction relating to interpretation of the phrase "arising from" an insurrection, stating that "arising from" means that there is "at least some causal relationship between the injury and the risk for which coverage is provided" and that "arising from" has "broader significance than the words 'caused by.'"

The jury issued a verdict in favor of CITGO on all issues but one, and the court issued judgment in the amount of approximately $54 million plus interest. The reinsurers appealed, arguing that the district court erred in granting CITGO's summary judgment motion and in instructing the jury on but-for causation.

DECISION

The Second Circuit affirmed the district court's ruling that the term "insurrection" was ambiguous and that the actions leading up to the oil cargo loss constituted an insurrection under the policy. As to ambiguity, the court noted that the term was undefined and subject to different reasonable interpretations.

The court then employed the definition endorsed in *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir. 1974), which held that an insurrection is "(1) a violent uprising by a group or movement (2) acting for the specific purpose of overthrowing the constituted government and seizing its powers." The court concluded that these elements were met because it was undisputed that Maduro had used violence to retain control of the country after his term had ended and that the United States had recognized Guaido as the legal government of Venezuela.

The court rejected the reinsurers' assertion that the "uprising" element was not satisfied because Guaido had never actually taken de facto control of Venezuela, noting that de facto control was not a necessary element of "uprising" and that Maduro's violent actions to unlawfully retain power constituted an "uprising" for the purpose of overthrowing an existing government. Additionally, the Second Circuit held that the district court did not err in taking judicial notice of statements by U.S. officials in finding that the Guaido regime was the legitimate existing government during the relevant time frame.

Finally, the Second Circuit ruled that the but-for causation instruction given to the jury (rather than the proximate causation advocated by the reinsurers) was not erroneous. The court held that the reinsurers waived the causation argument by withdrawing their objections on the record at trial, and that in any event, the policy required but-for causation. The court reasoned that the appropriate causation standard is not determined by the type of dispute (here, maritime law, which typically involves a proximate causation standard) but rather by contract language. "Arising out of" language has been interpreted as requiring a but-for causation standard under New York law.

COMMENTS

While the court deemed the term "insurrection" ambiguous, the decision does not alter the well-established principle that policy terms are not ambiguous simply because they are undefined or subject to competing interpretations by the parties to the dispute. Rather, the differing interpretations must be "susceptible to more than one meaning when viewed objectively by a reasonably intelligent person" and not resolved by reference to dictionary meanings.

Additionally, the court applied the doctrine of *contra proferentem* to resolve the ambiguity in favor of coverage. However, this doctrine is employed under New York law only as a last resort when extrinsic evidence does not resolve the meaning of the disputed term. Further, some courts have declined to apply *contra proferentem* when the insurance dispute involves a sophisticated business entity insured.

Finally, while original insureds typically lack contractual privity to bring direct actions against reinsurers, in this case the parties did not dispute that because of involvement of other non-party insurance companies in the insurance relationship, CITGO could pursue insurance claims directly against the reinsurers.

Simpson Thacher News

Simpson Thacher was ranked in Tier 1 for its Insurance Practice by *Benchmark Litigation* 2026. The Firm's Insurance Practice was recognized for its recent successes, including representation of Chubb in connection with an aviation coverage matter which involved litigating and then negotiating a resolution of two cases filed in the Supreme Court of the State of New York. The publication also recognized 31 of the Firm's Litigation Partners in this year's rankings and additional accolades, including the "Top 10 Women in Litigation" list, the "Top 250 Women in Litigation" list and the "40 & Under List."

Simpson Thacher has been ranked among the top 10 firms on *Law360*'s 2025 list of "Prestige Leaders," which recognizes the top 100 firms based on four pillars: financial success, reputation among attorneys, awards won by the firm and its talent and positive representation in the media. The Firm has been recognized among the top 10 firms on the "Prestige Leaders" list every year since its inception in 2021.

Summer Craig has been elected as a Fellow of the American College of Coverage Counsel, a national organization comprised of over 400 preeminent lawyers involved in coverage and extracontractual matters. Established in 2012, the College is focused on the creative, ethical and efficient adjudication of insurance coverage and extra-contractual disputes, peer-provided scholarship, professional coordination and improvement of the relationship among its diverse members.

Lynn Neuner was selected for the eighth consecutive year by *Benchmark Litigation* as one of the "Top 100 Trial Lawyers." The list highlights elite trial attorneys in the United States who are selected based on client and peer review, as well as proven achievements. Earlier this year, Lynn was recognized for the seventh consecutive year as one of *Benchmark*'s "Top 10 Women in Litigation" in the United States, a list which recognizes leading women litigators based on client and peer reviews and achievements.

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.

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

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

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

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

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

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

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

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

Alan C. Turner
+1-212-455-2472
aturner@stblaw.com

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

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

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

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

This edition of the
Insurance Law Alert
was prepared by
Joshua Polster / +1-212-455-2266
joshua.polster@stblaw.com
Abigail W. Williams / +1-202-636-5569
abigail.williams@stblaw.com
and Karen Cestari
kcestari@stblaw.com.

Simpson
Thacher

** In April 2025, Simpson Thacher announced plans to expand its Bay Area presence with an office in San Francisco.*

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Boston
855 Boylston Street, 9th Floor
Boston, MA 02116
+1-617-778-9200

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

Brussels
Square de Meeus 1, Floor 7
B-1000 Brussels
Belgium
+32-2-504-73-00

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

Luxembourg
Espace Monterey
40 Avenue Monterey
L-2163 Luxembourg
Grand Duchy of Luxembourg
+352-27-94-23-00

ASIA

Beijing
6208 China World Tower B
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000