Simpson Thacher

Insurance Law Alert

October 2025

In This Issue

"The firm is right at the top of the pyramid in terms of ability."

– *Chambers USA* 2025 (quoting a client)

Indiana Court Rules That First-Party Costs Incurred Due To Presence Of Chemical Are Not Covered By General Liability Policies

HOLDING

A general liability insurer has no duty to cover the testing and tenant relocation costs its insured incurred in responding to air contamination at the insured's property. *Thompson Thrift Dev., Inc. v. Cincinnati Ins. Co.*, 2025 U.S. Dist. LEXIS 186548 (S.D. Ind. Sept. 23, 2025).

BACKGROUND

Thompson Thrift is the owner of an apartment complex in Arizona located next to a dry-cleaning business. In 2022, environmental testing showed a high concentration of perchloroethylene ("PCE"), a toxic substance, in the air at the property. Concerned that the dry-cleaning business was the origin of the contamination, Thompson Thrift performed additional sampling at the property and then submitted a notice of claim to Cincinnati indicating the presence of PCE. Thereafter, Thompson Thrift notified the Arizona Department of Environmental Quality ("ADEQ") as well as the apartment tenants.

In response to elevated levels of PCE in one apartment unit, Thompson Thrift allowed a tenant to break her lease and paid for relocation expenses. The ADEQ confirmed that the unit should remain vacant. Additionally, the ADEQ requested the results of environmental testing the following year. In 2023, Thompson Thrift and the dry-cleaning company enrolled in the ADEQ's Joint Voluntary Remediation Program ("VRP").

In ensuing coverage litigation, Thompson Thrift and Cincinnati cross-moved for summary judgment. The court ruled in the insurer's favor, finding that its liability and umbrella policies do not cover the costs that Thompson Thrift incurred in responding to the contamination under Indiana law.

DECISION

Cincinnati's policy covers sums that Thompson Thrift is "legally obligated to pay as damages" because of bodily injury or property damage. It also gives Cincinnati the right and obligation to defend against any "suit," defined as "a civil proceeding in which money damages . . . are alleged," including arbitration proceedings, alternative dispute resolution proceedings, or appeals. Since no actual suit had been filed against Thompson Thrift, the central issue in dispute was whether the ADEQ's demands were "sufficiently coercive" to qualify as a "suit."

Under Indiana law, a "suit" includes actual lawsuits as well as "coercive and adversarial administrative proceedings." However, "'[l]ess coercive actions' – such as 'mere notification or investigation when no enforcement action is contemplated' – do not rise to the level of 'suit.'" Applying this framework, the court concluded that the conduct at issue did not constitute a "suit" for purposes of coverage under Cincinnati's policies. The court emphasized the absence of specific allegations of liability against Thompson Thrift or an "immediate threat of liability or enforcement actions."

While Thompson Thrift alleged that it was concerned about ramifications if it did not cooperate with the ADEQ, the court noted that the factual record lacked evidence of any threats of liability, penalties or other repercussions. More specifically, the court rejected the notion that the ADEQ's communication about the contaminated unit was a "keep vacant order" or that any other investigation-related communications rose to the level of a "formal demand" or administrative order.

Additionally, the court rejected Thompson Thrift's assertion that its participation in the VRP was a "suit." The court noted that a decision cited by Thompson Thrift in support of this assertion, *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Standard Fusee Corp.*, 917 N.E.2d 170 (Ind. Ct. App. 2009), had no precedential or persuasive authority, and that even if it was considered, was distinguishable because the VRP in that case subjected the insured to potential enforcement actions and penalties, whereas here, Thompson Thrift enrolled in the VRP to pursue a "no further action" determination. Finally, the court ruled that the tenant's demand to be released from her lease did not qualify as a "suit" since there was no measure of coercion involved in that decision.

COMMENTS

The mere potential for future litigation against a policyholder, even when coupled with notifications or investigations by regulatory agencies that relate to the presence of injury-causing substances, does not constitute a "suit." Similarly, an insured's voluntary remediation payments are not damages that the insured is legally obligated to pay, even when made in order to avoid or mitigate future liability.

New York Court Rules That Financial Institution Bond Does Not Cover Losses Resulting From Fraudulent Scheme Carried Out By Insured's Employee

HOLDING

Settlements with third-party claimants for losses stemming from a Ponzi scheme perpetrated by an employee of the insured company are not covered by a financial institution bond. *Cadaret, Grant & Co., Inc. v. Great Am. Ins. Co.*, 2025 U.S. Dist. LEXIS 188039 (E.D.N.Y. Sept. 23, 2025).

BACKGROUND

The coverage dispute arose out of allegedly fraudulent acts perpetrated by Steven Pagartanis, a registered representative licensed to sell securities on behalf of Cadaret, a securities broker-dealer. The Securities and Exchange Commission filed a civil complaint against Pagartanis, alleging that he defrauded investors through a Ponzi scheme, and he was later indicted for securities fraud and money laundering, among other things. Additionally, several Cadaret clients filed claims against the company, seeking to hold Cadaret responsible for the losses incurred in Pagartanis' fraudulent scheme. Cadaret settled all claims in mediation.

Cadaret sought coverage for the settlement pursuant to a financial institution bond issued by Great American which covered "[l]oss resulting directly from dishonest or fraudulent acts committed by an employee . . . with the manifest intent: (1) to cause the Insured to sustain such loss; and (2) to obtain an improper financial benefit for the Employee or another person entity."

Great American denied coverage, and Cadaret sued, alleging breach of contract and seeking a declaration that all existing and future losses resulting from Pagartanis' scheme are covered under the bond. The court granted Great American's summary judgment motion.

DECISION

The court ruled that Cadaret's third-party losses are not a "direct loss" under the bond. Under New York law, "direct loss" in fidelity bonds means loss to an insured stemming "directly" from an employee's improper conduct and does not extend to losses stemming from liability for third-party settlements. The court rejected Cadaret's assertion that the "direct loss" requirement can be established in third-party loss contexts by a showing of proximate causation.

The court also rejected Cadaret's argument that the funds stolen by Pagartanis from clients' personal bank accounts constituted "covered property," defined by the bond as "loss of Property (a) owned by the Insured, (b) held by the Insured in any capacity, or (c) owned or held by someone else under circumstances which make the Insured responsible for the Property prior to the occurrence of the loss." The court explained that the funds at issue were held in clients' personal accounts at the time of theft, not in any account associated with or accessible by Cadaret.

Finally, the court held that coverage was barred by an exclusion that applied to "damages of any type for which the Insured is legally liable, unless the Insured establishes that the act or acts which gave rise to the damages involved conduct which would have caused a covered loss to the Insured in a similar amount in the absence of such damages." Cadaret argued that the exception to the exclusion restored coverage because it would have sustained the same loss had it simply reimbursed clients without the settlements. Rejecting this contention, the court stated: "The exception to the exclusion concerns conduct that would have caused a covered loss absent legal liability, not whether Cadaret would have paid the same cost if it had reimbursed the clients involved in the scheme absent the threat of legal liability."

COMMENTS

The decision highlights an important distinction between liability policies and institutional bonds, particularly in the context of losses stemming from an employee's dishonest acts. Whereas a liability policy typically indemnifies against third-party liability faced by the insured entity as a result of actions by the insured or its agents, a bond generally protects against the loss of the insured's property, caused directly by employee dishonesty.

As the court noted, the Fifth, Seventh and Ninth Circuits have followed the principle that "direct loss" language in a fidelity bond precludes coverage for losses stemming from third-party settlements.

In Number Of Occurrences Dispute, Minnesota Appellate Court Rules That Government Shutdown Orders Were Cause Of Insured's Loss, Not COVID-19 Pandemic

HOLDING

Under the specific language of an insurance policy endorsement, the cause of the insured's loss was the government shutdown orders, rather than the pandemic, for purposes of determining the number of occurrences. *Life Time, Inc. v. Zurich Am. Ins. Co*, 2025 Minn. App. LEXIS 269 (Minn. Ct. App. Aug. 11, 2025).

BACKGROUND

Life Time, a fitness club operator with 150 locations across the country, closed its centers in response to government orders issued by state authorities at various times during March and April in 2020.

Life Time sought coverage from Zurich American under an Interruption by Communicable Disease ("ICD") endorsement that covered loss resulting from the suspension of business "caused by an order of an authorized governmental agency enforcing any law or ordinance regulating communicable diseases and that [sic] such portions of the location are declared uninhabitable due to the threat of the spread of communicable disease."

The policy included $1 million per-occurrence limits and defined "occurrence" as "[a]ll loss(es) or damage that is attributable directly or indirectly to one cause or a series of similar or related causes." Zurich took the position that all Life Time's business closures were due to the same cause (the COVID-19 pandemic) and thus constituted a single occurrence under the policy, subject to a single $1 million limit.

Life Time sued, arguing that it was entitled to $1 million in coverage for each of its insured locations, or alternatively, that there were 41 occurrences based on the 41 orders it received to close its locations.

A trial court granted Zurich American's summary judgment motion, ruling that the COVID-19 pandemic, rather than the government orders, was the operative event for purposes of determining the number of occurrences, and therefore that there was only one occurrence. The appellate court reversed.

DECISION

The appellate court ruled that the lower court erred by finding that the cause of Life Time's loss for purposes of establishing an "occurrence" was the pandemic. The appellate court focused on the following language in ICD endorsement: "Suspension *caused by* order of an authorized government agency." (Emphasis in original). The court noted that while the ICD endorsement requires the order to relate to the threat of the spread of communicable disease, the threat alone does not cause loss covered under the endorsement. Rather, the operative "cause" of Life Time's losses were the shutdown orders.

Additionally, the court concluded that all government orders within a specific jurisdiction constituted one occurrence. Focusing on the "series of related acts" language in the definition of "occurrence," the court reasoned that orders within a single jurisdiction were part of a single "series of similar or related causes," even if authorities allowed a business to reopen after a closure period but then issued a subsequent shutdown order. However, the court held that orders from different states, which were often released on the same day rather than in succession, could not be considered a single occurrence. Applying this framework, the court concluded that there were 29 occurrences.

COMMENTS

The reach of the appellate court's number-of-occurrences analysis may be limited. Most jurisdictions employ a cause-based test for determining the number of occurrences, focusing on whether there is "but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damages." However, the Minnesota Supreme Court has rejected this standard and instead endorsed "a more pragmatic approach" that "begins with the language of the policy itself."

The court noted that even if it were to apply a cause-oriented test, it would still find that the losses were attributable to the government orders rather than the pandemic, but other courts applying a cause-based analysis have reached the opposite conclusion. *See, e.g. Count Basie Theatre Inc. v. Zurich Am. Ins. Co.*, 2024 U.S. Dist. LEXIS 95978 (D.N.J. May 29, 2024) (finding that the insured's damages stemmed from a common cause—the spread of the COVID-19 virus—rather than from governmental orders).

Insurer Entitled To Rescission Of Policy Based On Material Misrepresentations In Renewal Application, Says Illinois Court

HOLDING

A policyholder's failure to report a tax audit in a renewal application was material, warranting rescission of the policy. *Call One Inc. v. Berkley Ins. Co.*, 2025 U.S. Dist. LEXIS 193697 (N.D. Ill. Sept. 30, 2025).

BACKGROUND

Call One, a telecommunications business, provided tax exemptions to certain governmental and non-profit entity customers. In 2010, a Call One employee was informed by a potential customer that such exemptions were improper. The employee followed up with the Illinois Department of Revenue and learned that the exemptions were in fact improper. He relayed this information to his supervisor and other employees but nonetheless continued to advertise the exemptions to customers based on the belief that management wanted him to do so.

Unbeknownst to Berkley, in 2016, the City of Chicago initiated an audit of Call One's financial records. In connection with the audit, Call One signed a "Consent to Waive Statute of Limitations" form in 2016, 2017 and 2018, at the request of the City.

In a separate development in 2017, Call One's Chief Financial Officer learned that the company had failed to remit taxes in other states. She informed fellow executive members about this failure and the potential ramifications. To resolve this issue, Call One retained two tax advisory firms which began conducting work in February 2018.

In June 2018, Call One filled out a renewal application for its professional liability policy, which was first issued by Berkley in 2011. The application included the following question: "Within the last 12 months, has there been any change in the status of any claims, loss or circumstances reported in any application previously submitted to the Insurer?" Call One had answered "No" in previous years but left the response field blank in 2018.

In 2019, Call One sought defense costs from Berkley for a *qui tam* action filed against it, as well as indemnity for a subsequent settlement in that suit. The parties disagreed whether Berkley paid all costs of defense, but agreed that Berkley did not indemnify Call One for the settlement. Call One sued Berkley, alleging breach of contract and bad faith. Berkley asserted a counterclaim, seeking rescission of the policy. The parties cross-moved for summary judgment and the court ruled in Berkley's favor.

DECISION

As a preliminary matter, the court rejected Call One's assertion that Berkley waived its rescission claim by failing to raise it when it filed a motion to dismiss based on policy terms rather than rescission. The court explained that since Call One's complaint did not contain facts relevant to rescission, Berkley's motion to dismiss "cannot be reasonably understood as a clear, unequivocal, and decisive waiver of its rescission counterclaim." The court also held that the four-year gap between the renewal application and the counterclaim did not establish waiver because Berkley did not know about Call One's liabilities at the time of renewal and when it discovered them, filed a counterclaim without undue delay.

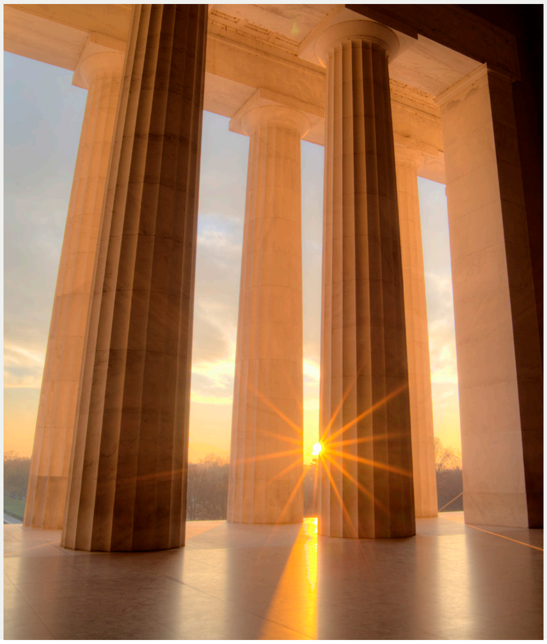
The court further held that Berkley established grounds for rescission. First, the court concluded that Call One's failure to report the City of Chicago audit was a misrepresentation, stating: "when Call One signed a waiver related to the audit but did not provide relevant details on the 2018 Application Renewal, it failed to disclose a Claim or a circumstance that might reasonably result in a Claim." In so ruling, the court rejected Call One's contention that because it never admitted wrongdoing in connection with the audit, there was no material omission, explaining that the audit itself was predicated on the allegation that Call One underpaid taxes.

Having found that Call One made a misrepresentation in the renewal application, the court turned to the issue of materiality. The court noted that the testimony of an underwriter indicating that he relied on the application to provide renewal terms, standing alone, is insufficient to establish materiality. The court explained that underwriter testimony has been deemed sufficient if it directly addresses whether the application would have been rejected or whether a higher premium would have been charged had the information been provided, but that statements of general reliance fall short of satisfying the materiality requirement.

However, the court deemed the misrepresentation material as a matter of law under Illinois' "objective test," stating: "If a reasonably careful and intelligent person learned that, in 2018, Call One was embroiled in an ongoing audit concerning an alleged failure to remit four types of taxes, that person would, 'at the very least, reconsider [Call One's] premiums.'" Additionally, the court noted that the subsequent settlement between Call One and the City of Chicago further supports materiality since it increased Call One's exposure and thus Berkley's risk.

COMMENTS

Although the rescission ruling was dispositive of the suit and eliminated Berkley's coverage obligations, the court went on to address Call One's breach of contract and bad faith claims "for the sake of completeness." The court reached the following conclusions: the *qui tam* action against Call One was a "Claim" under the policy; Call One's liability for failure to remit taxes was not uninsurable as a matter of public policy; the professional services exclusion did not bar coverage; the known loss doctrine was inapplicable; and that even if Berkley had not been entitled to rescission, it did not act "vexatiously and unreasonably" in denying coverage for the purposes of establishing bad faith.



Behavioral Study Reveals Factors Underlying Growing Trend Of Inflated Jury Damage Awards

While the increasing incidence of excessive jury awards has been frequently observed, there is not enough scientific data explaining the factors that contribute to this trend. However, a 2025 Behavioral Social Inflation Study conducted by Swiss Re adds to the understanding of the forces driving recent outcomes in civil litigation.

The study, based on a survey of 1,150 adults in the United States, reveals that litigation is now perceived a “social norm” rather than an extreme action of last resort in resolving disputes—a view that has changed significantly over the past decade. In terms of damage awards, the data demonstrates that the majority of respondents believe that damages awarded in lawsuits are either too low or appropriate—a significant finding in terms of jurors’ perspectives during (or even before) deliberation.

Respondents’ attitudes toward corporate defendants were also noteworthy. The majority believe that large companies prioritize profit over safety and a significant percentage believe that a large corporation should be responsible for medical expenses even if not directly at fault.

Another significant pattern revealed in the study is that the severity of the plaintiff’s injury (rather than the size of the company) is the most influential factor in verdict outcome. In fact, when hypothetical scenarios included a severe injury, participants were much more likely to recommend high compensation, regardless of whether the defendant was a large international corporation or a small business.

Perhaps a less surprising trend relates to the importance of monetary anchors. In the absence of plaintiff-based anchors, damage award expectations were lower for hypothetical personal injury cases, but when a plaintiff set an anchor, the results differed dramatically. Anchors resulted in significantly upward skewed verdicts for all size companies. Importantly, counter-anchors offered by the defendants in the testing scenarios were equally impactful, causing awards to drop by 40-50% as compared to what was expected without a counter-anchor.

The study also evaluated demographic factors that affect jury damages awards, including the age, political affiliation and socioeconomic status of jurors.

From an insurance standpoint, the study not only reaffirms the concerning trend of excessively high jury verdicts but also highlights the importance of underwriting and litigation-related considerations, such as the need for thoughtful of risk assessment for small or medium sized companies facing personal injury liability and the significance of counter-anchors.

For a more comprehensive discussion of the results of the study, please see *Verdicts on trial: The behavioral science behind America’s skyrocketing legal payout*.

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Simpson Thacher News

Joshua Polster, Andrew Marrero and Abigail Grise authored an article, “Application of New York General Business Law §349 in the Context of Recent Insurance Coverage Litigation,” which was published in the *New York Law Journal Insurance Law Special Report*. The article addresses how certain New York courts have recently allowed New York General Business Law Section 349 unfair trade practice claims against insurers to survive motions to dismiss, and the implications for attorneys litigating New York insurance coverage disputes. To read the full article, please click here (subscription required).

Summer Craig authored the United States chapter in the eighth edition of *Lexology In Depth: Insurance Disputes*. The chapter explores recent significant insurance-related developments in U.S. courts, including the definition of damages in general liability insurance policies, exhaustion of primary and excess coverage, “bump-up” exclusions in D&O policies, and coverage disputes over COVID-19 business losses. It also provides in-depth analysis of cutting-edge issues—from AI-related claims handling and PFAS “forever chemicals” to climate change litigation and mass tort bankruptcies—offering readers strategic insights into the future of insurance disputes in the U.S.

Lynn Neuner spoke at the Practicing Law Institute’s (PLI) *Trial by Jury 2025* program on October 16 in New York. Speaking on the “Choosing the Best Possible Jury” panel, Lynn joined other industry professionals in a discussion of techniques in choosing an effective jury. PLI’s *Trial by Jury* program brings together the most experienced and respected state and federal judges, as well as distinguished litigators, to give their perspectives and insights on jury trials.

Joshua Polster, Matthew Penny and Kate Rogers authored an article, “Policyholders Cannot Use Settlements With Claimants to Manufacture Insurance Coverage for Uncovered Claims,” which was published by *Delaware Business Court Insider*. The article discusses a recent Delaware Supreme Court decision which rejected a policyholder argument that a settlement agreement can be a “transformative document” and instead held that settlement agreements may not be reliable “coverage indicators” because they are subject to “manipulation” by policyholders and plaintiffs. To read the full article, please click here.

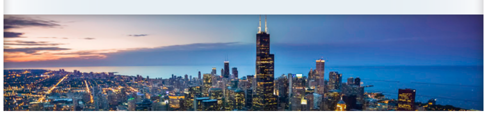
See us at **Upcoming Conferences**

American Property Casualty Insurance Association
INSURING AMERICA

APCIA

National General Counsel Conference

November 3 – 4, 2025
Chicago, IL

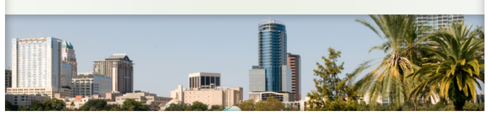


PLUS

PLUS

Conference

November 10 – 12, 2025
Orlando, FL



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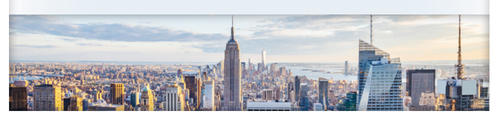
U.S. 2025 Fall Conference

November 13 – 14, 2025
New York, NY



If you are also attending one of these upcoming conferences, please click here to let us know.

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

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