Simpson Thacher

Insurance Law Alert

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Fifth Circuit Certifies Concurrent Causation Question To Texas Supreme Court

The Fifth Circuit asked the Texas Supreme Court to address the parameters of the concurrent cause doctrine, including which party bears the burden of proof regarding covered versus non-covered causes of damage. *Frymire Home Servs. Inc. v. Ohio Security Ins. Co.*, 2021 WL 3783150 (5th Cir. Aug. 26, 2021), certified question accepted (Tex. Sept. 10, 2021). (Click here for full article)

"[Simpson Thacher is] able to handle both direct insurance and reinsurance matters with equal flair, and also adept at handling the most complex of disputes regarding insurers' business practices. Often called on in cases involving potentially significant exposure."

–Chambers USA 2021

Violation Of Statutes Exclusion Bars Coverage For All Claims, Including Intentional Tort Claims, Rules Eighth Circuit

The Eighth Circuit ruled that a violation of statutes exclusion in a commercial umbrella policy barred coverage for all underlying claims, thereby relieving the insurer of its duty to defend. *Rodenburg LLP v. Certain Underwriters at Lloyd's of London*, 2021 WL 3745782 (8th Cir. Aug. 25, 2021). (Click here for full article)

Missouri Court Rules In Insurer's Favor On Policy Limits And Number Of Occurrences Disputes

A Missouri federal district court granted an insurer's summary judgment motion, ruling that policy limits for bodily injury claims applied on a per-occurrence, rather than a per-claim basis and that the bodily injury claims at issue arose out of a single occurrence. *Fluor Corp. v. Zurich Am. Ins. Co.*, 2021 WL 3145794 (E.D. Mo. July 25, 2021). (Click here for full article)

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A Delaware trial court ruled that a professional services exclusion in a Private Company Management Liability Policy did not bar coverage for an underlying suit alleging False Claims Act violations. *Guaranteed Rate, Inc. v. Ace American Ins. Co.*, 2021 WL 3662269 (Del. Super. Ct. Aug. 18, 2021). (Click here for full article)

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A Georgia district court granted an insurer's motion to dismiss, ruling that claims alleging that the policyholder engaged in false and deceptive marking in connection with its medical products did not fall within the scope of professional liability coverage. *Elite Integrated Medical, LLC v. Hiscox, Inc.*, No. 1:20-cv-3948 (N.D. Ga. Aug. 10, 2021). (Click here for full article)

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The Eleventh and Sixth Circuits affirmed the dismissal of claims seeking coverage for business losses incurred in the wake of government closure orders. *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.*, 2021 WL 3870697 (11th Cir. Aug. 31, 2021); *Santo's Italian Café LLC v. Acuity Ins. Co.*, No. 21-3068 (6th Cir. Sept. 22, 2021). (Click here for full article)

Virginia District Court Grants Class Certification To Policyholders In Business Interruption Coverage Suit

A Virginia federal district court granted a policyholder's motion for class certification in a suit alleging breach of contract and bad faith by an insurer based on its coverage denial for COVID-19-related business losses. *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-cv-265 (E.D. Va. Aug. 19, 2021). (Click here for full article)

Ninth Circuit Rules That State Law Prohibiting Arbitration Of Insurance Disputes Does Not Reverse Preempt Convention Treaty

The Ninth Circuit ruled that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is not subject to reverse preemption by Washington state law. *CLMS Mgmt. Servs. Ltd. Partnership v. Amwins Brokerage of Georgia, LLC*, 8 F.4th 1007 (9th Cir. 2021). (Click here for full article)

Citing Arbitration Panel's Broad Powers Under Honorable Engagement Clause, Seventh Circuit Upholds Arbitration Awards

The Seventh Circuit refused to set aside arbitration awards, finding that an honorable engagement clause provided the arbitration panel with wide discretion to interpret the underlying reinsurance agreement and impose remedies that extended beyond the "legal obligations" of the agreement. *Continental Casualty Co. v. Certain Underwriters at Lloyds of London*, 2021 WL 3720110 (7th Cir. Aug. 23, 2021). (Click here for full article)

Fifth Circuit Rules That Underlying Claimants Had Standing To Sue Insurer Directly Following Default Judgment

The Fifth Circuit ruled that underlying claimants who had obtained a default judgment against the policyholder had standing to sue the insurer directly notwithstanding a "no action clause." *Levy v. Cincinnati Ins. Co.*, No. 20-50548 (5th Cir. Aug. 13, 2021). (Click here for full article)

STB News Alert

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Property Damage Alerts:

Louisiana Court Denies Motion To Dismiss Civil Authority Coverage Claims

A Louisiana federal district court denied an insurer's motion to dismiss a suit seeking civil authority coverage, finding that the complaint sufficiently alleged property damage and a prohibition on access to the insured property. *Pathology Lab. Inc. v. Mt. Hawley Ins. Co.*, 2021 WL 3378596 (W.D. La. Aug. 3, 2021).

The coverage dispute arose out of local and federal executive orders issued in connection with a hurricane that made landfall in Louisiana. A medical laboratory sought coverage for financial losses incurred during the duration of the government orders. The insurer denied coverage, arguing that civil authority coverage was unavailable because the orders were issued in anticipation of property damage (rather than in response to actual property damage) and did not completely prohibit access to the insured property. The court rejected both assertions.

The court acknowledged that an initial mandatory evacuation order, issued prior to the hurricane's arrival, did not trigger civil authority coverage because no property damage had yet occurred. However, the court concluded that subsequent orders requiring evacuation and business closures were issued in response to "extensive physical damage to all areas" surrounding the insured premises.

The insurer also argued that the government orders did not completely prohibit access to the insured premises as required by Louisiana law. In particular, the insurer claimed that the orders used non-mandatory language (*e.g.*, "should") and included daily curfews that restricted access only during certain hours of the day. In addition, the insurer emphasized that laboratory employees accessed the property during the periods of closure to perform exigent medical services. Rejecting these assertions, the court concluded that access to the laboratory was "completely prohibited" based on the extent of physical devastation to nearby property and the mandatory nature of the orders, and that employees' alleged violations of those orders to perform urgent procedures were irrelevant.

Fifth Circuit Certifies Concurrent Causation Question To Texas Supreme Court

Noting the absence of state law precedent on the issue, the Fifth Circuit asked the Texas Supreme Court to address the parameters of the concurrent cause doctrine, including which party bears the burden of proof regarding covered versus non-covered causes of damage. *Frymire Home Servs. Inc. v. Ohio Security Ins. Co.*, 2021 WL 3783150 (5th Cir. Aug. 26, 2021), certified question accepted (Tex. Sept. 10, 2021).

The policyholder sought property coverage for roof damage allegedly incurred during a hailstorm. The insurer denied the claim, arguing that the damage was caused by wear and tear (which was excluded under the policy), rather than by wind and hail (which were covered perils). The policyholder's

adjuster opined that although some preexisting roof damage was possible, the hailstorm was the cause of the damage for which the policyholder sought repair.

The Fifth Circuit observed that this case "raises the difficult specter of whether any 'wear or tear' on a roof triggers the 'concurrent cause' scenario in building insurance cases." Further, the court noted that if the concurrent causation doctrine applies, there remain unsettled questions of law, including whether the policyholder, in advancing a sole-cause theory of damage, bears the burden of discrediting concurrent causes, and if so, what evidence is sufficient to establish a single cause of loss. As such, the Fifth Circuit certified the following questions to the Texas Supreme Court:

1. Whether the concurrent cause doctrine applies where there is any non-covered damage, including 'wear and tear' to an insured property, but such damage does not directly cause the particular loss eventually experienced by plaintiffs;

2. If so, whether plaintiffs alleging that their loss was entirely caused by a single, covered peril bear the burden of attributing losses between that peril and other, non-covered or excluded perils that plaintiffs contend did not cause the particular loss; and

3. If so, whether plaintiffs can meet that burden with evidence indicating that the covered peril caused the entirety of the loss (that is, by implicitly attributing one hundred percent of the loss to that peril).

We will report on developments in this matter.

Coverage Alerts:

Violation Of Statutes Exclusion Bars Coverage For All Claims, Including Intentional Tort Claims, Rules Eighth Circuit

Affirming a North Dakota district court decision, the Eighth Circuit ruled that a violation of statutes exclusion in a commercial umbrella policy barred coverage for all underlying claims, thereby relieving the insurer of its duty to defend. *Rodenburg LLP v. Certain Underwriters at Lloyd's of London*, 2021 WL 3745782 (8th Cir. Aug. 25, 2021).

Rodenburg, a law firm specializing in debt collection, was sued by a claimant after her wages were garnished as a result of mistaken identity. The underlying suit alleged wrongful garnishment, tort claims and violations of the Fair Debt Collection Practices Act ("FDCPA"), which provides protections for a person's right to privacy in debt collection matters. Rodenburg's insurer denied coverage and in ensuing litigation, the district court ruled that a violation of statutes exclusion precluded coverage. The Eighth Circuit affirmed.

The exclusion barred coverage for:

> Any liability arising directly or indirectly out of any action or omission that violates or is alleged to violate: (a) The Telephone Consumer Protection Act, . . .; (b) The CAN-SPAM Act of 2003, . . .; or (c) Any statute, ordinance or regulation . . . that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

The Eighth Circuit concluded that alleged violations of the FDCPA fall squarely within this language, rejecting Rodenburg's contention that the FDCPA does not limit communication in the same way that the TCPA and CAN-SPAM Act do. The court also rejected Rodenburg's assertion that even if the exclusion barred coverage for the alleged FDCPA violations, it did not apply to intentional tort claims, alleging invasion of privacy, defamation and malicious prosecution. Citing the broad exclusionary language, the court held that all of the alleged injuries, including those sounding in tort,

originated from the FDCPA-violating conduct and were thus excluded from coverage.

Missouri Court Rules In Insurer's Favor On Policy Limits And Number Of Occurrences Disputes

A Missouri federal district court granted an insurer's summary judgment motion, ruling that policy limits for bodily injury claims applied on a per-occurrence, rather than a per-claim basis and that the bodily injury claims at issue arose out of a single occurrence. *Fluor Corp. v. Zurich Am. Ins. Co.*, 2021 WL 3145794 (E.D. Mo. July 25, 2021).

Fluor, a defendant in suits alleging lead-related bodily injury, sought coverage under four general liability policies issued by Zurich. Each policy included a limits of liability provision that specifically applied to "each occurrence." In addition, all policies defined "occurrence" as "an accident, including continuous or repeated exposure to a condition, which results in bodily injury." Fluor claimed that each underlying plaintiff constituted a separate occurrence under the policies, subject to its own per-occurrence limit. Fluor additionally argued that endorsements in two of the policies allowed it to obtain bodily injury coverage on a "per claim" basis.

Addressing a preliminary matter, the court ruled that the insured bears the burden of establishing policy limits, rejecting Fluor's contention that policy limits provisions should be treated like policy exclusions for purposes of allocating burdens of proof. With respect to the number-of-occurrences dispute, the court concluded that under Missouri's cause-oriented approach, the alleged underlying injuries arose out of a single occurrence—the lead smelter plant's operations. The court rejected Fluor's assertion that the immediate cause of each plaintiff's injury turned on his/her unique exposure to contamination, emphasizing that Fluor's analysis improperly focused on "when and where" the underlying injuries occurred rather than "the negligent actions that caused the injury." The court distinguished decisions finding multiple occurrences from environmental harm, noting that those cases involved distinct incidents of property damage at numerous sources of contamination, requiring different remediation techniques.

In addition, the court ruled that endorsements in two policies did not create per-claim limits for bodily injury claims. The endorsement stated: "LIMITS OF LIABILITY FOR COMPREHENSIVE GENERAL LIABILITY AS DESIGNATED UNDER ITEM 3 OF THE POLICY DECLARATIONS IS AMENDED TO READ: 500,000 EACH CLAIM 500,000 EACH AGGREGATE AS RESPECTS INCIDENTAL PROFESSIONAL LIABILITY ENDORSEMENT." Citing the "clear reference" to professional liability coverage, the court rejected Fluor's contention that the endorsement amended the per-occurrence bodily injury limits stated on the Declarations forms. The court explained:

> It strains credulity to think the phrase '500,000 EACH CLAIM' would be left blank as to the type of coverage it applied to, while the second phrase immediately below it for the aggregate limit specifically references an entirely different type of coverage. The Court declines to create ambiguity where none exists and will read policies as a whole.

Fifth Circuit Rules That Policy May Cover Settlement Stemming From Fraudulent Wire Transfer

Vacating a summary judgment ruling in the insurer's favor, the Fifth Circuit held that a demand letter to the policyholder constitutes a covered "claim" and that a settlement payment constitutes a covered "loss" the policyholder was legally obligated to pay. *HMI International, LLC v. Twin City Fire Ins. Co.*, 2021 WL 3928970 (5th Cir. Sept. 2, 2021).

HMI, an accounting and financial services provider, fell prey to a fraudulent scheme which resulted in the wire transfer of a client's

funds to a hacker. The client sent HMI a letter accusing it of negligence and demanding reimbursement. Twin City denied coverage and HMI brought suit. While that litigation was pending, HMI settled with the client. Thereafter, Twin City moved for summary judgment, which the district court granted. The district court reasoned that HMI was not "legally obligated to pay" the settlement, as required by the policy, because the client had never brought suit and because any potential underlying negligence claim was barred by the applicable statute of limitations. The Fifth Circuit vacated the ruling.

The Fifth Circuit reasoned that the district court erroneously equated "claim" with "cause of action," explaining that a covered claim includes a written demand for money, which cannot be time barred. Additionally, the Fifth Circuit ruled that the district court misinterpreted "legally obligated to pay" to require that HMI "actually lost or would have lost" if the clients had filed suit. Under Texas law, "legally obligated to pay" can include a contractual obligation to pay through settlement. The court deemed it irrelevant that the clients never actually filed suit and that the limitations period had seemingly run on a potential negligence cause of action because "insurers that breach their duty to defend cannot challenge the reasonableness of the settlement amount."

Professional Services Alerts

Delaware Court Rules That Professional Services Exclusion Does Not Bar Coverage For Underlying False Claims Act Suit

A Delaware trial court ruled that a professional services exclusion in a Private Company Management Liability Policy did not bar coverage for an underlying suit alleging False Claims Act violations. *Guaranteed Rate, Inc. v. Ace American Ins. Co.*, 2021 WL 3662269 (Del. Super. Ct. Aug. 18, 2021).

The policyholder, an underwriter of federally-insured mortgage loans, sought approximately $18 million in coverage in connection with a federal investigation of alleged False Claims Act violations. ACE denied coverage on several bases, including a professional services exclusion. Ruling on the parties' cross-motions for judgment on the pleadings, the court concluded that the exclusion did not apply.

The exclusion provided that ACE "shall not be liable for Loss on account of any Claim . . . alleging, based upon, arising out of, or attributable to any Insured's rendering or failure to render professional services." The term "professional services" was not defined. The court noted that the wrongful acts alleged in the investigation involved the policyholder's failure to meet certain quality-control standards imposed by the government. The court concluded that "[c]ompliance with applicable quality-control standards is not a Professional Service provided directly to borrower clients, such that coverage would be excluded by the Policy's Professional Services Exclusion."

Unfair And Deceptive Business Practices Claims Are Not Covered By Professional Liability Policy, Says Georgia Court

A Georgia district court granted an insurer's motion to dismiss, ruling that claims alleging that the policyholder engaged in false and deceptive marking in connection with its medical products did not fall within the scope of professional liability coverage. *Elite Integrated Medical, LLC v. Hiscox, Inc.*, No. 1:20-cv-3948 (N.D. Ga. Aug. 10, 2021).

The state of Georgia initiated an investigation of Elite for alleged violations of statutory and common law based on its marketing of certain medical products and services. The state's notice included a series of alleged unfair and deceptive business practices, including making false or misleading representations regarding Elite's stem therapy and regenerative products. Hiscox denied coverage, arguing that the claims did not fall within the policy's professional services coverage. The court agreed and ruled that the insurer had no duty to defend or indemnify the claims.

The policy covered claims alleging negligence in "professional services," defined as "[s]olely in the performance of services as a physical medicine clinic including chiropractic, hormone therapy, neuropathy, medical and

non-medical weight loss, allergy testing, durable medical equipment therapy and/or instruction, PRP, and amniotic human tissue injections and naltrexone implants." The court concluded that deceptive marketing claims did not fall within the scope of this language, explaining that making false or misleading statements was "incidental to" Elite's performance of services as a medical clinic. The court further reasoned that misleading advertising activities do not involve use or application of specialized learning unique to Elite's profession.

COVID-19 Alerts:

Two Federal Appellate Courts Affirm Dismissal Of Business Interruption Claims

In the second federal appellate ruling in this context, the Eleventh Circuit affirmed the dismissal of claims seeking coverage for business losses incurred in the wake of government closure orders. *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.*, 2021 WL 3870697 (11th Cir. Aug. 31, 2021).

Applying Georgia law, the Eleventh Circuit ruled that the complaint did not allege accidental physical loss or damage because there was no "actual change in insured property" that rendered it "unsatisfactory for future use" or that required "repairs." The court expressly rejected the contention that the presence of particles caused physical damage or loss to the insured (or other) property for purposes of business interruption and civil authority coverage. In addition, the court emphasized that emergency dental procedures conducted during the closure periods demonstrated that the property was capable of being used for its intended purpose.

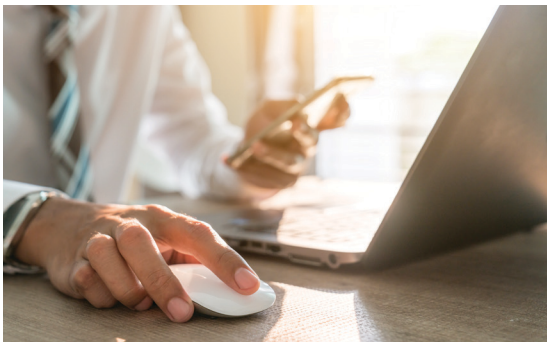
The Sixth Circuit also affirmed the dismissal of business interruption coverage claims in *Santo's Italian Café LLC v. Acuity Ins. Co.*, No. 21-3068 (6th Cir. Sept. 22, 2021). Applying Ohio law, the appellate court ruled that neither the virus itself nor government shut down orders constituted a "direct physical loss of or damage to" property. The court explained: "A loss of use simply is not the same as a physical loss. It is one thing for the government to ban the use of a bike or a scooter on city sidewalks; it is quite another for someone to steal it." The court noted that the policy's "period of restoration" provision reinforced its conclusion, noting that there was nothing to repair, rebuild or replace that would allow the resumption of in person dining operations.

Other federal appellate courts are also poised to rule on this issue. In *Uncork and Create LLC v. Cincinnati Ins. Co.*, No. 21-1311 (4th Cir.), the Fourth Circuit will decide whether, under West Virginia law, a policyholder's inability to use insured property for its intended purpose constitutes a physical loss for purposes of business interruption coverage. And several policyholder businesses urged the Second and Seventh Circuits to reverse a number of district court rulings dismissing their claims that insurers wrongfully denied coverage for their COVID-19-related losses. *10012 Holdings v. Hartford et al.*, No. 21-80 (2d. Cir.); *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, No. 21-1173 (7th Cir.); *Crescent Plaza Hotel Owner LP v. Zurich American Ins. Co.*, No. 21-1316 (7th Cir.); *Mashallah Inc. v. West Bend Mutual Ins. Co.*, No. 21-1507 (7th Cir.); *Bend Hotel Development Co. v. Cincinnati Ins. Co.*, No. 21-1559 (7th Cir.).

Virginia District Court Grants Class Certification To Policyholders In Business Interruption Coverage Suit

A Virginia federal district court granted a policyholder's motion for class certification in a suit alleging breach of contract and bad faith by an insurer based on its coverage denial for COVID-19 related business losses. *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-cv-265 (E.D. Va. Aug. 19, 2021).

The court concluded that plaintiff met the requirements of Federal Rule of Procedure 23 for purposes of establishing a class of persons or entities within the Commonwealth of Virginia that purchased and sought coverage under the same income loss and/or extra expense provisions as a result of government orders issued from March 2020 forward. In particular, the court concluded that the commonality and typicality requirements were satisfied because the central coverage questions—the presence/absence of "direct physical loss" and interpretation of a virus exclusion—were the same across all class members.



In so ruling, the court deemed unpersuasive State Farm's assertion that questions of policy interpretation would apply differently to different class members depending on type of business and specific factual scenario. The court acknowledged that plaintiffs may be unable to prove class-wide damages without individualized inquiry, but noted that the need for such individual damage determinations does not foreclose class certification.

Notably, the court rejected a proposed class that would have included nearly 20,000 Virginia policyholders who purchased identical all risk policies, explaining that policyholders who did not file claims with State Farm did not meet the commonality requirement for the declaratory judgment and breach of contract claims. The court held that even if the class were limited to the 111 policyholders that actually filed claims against State Farm, the numerosity requirement of Rule 23 was satisfied.

In a previous ruling in this matter, the court held that "direct physical loss" includes property that is uninhabitable because of an intangible risk. *See* December 2020 and February 2021 Alerts.

Arbitration Alerts:

Ninth Circuit Rules That State Law Prohibiting Arbitration Of Insurance Disputes Does Not Reverse Preempt Convention Treaty

As discussed in our May 2019 Alert, federal circuit courts are divided as to whether state laws that prohibit the arbitration of insurance disputes reverse preempt the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a multilateral treaty. The Fourth and Fifth Circuits have held that reverse preemption under the McCarran Ferguson Act is limited to federal legislation (such as the Federal Arbitration Act) and does not encompass an international treaty such as the Convention. *See ESAB Grp. Inc. v. Zurich Ins. PLC*, No. 11-1243 (4th Cir. July 9, 2012); *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714 (5th Cir. 2009). However, the Second Circuit reached the opposite conclusion in *Stephens v. American International Ins. Co.*, 66 F.3d 41 (2d Cir. 1995). Last month, the Ninth Circuit weighed in, ruling that the Convention is not subject to reverse preemption by Washington state law. *CLMS Mgmt. Servs. Ltd. Partnership v. Amwins Brokerage of Georgia, LLC,* 8 F.4th 1007 (9th Cir. 2021).

In this insurance dispute, plaintiffs argued that an arbitration provision in the relevant policy was unenforceable because Washington statutory law specifically prohibits enforcement of arbitration clauses in insurance contracts. Plaintiffs further argued that, pursuant to the McCarran-Ferguson Act, Washington state law reverse preempts the Convention. A Washington district court disagreed and enforced the arbitration provision pursuant to the Convention. The Ninth Circuit affirmed.

The Ninth Circuit ruled that the relevant provision of the Convention is "self-executing," and therefore not an "Act of Congress" subject to reverse preemption under the McCarran-Ferguson Act. In so ruling, the court expressly rejected the Second Circuit's reasoning in *Stephens*.

Citing Arbitration Panel's Broad Powers Under Honorable Engagement Clause, Seventh Circuit Upholds Arbitration Awards

The Seventh Circuit refused to set aside arbitration awards, finding that an honorable engagement clause provided the arbitration panel with wide discretion to interpret the underlying reinsurance agreement and impose remedies that extended beyond the "legal obligations" of the agreement. *Continental Casualty Co. v. Certain Underwriters at Lloyds of London*, 2021 WL 3720110 (7th Cir. Aug. 23, 2021).

In this reinsurance dispute between Continental and the Underwriters, an arbitration panel issued a Final Award in the Underwriters' favor. At Continental's request, the panel later issued a supplemental award ("Interim Order No. 3") that clarified how its original award applied to certain future billings. Interim Order No. 3 specified that the Underwriters "have fully and finally discharged their past, present and future obligations" as to certain asbestos losses. Continental asked an Illinois federal court to set aside Interim Order No. 3, as well as a post-Final Award order denying its motion for consideration. Continental argued that the panel strayed beyond the scope of the reinsurance agreement in issuing those awards. In particular, Continental claimed that Interim Order No. 3 was a "sanction" because the Underwriters had not sought a ruling on future bills and that the panel lacked authority under the arbitration agreement to issue sanctions. The district court confirmed all arbitration awards and the Seventh Circuit affirmed.

The Seventh Circuit reasoned that the arbitration agreement gave the panel broad authority to "interpret the agreement as an honorable engagement and not merely a legal obligation." More specifically, the court held that honorable engagement language gives the panel wide discretion to order remedies it deems appropriate, even those not expressly mentioned in the underlying agreement.

The court noted that while application of an honorable engagement clause presents a matter of first impression in the Seventh Circuit, the First and Second Circuits have similarly held that such clauses "leave the arbitrators pretty much at large in the formulation of remedies, just as in the formulation of contract interpretation." (Citation omitted).

Direct Action Alert:

Fifth Circuit Rules That Underlying Claimants Had Standing To Sue Insurer Directly Following Default Judgment

The Fifth Circuit ruled that underlying claimants who had obtained a default judgment against the policyholder had standing to sue the insurer directly notwithstanding a "no action clause." The court held that the default judgment constituted an "adversarial assignment" and that a valid assignment of rights was not required. *Levy v. Cincinnati Ins. Co.*, No. 20-50548 (5th Cir. Aug. 13, 2021).

In several different actions filed over the course of a year, former students sued a trade school company, alleging negligence, fraud and various statutory violations. In one suit, the trade school failed to appear and the state court entered a default judgment in favor of the plaintiffs. Thereafter, plaintiffs sued Cincinnati Insurance as "judgment creditors" of the trade school, seeking to enforce the insurer's obligations under the policy. A Texas district court ruled that plaintiffs lacked standing to bring a direct action against Cincinnati because there was no judgment against the school resulting from a fully adversarial trail or a valid assignment of the policyholder's claims. Alternatively, the district court held that the policy did not cover the claims at issue based on a "first filed" provision in the policy. The Fifth Circuit reversed in part and affirmed in part.

Addressing this matter of first impression under Texas law, the Fifth Circuit noted that the specific language of the no action clause at issue required only "an adjudication against" the policyholder, and not an "actual trial." The court concluded that a default judgment satisfied that adjudication requirement so as to allow the plaintiffs to bring a direct action against Cincinnati.

However, the Fifth Circuit affirmed the district court's ruling that the lawsuit fell outside the scope of coverage. The court held that the claims in the lawsuit were sufficiently interrelated to those in prior suits filed before the policy incepted. As such, coverage was barred by a provision relating to claims "first made" prior to the period of policy coverage.

STB News Alert

Mary Beth Forshaw and Lynn Neuner were among the six Simpson Thacher partners named as this year's "Top 250 Women in Litigation" by Euromoney's *Benchmark Litigation*. The feature honors the accomplishments of America's leading female litigators who have participated in some of the most impactful litigation matters in recent history and who have earned the respect of their peers and clients. *Benchmark* selects its honorees through extensive research, client feedback surveys and one-on-one interviews. In addition to being named to the "Top 250 Women in Litigation" list, Lynn was also recognized as "Top 10 Women in Litigation" in the United States.

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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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