Simpson Thacher

Insurance Law Alert

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New York's highest court rejected an "unavailability" exception to pro rata allocation, holding that policyholders, not insurers, are responsible for damages that occurred during periods in which applicable insurance coverage was unavailable in the marketplace. *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.*, 2018 WL 1472635 (N.Y. Mar. 27, 2018). (Click here for full article)

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***– Chambers USA* 2017 (quoting a client)**

Applying New York Law, Virginia Court Follows *Viking Pump* To Apply "All Sums" Allocation And Vertical Exhaustion To Excess Policies In Asbestos Coverage Dispute

A Virginia federal district court ruled that a policyholder's asbestos-related liabilities under certain excess policies were subject to "all sums" allocation and vertical exhaustion under New York law. *Hopeman Bros., Inc. v. Continental Cas. Co.*, 2018 WL 1726272 (E.D. Va. Apr. 2, 2018). (Click here for full article)

Ninth Circuit Rules That Exhaustion Provision Requires Underlying Limits To Be Paid By Insurers

Applying New York law, the Ninth Circuit ruled that an excess policy unambiguously required exhaustion of underlying limits through payment by underlying insurers, rather than by the insured. *Cooper v. Certain Underwriters at Lloyd's, London*, 2018 WL 1548208 (9th Cir. Mar. 30, 2018). (Click here for full article)

New York Court Of Appeals Rules That Policy Requires Contractual Privity For Additional Insured Coverage

The New York Court of Appeals ruled that an insurer was not obligated to provide additional insured coverage where there was no contractual privity between the named insured and the party seeking additional insured coverage. *Gilbane Building Co. v. St. Paul Fire and Marine Ins. Co.*, 2018 WL 1473553 (N.Y. Mar. 27, 2018). (Click here for full article)

Ninth Circuit Rules That Fraudulent Wire Transfers Are Excluded From Crime Policy's Coverage

The Ninth Circuit ruled that an exclusion in a crime policy barred coverage for losses arising from a wire transfer of funds initiated by a fraudulent email. *Aqua Star (USA) Corp. v. Travelers Casualty & Surety Co. of America,* 2018 WL 1804338 (9th Cir. Apr. 17, 2018). (Click here for full article)

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A Kansas federal district court predicted that the Texas Supreme Court would require an insurer to establish prejudice in order to deny coverage based on the policyholder's violation of a time-specific notice provision. *PetroSantander (USA), Inc. v. HDI Global Ins. Co.*, 2018 WL 1706516 (D. Kan. Apr. 9, 2018). (Click here for full article)

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The Idaho Supreme Court ruled that an intentional act by a non-insured third party is not a covered occurrence even if the incident was unexpected from the policyholder's perspective. *Farm Bureau Mutual Ins. Co. v. Cook*, 2018 WL 1547109 (Idaho Mar. 30, 2018). (Click here for full article)

Connecticut Court Rules That Madoff Losses Are Not Covered Under "Wrongful Entry" Provision In Property Policy

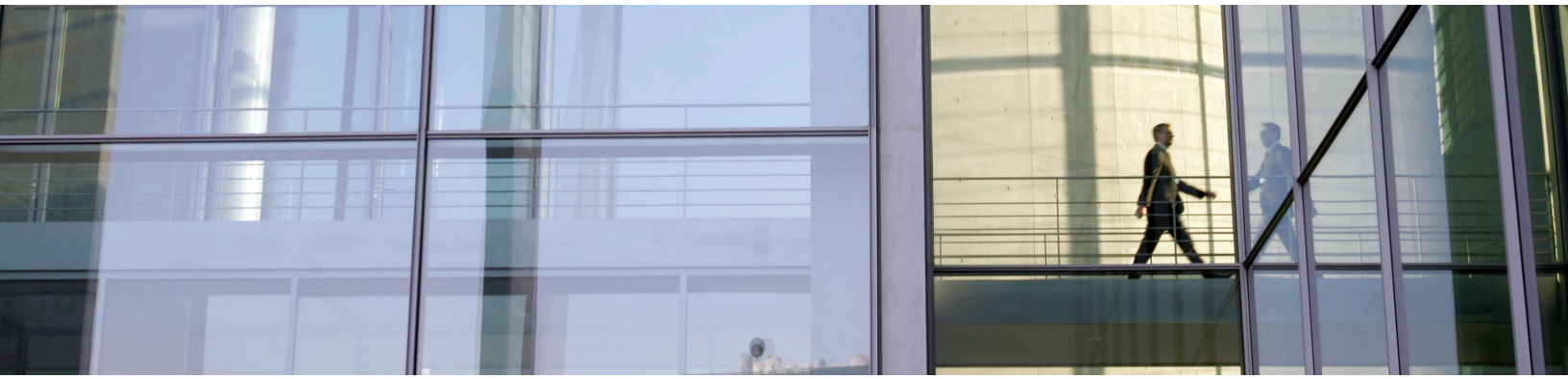
A Connecticut federal district court ruled that Pacific Indemnity had no duty to defend or indemnify its insured under a homeowner's policy for losses incurred in connection with Bernard Madoff's Ponzi scheme, finding that Madoff's fraudulent conduct did not constitute a "wrongful entry" into the homeowner's investment accounts. *Kostin v. Pacific Indemnity Co.*, 2018 WL 1747047 (D. Conn. Apr. 10, 2018). (Click here for full article)

Florida Appellate Court Rules That Favorable Resolution Of Underlying Coverage Action Is Not Prerequisite To Bad Faith Claim Against Insurer

A Florida appellate court ruled that homeowners could pursue a bad faith claim against their property insurer even absent a favorable coverage ruling because the insurer's tender of policy limits constituted a determination as to liability and damages. *Demase v. State Farm Florida Ins. Co.*, 2018 WL 1525851 (Fla. Dist. App. Ct. Mar. 29, 2018). (Click here for full article)

Fifth Circuit Seeks Mississippi Supreme Court Guidance Regarding Insurer's Right To Reimbursement Of Settlement Payments

The Fifth Circuit has certified two questions to the Mississippi Supreme Court relating to whether the voluntary payment doctrine precludes an insurer from recovering settlement payments made on behalf of an additional insured where the insurer disputed coverage as to the additional insured. *Colony Ins. Co. v. First Specialty Ins. Co.*, 2018 WL 1804670 (5th Cir. Apr. 16, 2018). (Click here for full article)



Allocation Alerts:

New York Court Of Appeals Rejects Unavailability Exception To Pro Rata Allocation

New York's highest court rejected an "unavailability" exception to pro rata allocation, holding that policyholders, not insurers, are responsible for damages that occurred during periods in which applicable insurance coverage was unavailable in the marketplace. *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.*, 2018 WL 1472635 (N.Y. Mar. 27, 2018).

The coverage dispute arose out of environmental contamination that took place over several decades. Keyspan sought a declaration that it was not responsible for damage that occurred during policy periods in which it was uninsured due to the unavailability of insurance in the marketplace. A New York trial court ruled that Keyspan was liable for years in which it elected to self-insure, but not for periods in which relevant coverage was unavailable. An intermediate appellate court reversed in part, holding that Continental was not obligated to indemnify Keyspan for losses attributable to periods in which insurance was unavailable. *See* Sept. 2016 Alert. Answering a certified question, the New York Court of Appeals affirmed, rejecting application of an unavailability exception.

The Court of Appeals reasoned that policy language limiting the insurer's liability to losses "during the policy period" was inconsistent with an unavailability exception, stating that "it would be incongruous to include harm attributable to years of non-coverage within the policy periods." Additionally, the court explained that the unavailability exception "would effectively provide insurance coverage to policyholders for years in which no premiums were paid and in which insurers made the calculated choice not to assume or accept premiums for the risk in question."

As the court noted, some jurisdictions have adopted an unavailability exception based largely on public policy concerns, whereas others have deemed such an exception inconsistent with policy language. Two cases that implicate the unavailability exception are currently pending in the supreme courts of New Jersey and Connecticut. *See Continental Ins. Co. v. Honeywell Internat'l Inc.*, 2016 WL 7665452 (N.J. Dec. 12, 2016); *R.T. Vanderbilt Co., Inc. v. Hartford Acc. & Indem. Co.*, 156 A.3d 538 (Conn. App. Ct. 2017), *cert. granted*, 171 A.3d 63 (Conn. 2017). We will keep you posted on any developments in those matters.

Applying New York Law, Virginia Court Follows *Viking Pump* To Apply "All Sums" Allocation And Vertical Exhaustion To Excess Policies In Asbestos Coverage Dispute

A Virginia federal district court ruled that a policyholder's asbestos-related liabilities under certain excess policies were subject to "all sums" allocation and vertical exhaustion under New York law. *Hopeman Bros., Inc. v. Continental Cas. Co.*, 2018 WL 1726272 (E.D. Va. Apr. 2, 2018).

Hopeman, a manufacturer of asbestos-containing materials, was sued in thousands of personal injury suits. During the relevant time frame, Hopeman maintained multi-layer insurance coverage provided by numerous primary and excess insurers. Hopeman received payments from or otherwise resolved coverage disputes with all insurers covering the 1971-77 time period, except Continental and Lexington, both of which participated in a quota-share excess layer of coverage. In the present matter, the parties disputed, among other things, the appropriate method of allocation and exhaustion.

The court ruled that "all sums" (rather than pro rata) allocation was mandated by *In re Viking Pump, Inc.*, 27 N.Y.3d 244 (2016) (discussed in our May 2016 Alert). There, the New York Court of Appeals held that all sums allocation applies to excess policies containing non-cumulation clauses. Because the policies at issue included non-cumulation clauses identical to those at issue in *Viking Pump,* or followed form to policies that included such clauses, the court deemed the decision binding precedent. In addition, the court rejected the insurers' contention that Hopeman was bound by pro rata allocation based on its previous participation in pro rata allocation settlements. The court also rejected the argument that Hopeman must allege a single loss or occurrence to obtain all sums allocation under its excess policies, noting

that no such requirement exists under the policy language or New York law.

The court further ruled that the policies required vertical exhaustion of directly underlying insurance, rather than horizontal exhaustion by layers, rejecting the insurers' assertion that triggered policy periods must be exhausted in chronological order.

The court also addressed whether Hopeman could exhaust underlying policies issued by an insolvent insurer by "filling the gap" with its own payments. With respect to a Lexington policy, the court held that applicable language ("only after the Underlying Umbrella Insurers have paid or have been held liable to pay") required either actual payment by or liability attributable to the insurer and did not permit exhaustion via payments by the insured. Because material issues of fact existed as to whether the insolvent insurer was "held liable" to pay its policy limit, the court declined to grant summary judgment on this issue. With respect to a Continental policy, the court ruled that policy language indicating that Continental will "indemnify the insured for the amount of loss which is in excess of the applicable limits of liability of the underlying insurance" allowed for exhaustion by payment by the insured.

Excess Coverage Alert:

Ninth Circuit Rules That Exhaustion Provision Requires Underlying Limits To Be Paid By Insurers

Applying New York law, the Ninth Circuit ruled that an excess policy unambiguously required exhaustion of underlying limits through payment by underlying insurers, rather than by the insured. *Cooper v. Certain Underwriters at Lloyd's, London*, 2018 WL 1548208 (9th Cir. Mar. 30, 2018).

The dispute arose from the settlement of several lawsuits following the bankruptcy of Quality Home Loans, Inc. Plaintiffs sought to recover under a second-tier excess policy issued by Lloyd's. Lloyd's denied coverage, citing a provision that defines exhaustion as "by reason of the payment of any claims or losses or costs and expenses . . . . by the insurers of the Underlying Policies." Lloyd's argued that there had been no exhaustion because, pursuant to the settlement agreement, the underlying insurer paid only $3.47 million of the $5 million policy limit, with additional amounts paid by the insured. The court agreed, stating that the exhaustion provision "forecloses the possibility of exhaustion through payment by parties other than the underlying insurers."

Additional Insured Alert:

New York Court Of Appeals Rules That Policy Requires Contractual Privity For Additional Insured Coverage

The New York Court of Appeals ruled that an insurer was not obligated to provide additional insured coverage to a construction manager where there was no contractual privity between the manager and the named insured. *Gilbane Building Co. v. St. Paul Fire and Marine Ins. Co.*, 2018 WL 1473553 (N.Y. Mar. 27, 2018).

The Dormitory Authority of the State of New York ("DASNY") engaged with Samson Construction to build a forensic laboratory. Samson, in turn, contracted with Gilbane to serve as construction manager. DASNY's contract with Samson required Samson to obtain liability insurance listing Gilbane as an additional insured. Samson's contract with Gilbane, however, included no additional insured requirement. Samson secured coverage with Liberty under a policy containing the following additional insured provision: "WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization with whom you have agreed to add as an additional insured by written contract." A "Sample Certificate of Insurance" listed Gilbane as an additional insured. When negligent construction litigation arose, Gilbane sought coverage from Liberty as an additional insured, which the insurer denied. A New York trial court ruled that Gilbane was entitled to coverage as an additional insured under the policy. An appellate court reversed and the New

York Court of Appeals affirmed the appellate court ruling.

The Court of Appeals held that the phrase "with whom you have agreed to add" was unambiguous and required a written contract between Samson and Gilbane denominating Gilbane as an additional insured. Because no such contract existed, the court concluded that Gilbane was not entitled to additional insured coverage.

As the dissent noted, a contrary result was reached in *Liberty Mutual Fire Ins. Co. v. Zurich Am. Ins. Co.*, 2016 WL 452157 (S.D.N.Y. Feb. 4, 2016), which involved similar policy language. There, the court declined to "add a requirement of direct contractual privity between the named insured and the purported additional insured that [did] not exist in the policy language." An Oklahoma appellate court similarly rejected a contractual privity requirement for additional insured coverage in *JP Energy Marketing, LLC v. Commerce and Industry Ins. Co.*, 412 P.3d 121 (Okla. Ct. App. 2017).

Cyber Coverage Alert:

Ninth Circuit Rules That Fraudulent Wire Transfers Are Excluded From Crime Policy's Coverage

The Ninth Circuit ruled that an exclusion in a crime policy barred coverage for losses arising from a wire transfer of funds initiated by a fraudulent email. *Aqua Star (USA) Corp. v. Travelers Casualty & Surety Co. of America,* 2018 WL 1804338 (9th Cir. Apr. 17, 2018).

Aqua Star, a seafood importer, purchased shrimp from Zhanjiang Longwei Aquatic Products Industry Co. Ltd. ("Longwei"). Longwei's computer system was hacked, allowing individuals to send fraudulent emails to Aqua Star about invoice payments. In certain emails, the hackers directed Aqua Star employees to transfer funds to their own bank accounts. After the fraud was discovered, Aqua Star sought coverage under a crime policy, which covered loss caused by computer fraud. The insurer denied coverage, arguing that the loss was not directly caused by computer fraud and that several exclusions applied. In ensuing litigation, a Washington federal district court granted the insurer's summary judgment motion. The Ninth Circuit affirmed.

The Ninth Circuit ruled that even assuming that Aqua Star's losses were covered by the computer fraud provision, coverage was barred by an exclusion that applied to "loss or damages resulting directly or indirectly from the input of Electronic Data by a natural person having the authority to enter the Insured's Computer System." The court found that the exclusion squarely applied because Aqua Star's losses resulted from authorized entry into its computer system by employees who changed the bank wiring information and sent payment to the hackers' account.

Notice Alert:

Kansas Court Predicts That Texas Supreme Court Would Apply Notice-Prejudice Rule Notwithstanding Time-Specific Reporting Requirement

A Kansas federal district court predicted that the Texas Supreme Court would require an insurer to establish prejudice in order to deny coverage based on the policyholder's violation of a time-specific notice provision. *PetroSantander (USA), Inc. v. HDI Global Ins. Co.*, 2018 WL 1706516 (D. Kan. Apr. 9, 2018).

PetroSantander sought coverage from HDI for damage caused by a saltwater spill. Although the relevant HDI policy contained a pollution exclusion, it also included a pollution endorsement that extended coverage for pollution-related losses if certain conditions were met, including that PetroSantander report any pollution incident within 120 days. HDI argued that coverage was barred under the policy because it did not receive notice until 141 days after discovery of the spill. In ensuing litigation, both parties moved for summary judgment on whether HDI must demonstrate prejudice as a result of the late notice. Ruling on this matter of first impression under Texas law, the court ruled that prejudice was required.

The court predicted that the Texas Supreme Court would require prejudice in this context

based on Texas State Board of Insurance Order 23080, which obligates all general liability policies to include an endorsement requiring insurers to establish prejudice in order to deny coverage based on late notice. Although Texas courts have not addressed whether Order 23080 applies to a time-specific notice requirement, the court reasoned that the mandatory nature of the Order, and its application to "as soon as practicable" notice requirements in claims-made policies, mitigated in favor of its application here.

The court acknowledged that two Fifth Circuit decisions have held that prejudice is not required in the context of time-specific notice requirements in pollution endorsements, but deemed those cases inapposite and unpersuasive. In particular, the court noted that those decisions did not specifically address Order 23080 and that one case involved a surplus lines carrier, rather than a general liability insurer.

Coverage Alerts:

Idaho Supreme Court Rules That Intentional Act By Third Party Is Not An "Occurrence" Even If Unexpected From Standpoint Of Insured

Last month's Alert reported on a Ninth Circuit decision holding that an intentional act cannot be considered an accident for insurance coverage purposes, regardless of the policyholder's reasonable subjective beliefs. *See Crown Tree Serv. v. Atain Specialty Ins. Co.*, 2018 WL 1042673 (9th Cir. Feb. 26, 2018). In a recent decision, the Idaho Supreme Court followed suit, ruling that an intentional act by a non-insured third party is not a covered occurrence even if the incident was unexpected from the policyholder's perspective. *Farm Bureau Mutual Ins. Co. v. Cook*, 2018 WL 1547109 (Idaho Mar. 30, 2018).

The Cooks owned a cabin situated on 200 acres of property in Idaho. They allowed Michael Chisholm to stay in the cabin in exchange for maintaining the property. While residing at the cabin, Chisholm shot a visitor to the property. The victim sued Chisholm, the Cooks and Farm Bureau, the Cooks' property insurer. Farm Bureau argued that it had no duty to defend or indemnify the Cooks for the shooting because it was not a covered occurrence under the policy. An Idaho district court agreed and granted Farm Bureau's summary judgment motion. The Idaho Supreme Court affirmed.

The Idaho Supreme Court ruled that the shooting could not be considered an occurrence because it was an intentional act, rejecting the Cooks' contention that from their perspective, it was an unexpected event. The court explained that for purposes of an occurrence determination, the focus is on the injury-causing event (here, the shooting) rather than the insureds' alleged negligence. The court noted that although some jurisdictions employ a "standpoint of the insured" analysis, Idaho follows a "nature of the event" test under which an intentional shooting cannot be considered an accident, regardless of the insureds' subjective expectations.

Connecticut Court Rules That Madoff Losses Are Not Covered Under "Wrongful Entry" Provision In Property Policy

A Connecticut federal district court ruled that Pacific Indemnity had no duty to defend or indemnify its insured under a homeowner's policy for losses incurred in connection with Bernard Madoff's Ponzi scheme. The court found that Madoff's fraudulent conduct did not constitute a "wrongful entry" into the homeowner's investment accounts under the policy. *Kostin v. Pacific Indemnity Co.*, 2018 WL 1747047 (D. Conn. Apr. 10, 2018).

Susan Kostin's family company had an investment account with Madoff. Before Madoff's fraud was discovered, Kostin withdrew $3.75 million from her account. After discovery of the Madoff scheme, the

bankruptcy trustee brought an adversary proceeding against Kostin, seeking recovery of the withdrawn funds. Kostin sought coverage under her homeowner's and excess policies. When Pacific Indemnity denied coverage, Kostin retained counsel at her own expense and ultimately settled with the trustee. In the present suit, Kostin sought reimbursement of defense and settlement costs from Pacific Indemnity.

The court dismissed Kostin's suit, finding that the policies did not cover the Madoff-related losses. In particular, the court rejected Kostin's argument that her losses were caused by Madoff's "wrongful entries" into her family's investment account. The court explained that even assuming that "wrongful entry" could be interpreted to include a variety of unauthorized intrusions into personal property or electronic accounts, it could not be construed to include fraudulent ledger book entries. Further, the court noted that Madoff's access and "entry" to Kostin's account was authorized, notwithstanding the fact that he engaged in fraudulent accounting within that account.

Bad Faith Alert:

Florida Appellate Court Rules That Favorable Resolution Of Underlying Coverage Action Is Not Prerequisite To Bad Faith Claim Against Insurer

A Florida appellate court ruled that homeowners could pursue a bad faith claim against their property insurer even absent a favorable coverage ruling because the insurer's tender of policy limits constituted a determination as to liability and damages. *Demase v. State Farm Florida Ins. Co.*, 2018 WL 1525851 (Fla. Dist. App. Ct. Mar. 29, 2018).

The Demases sought coverage from State Farm for sinkhole-related property damage. Over the course of several years, State Farm investigated the damage, made recommendations and demanded additional documentation. The Demases complied with all of State Farm's requests and after receiving no payment, served a civil remedy notice pursuant to state statutory law, alleging that State Farm engaged in bad faith insurance practices by failing to investigate and resolve the claim promptly. Under the relevant statute, § 624.155(a), Fla. Stat. (2014), State Farm had a 60 day period in which to cure its alleged wrongful conduct. State Farm took no action during that period, but tendered the limits of its policy several months later. The Demases thereafter sued State Farm for bad faith.

A Florida trial court dismissed the suit, reasoning that the bad faith claim could not proceed absent "a favorable resolution of an underlying civil action for insurance benefits against the insurer—whether in the form of a judgment, arbitration, appraisal, or action on the contract." The appellate court reversed, holding that:

> an underlying action on the insurance contract is not required for there to be a determination of the insurer's liability and the extent of the damages as a prerequisite to filing a statutory bad faith action. Instead, an insurer's payment of an insurance claim after the sixty-day cure period provided by section 624.155(3) constitutes a determination of an insurer's liability for coverage and extent of damages under section 624.155(1)(b) even when there is no underlying action.

Settlement Alert:

Fifth Circuit Seeks Mississippi Supreme Court Guidance Regarding Insurer's Right To Reimbursement Of Settlement Payments

The Fifth Circuit has certified two questions to the Mississippi Supreme Court relating to whether the voluntary payment doctrine precludes an insurer from recovering settlement payments made on behalf of an

additional insured where the insurer disputed coverage as to the additional insured. *Colony Ins. Co. v. First Specialty Ins. Co.*, 2018 WL 1804670 (5th Cir. Apr. 16, 2018).

An employee of Accu-Fab was killed in an explosion at Omega Protein Corporation's facility. Accu-Fab was insured under a liability policy issued by Colony Insurance. Omega sought coverage as an additional insured under the Colony policy for the claims arising out of the accident. Colony defended under a reservation of rights and filed a declaratory judgment action seeking a ruling as to coverage under its policy. The underlying suit ultimately settled, with Colony agreeing to pay its $1 million policy limit. Thereafter, Colony demanded reimbursement of its $1 million from one of Omega's liability insurers, First Specialty, on the basis that the Colony policy did not cover the underlying claims. When First Specialty refused to pay, Colony filed suit, asserting claims for equitable subrogation and implied indemnity.

A Mississippi district court granted First Specialty's summary judgment motion, relying on Mississippi's voluntary payment doctrine. The court reasoned that Colony acted as a "voluntary payor" by making payments it believed it was not obligated to make, and thus could not recover the settlement payments. On appeal, the Fifth Circuit noted that the Mississippi Supreme Court has not addressed whether the voluntary payment doctrine precludes recovery by an insurer that contests coverage but nonetheless contributes to a settlement on behalf of a purported insured. The Fifth Circuit certified to the Mississippi Supreme Court the following questions of law:

1. Does an insurer act under "compulsion" if it takes the legal position that an entity purporting to be its insured is not covered by its policy, but nonetheless pays a settlement demand in good faith to avoid potentially greater liability that could arise from a future coverage determination?

2. Does an insurer satisfy the "legal duty" standard if it makes a settlement payment on behalf of a purported insured whose defense it has assumed in good faith, but whose coverage under the policy has not been definitely resolved, even if the insurer maintains that the purported insured is not actually insured under the policy?

We will keep you posted on any developments in this matter.

Simpson Thacher

Simpson Thacher has been an international leader in the practice of insurance and reinsurance law for more than a quarter of a century. Our insurance litigation team practices worldwide.

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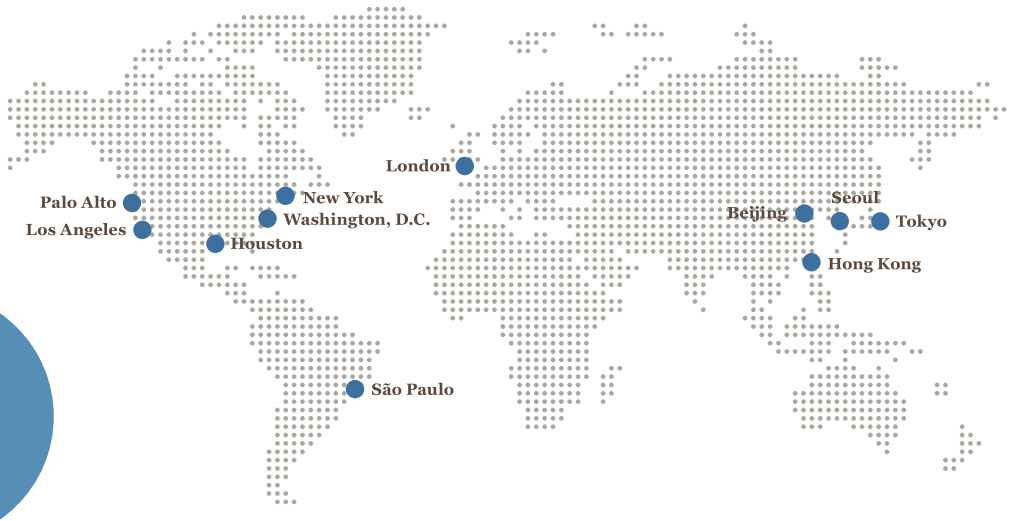

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