Simpson Thacher

# Insurance Law Alert

November 2015

"A very, very impressive team which is completely hands-on in terms of shaping the issues, and dealing with other parties and the judge."

***–Chambers USA 2015***

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Reversing a trial court decision, a Wisconsin appellate court ruled that a pollution exclusion endorsement was ambiguous in the context of Legionnaires-related illness claims. *Connors v. Zurich Am. Ins. Co.*, 2015 WL 5972551 (Wis. Ct. App. Oct. 15, 2015). (click here for full article)

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A New York court dismissed LifeLock's coverage suit against its insurer, finding that policy exclusions barred coverage for deceptive practices and misleading advertising claims. *LifeLock, Inc. v. Certain Underwriters at Lloyd's, London*, No. 651577/2015 (N.Y. Sup. Ct. N.Y. Cnty. Nov. 19, 2015). (click here for full article)

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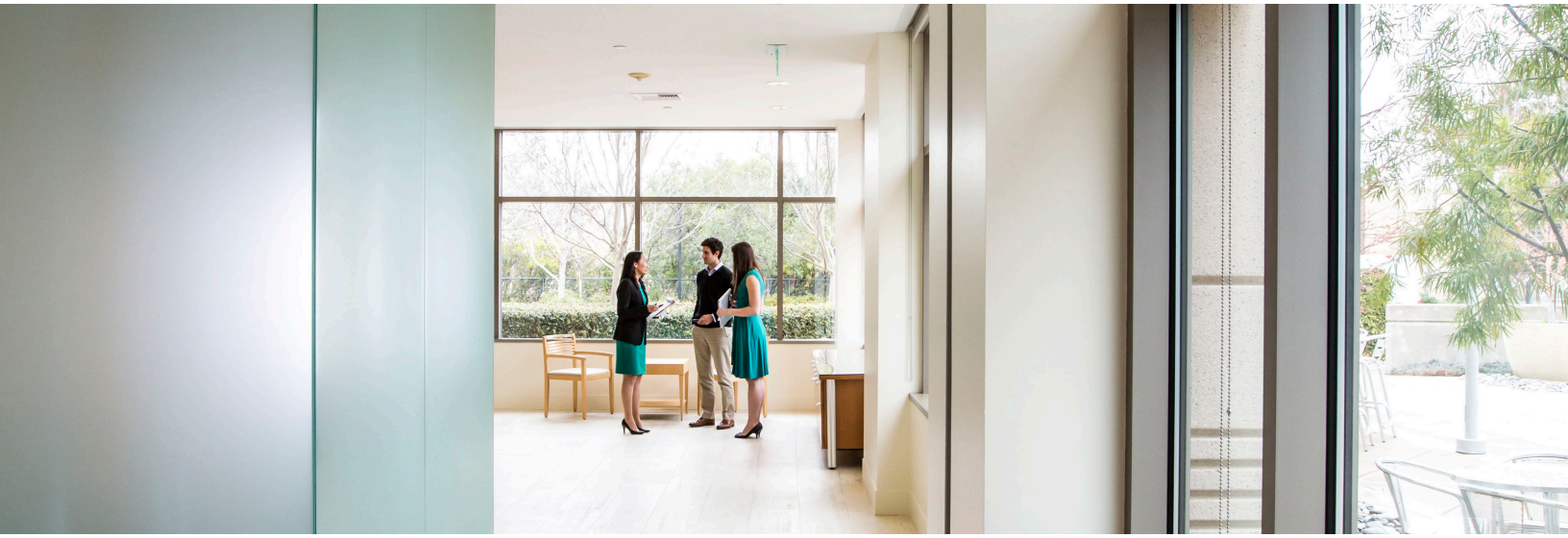
The Fifth Circuit ruled that applicable policy language requires actual payment of full policy limits by the primary insurer in order to implicate excess coverage. *Martin Res. Mgmt. Corp. v. AXIS Ins. Co.*, 803 F.3d 766 (5th Cir. 2015). (click here for full article)

## Simpson Thacher's Insurance Practice Recognized as Top Tier

(click here for full article)



# Defense Alert:

## Finding "Arising Out Of" Ambiguous, California Court Rules That Insurer Must Defend Cosby Defamation Suit

A California federal district court ruled that because language in a sexual misconduct policy exclusion was ambiguous, the insurer was obligated to provide a defense. *AIG Prop. Cas. Co. v. William H. Cosby et al.*, No. 15-04842 (C.D. Cal. Nov. 13, 2015).

The coverage dispute arose out of a lawsuit filed by Janice Dickinson against Bill Cosby alleging defamation and intentional infliction of emotional distress. Dickinson claimed that in response to her allegations of assault and rape, Cosby made numerous public statements that injured her reputation. Cosby tendered defense of the action to his homeowners and excess insurer. The insurer defended under a reservation of rights and brought suit seeking a declaration that it had no duty to defend and reimbursement of defense costs. Although the insurer did not dispute that the policies covered claims for defamation and intentional infliction of emotional distress, it argued that the claims fell within a sexual misconduct exclusion, which barred coverage for "personal injury arising out of any actual, alleged, or threatened by any person … sexual molestation, misconduct, or harassment." The court disagreed and granted Cosby's motion to dismiss the insurer's action.

The court concluded that the phrase "arising out of" in the sexual misconduct exclusion was ambiguous. Noting a split in California case law, the court stated that "the sexual misconduct exclusion could be reasonably read to require that Dickinson's claims merely relate to sexual misconduct, or that Dickinson's claims be proximately caused by the sexual misconduct." The court went on to explain that the exclusion would not apply under the proximate causation interpretation because the alleged rape and assault did not give rise to the defamation claim; rather, the crux of the underlying claims were Cosby's denials and personal statements about Dickinson's credibility. The court also noted that even if the exclusion was unambiguous, the insurers would still be obligated to defend the suit because some of the underlying claims were unrelated to the alleged sexual misconduct and would thus still potentially be covered by the policies.

# Pollution Exclusion Alert:

## Wisconsin Appellate Court Deems Pollution Exclusion Ambiguous as to Legionnaires Illness Claims

Reversing a trial court decision, a Wisconsin appellate court ruled that a pollution exclusion endorsement was ambiguous in the context of Legionnaires-related illness claims. *Connors v. Zurich Am. Ins. Co.*, 2015 WL 5972551 (Wis. Ct. App. Oct. 15, 2015).

Connors, an employee of a foundry, brought a direct action against the foundry's insurer, alleging that cooling towers on his job site contained and dispersed legionella bacteria, resulting in illness. The insurer moved for summary judgment on the basis that a pollution exclusion precluded coverage for the claims. The trial court agreed and granted the motion. The appellate court reversed.

As discussed in our January 2015 Alert, the Wisconsin Supreme Court has enforced standard form pollution exclusions to bar coverage for non-traditional contamination claims (including claims arising from the use of cow manure and septic waste as fertilizer). The appellate court deemed those cases inapposite here, because the policy contained an endorsement with different

language. The endorsement set forth the standard pollution exclusion language and also defined four categories of substances as pollutants. The court interpreted this additional language as limiting the scope of "pollutants" and thus concluded that "there is ambiguity as to whether the bacteria alleged to have infected Connors fit into any of the four categories." The court also found ambiguity in another clause of the endorsement, which provided that the definition of "pollutants" applies regardless of whether the "irritant or contaminant, or the particular form, type of source of the irritant or contaminant … is specifically identified or described in this definition …." Although the court acknowledged that this clause might operate to nullify any limiting effect of the four-categories clause, it concluded that the clause should more reasonably be interpreted to require a substance to be similar in kind to those listed in the four categories in order to be a "pollutant." Emphasizing the importance of policy language in this context, the court expressly noted that if the policy had included only a standard form pollution exclusion, coverage would be barred as a matter of law.

The court reached the same conclusion in *Ramos v. Charter Oak Fire Ins. Co.*, 2015 WL 5972555 (Wis. Ct. App. Oct. 15, 2015), a case involving the same factual allegations, policy language and insurer as in *Connors*.

# Coverage Alerts:

## Policy Exclusions Bar Coverage for Class Action Claims Against LifeLock, Says New York Court

A New York court dismissed LifeLock's coverage suit against its insurer, finding that policy exclusions barred coverage for deceptive practices and misleading advertising claims. *LifeLock, Inc. v. Certain Underwriters at Lloyd's, London*, No. 651577/2015 (N.Y. Sup. Ct. N.Y. Cnty. Nov. 19, 2015).

Several class action suits were filed against LifeLock, a company that provides identity theft protection services. The suits alleged that LifeLock engaged in fraudulent and deceptive activities to induce customers to purchase its services. LifeLock sought coverage from Certain Underwriters at Lloyd's London, which the insurer denied.

Underwriters argued that coverage was barred by Exclusion L, which precluded coverage for claims "[a]rising out of any related or continuing acts, errors [or] omissions … where the first such act, error or omission … was committed or occurred prior to the Retroactive Date. Underwriters emphasized that the underlying claims alleged a pattern of false and misleading advertising since 2005, more than three years before the Retroactive Date of January 8, 2008. In addition, Underwriters argued the coverage was barred pursuant to Exclusion I, which precluded coverage for claims "arising out of or resulting from … unfair competition … false, deceptive or unfair trade practices, or false or deceptive or misleading advertising."

In a ruling from the bench, the court dismissed the suit against Underwriters, agreeing with the insurer that the exclusions were unambiguous and applied squarely to the claims against LifeLock. Underwriters are represented by Simpson Thacher attorneys Bryce Friedman and Summer Craig.

## All-Risk Policy Does Not Cover Losses Related to Quality Control Failures, Says Massachusetts Appellate Court

A Massachusetts appellate court ruled that an all-risk policy does not provide coverage for losses sustained in connection with a company's decision to destroy beverage products after certain quality control failures. *H.P. Hood LLC v. Allianz Global Risks U.S. Ins. Co.*, 88 Mass. App. Ct. 613 (Mass. App. Ct. 2015).

Hood conducted various quality control tests in connection with its production of a milk-based beverage. In the May 2009 production run, a number of bottles (representing about nine percent of the total production run) failed the "secure seal test" designed to ensure the hermetical seal of the bottles. Because Hood was unable to isolate the problematic bottles, it chose to destroy the entire May 2009 production run. Thereafter, Hood sought coverage for the losses associated with the destruction under an all-risk policy issued by Allianz. Allianz denied coverage on the ground that there was no "damage to Insured Property." More specifically, Allianz noted that none of the bottles lost its seal or otherwise sustained physical damage before Hood made the business decision to destroy the production run. Allianz argued that "a mere increased risk of future property damage" is not a covered loss. In response, Hood argued that once doubts have been raised as to the fitness of a product intended for human consumption, the requisite property damage has occurred.

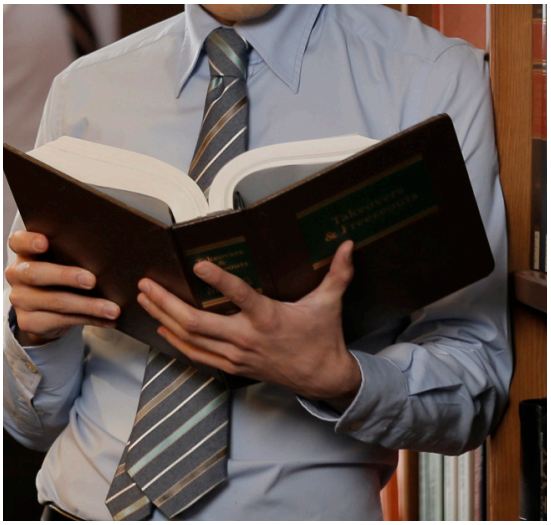
Noting a split of authority on this issue, the court declined to rule on whether this scenario presented "property damage." Instead, the court ruled that even assuming there was damage to property, an exclusion for "faulty workmanship, material, construction or design" barred coverage. The court further held that coverage was not restored by an ensuing loss provision, which stated that "if physical loss or damage not otherwise excluded … results [from an excluded loss], then only such resulting physical loss or damage is covered." Hood argued that even if the initial loss was caused by an excluded event (what turned out to be defective bottle caps), the resulting loss of the milk product was covered under the ensuing loss provision. The court acknowledged the "interpretive challenges" of the ensuing loss provision, explaining that some courts have required damage that is "wholly separate" from the damage caused by the excluded event, while other courts have allowed coverage so long as the resulting damage is "different in kind." Without deciding the appropriate standard for "ensuing loss" coverage, the court held that "[o]n the particular facts of this case, Hood cannot prevail under any reasonable interpretation of the resulting loss language."

## Arkansas Court Rules That Policy Provides Contingent Extra Expense Coverage for Losses Incurred in Connection With Oil Pipeline Shutdown

An Arkansas federal district court ruled that an insurance policy provided Contingent Extra Expense ("CEE") coverage for losses incurred in connection with an oil pipeline rupture. *Lion Oil Co. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2015 WL 6680900 (W.D. Ark. Nov. 2, 2015).

Lion Oil, a refinery owner, experienced an interruption in business for several months due to pipeline repairs and remediation by its oil supplier. Lion Oil sought coverage from its insurers for business losses incurred during the pipeline shutdown. Although the parties disputed the applicability of numerous policy provisions, the sole question before the court on the parties' cross motions for summary judgment was whether an insurance policy provided CEE coverage.

The policy contained only one reference to CEE coverage. That reference was in the definition of the term "Time Element" for the purposes of explaining "Contingent Time Element" coverage. The policy states: "The term Time Element means any one or all of the following coverages: Business Interruption, Extra Expense, Contingent Business Interruption, Contingent Extra Expense … and all other Time Element extensions provided." The insurers argued that the absence of any other reference to CEE coverage in the policy demonstrates that the parties did not intend to include CEE coverage. The insurers further contended



that interpreting the policy to provide CEE coverage would lead to the "absurd result" of providing $700 million of CEE coverage (because no specific sub-limits were provided for CEE) whereas the Direct Extra Expense coverage was limited to $15 million. The court rejected these arguments.

The court held that the lack of a formal definition for CEE in the policy did not indicate the absence of CEE coverage. The court explained that the policy did not define other types of coverage (such as Contingent Business Interruption Coverage), and yet the parties did not dispute the existence of those other coverages. In addition, the court deemed it irrelevant that the policy did not provide a sub-limit for CEE, even though sub-limits were provided for other types of contingent coverages. The court concluded that "[b]ecause CEE is listed as an available coverage in the Time Element definition, and has not been excluded in any way," the policy unambiguously provides CEE coverage.

# Advertising Injury Alert:

## Third Circuit Outlines Scope of "Prior Publication" Exclusion

Addressing a matter of first impression under Pennsylvania law, the Third Circuit clarified the scope of a "prior publication" exclusion to advertising injury coverage. *Hanover Ins. Co. v. Urban Outfitters, Inc.*, 2015 WL 6405763 (3d Cir. Oct. 23, 2015).

The Navajo Nation sued Urban Outfitters for trademark infringement and related common law and statutory violations. The complaint alleged that the store advertised and sold goods under the "Navajo" name. Urban Outfitters tendered the claims to its general liability and umbrella insurers. The insurers sought a declaration that they had no duty to defend or indemnify based on a "prior publication" exclusion, which barred coverage for advertising injury liability "arising out of oral or written publication of material whose first publication took place before the beginning of the policy period." The insurers argued that because the underlying complaint alleged infringement beginning in March 2009, more than a year before the July 2010 inception of the policy period, the exclusion

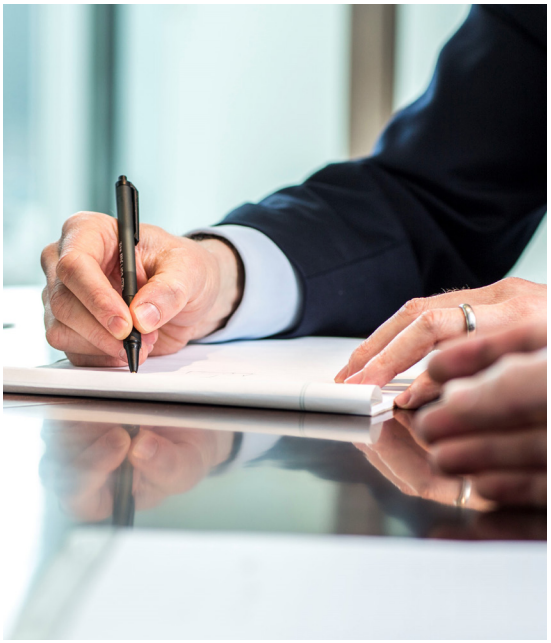
applied. A Pennsylvania federal district court agreed and ruled in the insurers' favor. The Third Circuit affirmed.

First, the Third Circuit addressed the proper analysis for determining "whether Urban Outfitters' liability-triggering conduct preceded or postdated [the] policy period's inception." The court held that this determination must be made solely by reference to allegations in the underlying complaint, rejecting Navajo Nation's attempt to use extrinsic evidence relating to the chronology of trademark infringement incidents. Second, the court held that there is an exception to the prior publication exclusion if the underlying complaint alleges "fresh wrongs" during the policy period. Noting a lack of precedent on this issue, the court defined "fresh wrongs" as advertisements with a "substantive difference" from the original infringing advertisements, as opposed to mere "variations, occurring within a common, clearly identifiable advertising objective." The court further explained that in deciding whether two or more sets of advertisements share a "common objective," relevant factors include: whether the policyholder was charged with separate torts for each advertising incident; whether there was a "significant lull" between pre and post policy period advertising initiatives; and whether the advertisements share a common theme. Applying these factors to the factual record, the court found no "fresh wrongs" during the relevant policy periods. Therefore, the court concluded that the prior publication exclusion barred coverage for the underlying claims.

# Underwriting Alert:

## Third Circuit Adopts Middle-of-the-Road Definition of "Renewal Policy"

Addressing a matter of first impression under Pennsylvania law, the Third Circuit ruled that in order to constitute a "renewal," the terms of an insurance policy must be the same or nearly the same as the initial contract. *Indian Harbor Ins. Co. v. F&M Equip., Ltd.*, 804 F.3d 310 (3d Cir. 2015).



Indian Harbor Insurance Company issued an insurance policy to F&M that included a promise by Indian Harbor to offer a renewal. At the end of the policy term, Indian Harbor offered a "renewal" that contained substantially different terms than the original policy. In particular, it provided $5 million of coverage over a one-year term. The original policy had provided $10 million in coverage for a ten-year term. In addition, the "renewal" omitted coverage for a site previously covered and for which F&M had previously made a claim. F&M rejected the policy and requested that Indian Harbor renew under the original terms and conditions. Thereafter, Indian Harbor sought a declaratory judgment that it had complied with its contractual obligation to offer a renewal and had no further duty to offer the same terms and conditions as the expiring policy. F&M counterclaimed for breach of contract and moved for summary judgment. A Pennsylvania federal district court denied F&M's motion and ruled in favor of Indian Harbor. The Third Circuit vacated the judgment.

The Third Circuit ruled that for a contract to be a renewal, it must contain the same, or nearly the same, terms as the original contract. In adopting this fact-based approach, the court rejected bright-line rules at either end of the spectrum. The court reasoned that a renewal need not be "identical" to the original policy; however, it cannot be "any offer of a new contract, so long as advance notice is provided for any changed terms and the terms are commercially reasonable." The court noted that under the interpretation advocated by Indian Harbor, the promise to renew would be illusory.

Applying the "same or nearly the same" terms standard, the Third Circuit concluded that Indian Harbor's new offer did not constitute a renewal because the new policy differed in terms of price, term length, coverage limits and site exclusions. However, the court noted that a reasonable change in price alone would not render a new contract a non-renewal.

# Excess Coverage Alert:

## Fifth Circuit Rules That Excess Coverage Is Contingent Upon Payment of Full Policy Limits By Primary Insurer

Previous Alerts have reported on decisions addressing whether excess coverage is available when a policyholder has settled with a primary insurer for an amount less than primary policy limits. *See* June 2013 Alert; October 2012 Alert; September and October 2011 Alerts. In a recent decision, the Fifth Circuit followed what appears to be an emerging trend, ruling that applicable policy language requires actual payment of full policy limits by the primary insurer in order to implicate excess coverage. *Martin Res. Mgmt. Corp. v. AXIS Ins. Co.*, 803 F.3d 766 (5th Cir. 2015).

The policyholder sought excess coverage from AXIS Insurance Company following a below-limits settlement with its primary insurer. In ensuing litigation, a Texas magistrate

judge granted AXIS's summary judgment motion, finding that the excess insurer owed no coverage because excess coverage was conditioned upon the primary insurer's actual payment of full policy limits. *Martin Res. Mgmt. Corp. v. Zurich Am. Ins. Co.*, No. 6:12-CV-758 (E.D. Tex. May 12, 2014) (discussed in our May 2014 Alert). The Fifth Circuit affirmed.

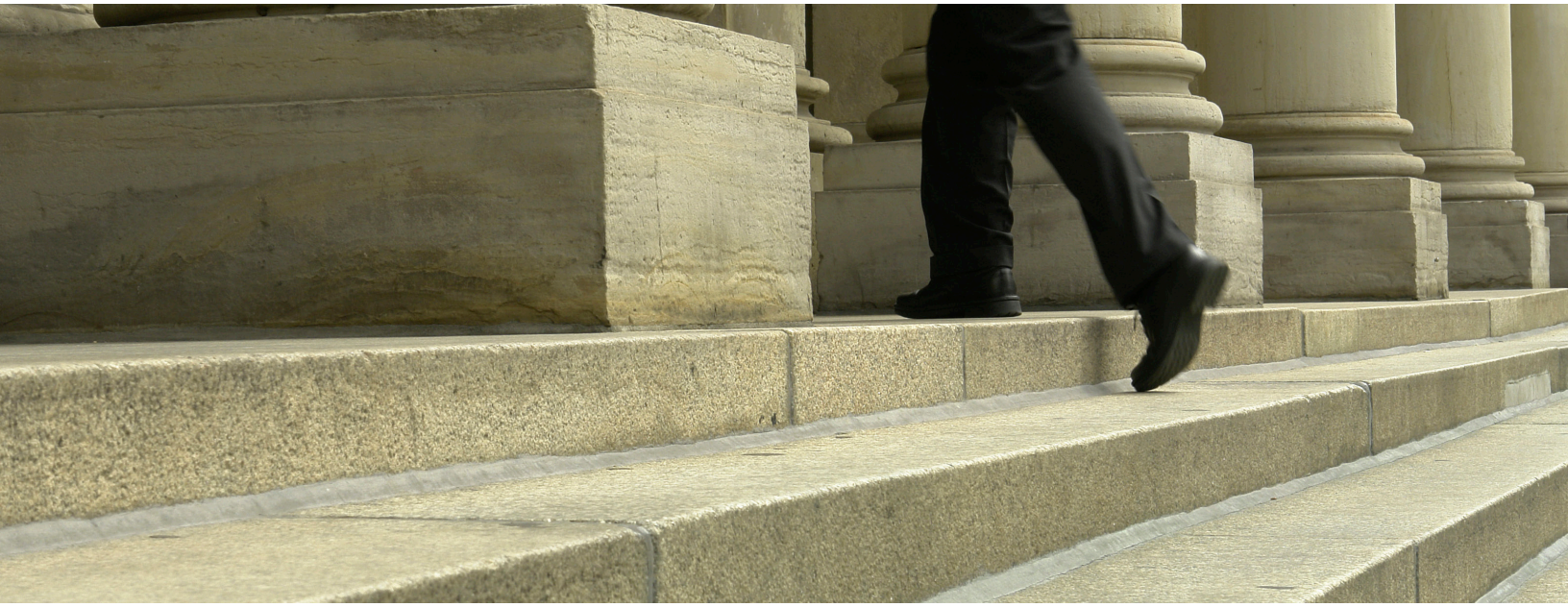
The operative policy provision stated that excess coverage applied "after all applicable Underlying Insurance ... has been exhausted by actual payment under such Underlying Insurance ...." The court held that this language unambiguously precluded exhaustion by a below-limits settlement. The court reasoned that the phrases "actual payment" and "all applicable Underlying Insurance" required both full payment of primary policy limits, and payment by the primary insurer itself. The court cited its prior ruling in *Citigroup Inc. v. Fed. Ins. Co.*, 649 F.3d 367 (5th Cir. 2011) (discussed in September 2011 Alert), which reached the same result. Although some courts have deemed primary insurance exhausted notwithstanding a below-limits settlement, the Fifth Circuit found these decisions were distinguishable in light of differing policy language or not well reasoned. The court explicitly disagreed with decisions that deemed similar language ambiguous, emphasizing that an exhaustion clause is not ambiguous merely because it does not specify which party must make the requisite payments.

# STB News Alert:

## Simpson Thacher's Insurance Practice Recognized as Top Tier

Last month, Euromoney's *Benchmark Litigation* ranked the Firm as Tier 1 for its Insurance Practice. Describing the Firm, the publication notes, "[b]oasting what peers consider to be a 'blue-ribbon bench,' Simpson Thacher & Bartlett continues to see its reputation soar in the eyes of peer and clients."

*Benchmark Litigation* also recognized several of the Firm's Insurance Litigation Partners, including Mary Kay Vyskocil, Andrew Amer, David Woll, Mary Beth Forshaw, Andrew Frankel, Lynn Neuner, Bryce Friedman and Michael Garvey.



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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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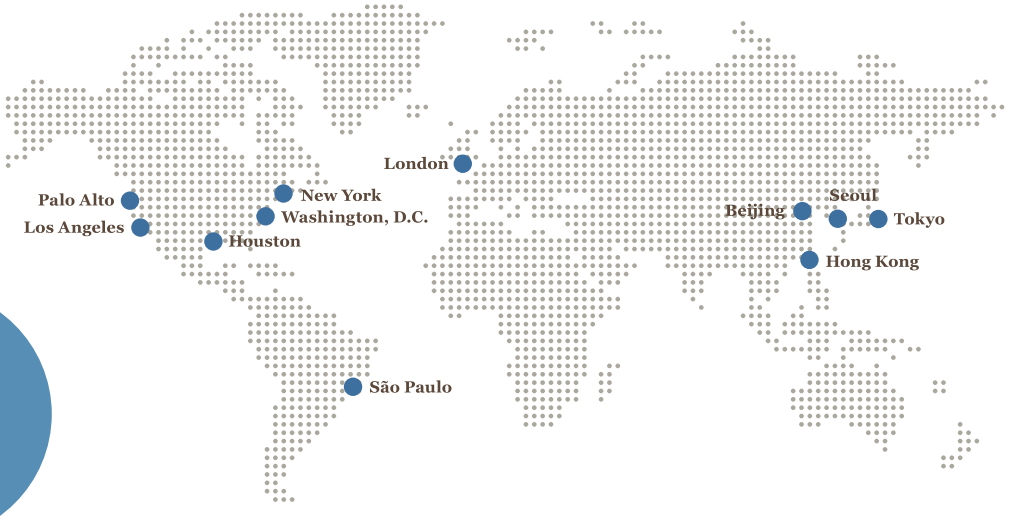


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