Simpson Thacher

Insurance Law Alert

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The United States Supreme Court ruled that an insurer can intervene in a Chapter 11 bankruptcy proceeding of manufacturers subject to asbestos claims, finding that the insurer has standing as a "party in interest" under federal bankruptcy law. *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 2024 U.S. LEXIS 2483 (U.S. June 6, 2024). (Click here for full article)

California Supreme Court Rules That First-Level Excess Policies Are Triggered Upon Exhaustion Of Directly Underlying Primary Coverage

The California Supreme Court ruled that a primary insurer is permitted to access excess insurance policies after primary policies covering the same policy period and directly underlying the excess policies are exhausted. *Truck Ins. Exch. v. Kaiser Cement and Gypsum Corp.*, 2024 Cal. LEXIS 3271 (Cal. June 17, 2024). (Click here for full article)

"[Simpson Thacher has] a good bench of talented attorneys and have performed exceptionally well in relation to very complex disputes."

– *Chambers USA* 2024 (quoting a client)

Cedent Is Responsible For Two Retention Payments Under Reinsurance Treaties, Says Alabama Court

An Alabama district court ruled that a cedent was required to pay two retentions under reinsurance treaties, finding that the conduct giving rise to the underlying insured's liability was not a single "Wrongful Act" subject to a single retention. *Ala. Mun. Ins. Corp. v. Munich Reinsurance America, Inc.*, 2024 U.S. Dist. LEXIS 9247 (M.D. Ala. May 23, 2024). (Click here for full article)

Reversing Trial Court, Florida Appellate Court Deems Policyholder's Notice Untimely As A Matter Of Law

Reversing a final judgment following a jury trial, a Florida appellate court ruled that a homeowner violated the policy's prompt notice provision as a matter of law. *Sec. First Ins. Co. v. Visca*, 2024 Fla. App. LEXIS 4358 (Fla. Dist. Ct. App. June 5, 2024). (Click here for full article)

California Appellate Court Rules That Email Impersonation Scheme Did Not Result In "Direct Financial Loss" Under Cyber Policy

A California appellate court ruled that an insured did not allege a "direct financial loss" and was therefore not entitled to coverage under a provision in a cybersecurity policy that required such loss. *Door Sys., Inc. v. CFC Underwriting Ltd.*, 2024 Cal. App. Unpub. LEXIS 3441 (Cal. Ct. App. June 3, 2024). (Click here for full article)

Illinois Appellate Court Rules That Professional Services Exclusion Barred Coverage For All Underlying Claims

An Illinois appellate court ruled that all underlying allegations fell within the scope of a professional services exclusion and that the insurer had no duty to defend. *Allied Design Consultants, Inc. v. Pekin Ins. Co.*, 2024 Ill. App. Unpub. LEXIS 1077 (Ill. App. Ct. May 23, 2024). (Click here for full article)

Simpson Thacher News

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United States Supreme Court Rules That Insurer Is A "Party In Interest" And Can Intervene In Chapter 11 Bankruptcy Proceedings

HOLDING

In a unanimous opinion, the United States Supreme Court ruled that an insurer can intervene in a Chapter 11 bankruptcy proceeding of manufacturers subject to asbestos claims, finding that the insurer has standing as a "party in interest" under federal bankruptcy law. *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 2024 U.S. LEXIS 2483 (U.S. June 6, 2024).

BACKGROUND

Kaiser Gypsum and its parent company, Hanson Permanente Cement, manufactured and sold products containing asbestos. Faced with thousands of lawsuits, both companies filed for Chapter 11 bankruptcy. A proposed reorganization plan created a trust that was funded by the Debtors and assumed the Debtors' liabilities. The Plan also transferred all of the Debtors' rights under insurance policies to the trust. Truck Insurance was the Debtors' primary insurer for two decades.

The Plan treated insured and uninsured claims differently. Insured claims were to be filed in court, with Truck Insurance defending such claims and paying up to $500,000 per claim for any favorable judgments obtained by claimants. In contrast, uninsured claims were to be submitted directly to the trust, subject to specific requirements aimed at reducing fraudulent or duplicative claims, such as the identification of other related claims and signed releases authorizing the trust to obtain documentation from other asbestos trusts.

Truck Insurance objected to the Plan, arguing that it was not proposed in good faith because it did not require the aforementioned disclosures and authorizations for insured claims, among other things.

A district court confirmed the Plan, concluding that Truck Insurance had limited standing to object to the Plan because it was "insurance neutral." The Fourth Circuit affirmed, ruling that Truck Insurance was not a "party in interest" under §1109(b) of the Bankruptcy Code because the Plan did not increase Truck Insurance's pre-petition obligations or impair its pre-petition rights under the insurance policies. The United States Supreme Court reversed.

DECISION

The Supreme Court ruled that Truck Insurance was a "party in interest" because it had financial responsibility for bankruptcy claims and might be "directly and adversely" affected by the Plan. The Court noted myriad ways in which a bankruptcy plan might abrogate an insurer's contractual rights, such as the right to control settlement or seek contribution from other insurers.

With respect to the Plan at issue, the Court ruled that Truck Insurance had a financial interest in preventing millions of dollars in fraudulent tort claims for which it would be responsible, based on the lack of adequate disclosure requirements. Further, the Court emphasized that Truck Insurance was the only entity with an incentive to "limit the post-confirmation cost of defending or paying claims."

As the Court observed, an expansive reading of "party in interest" comports with the purpose of §1109(b)—to ensure an equitable reorganization process that does not unfairly benefit the debtor.

COMMENTS

The Court expressly rejected the Fourth Circuit's application of the "insurance neutrality" doctrine, which focuses on whether a bankruptcy plan increases the insurer's pre-petition obligations or impairs its pre-petition rights. The Court explained:

> Conceptually, the insurance neutrality doctrine conflates the merits of an objection with the threshold party in interest inquiry. The §1109(b) inquiry asks whether the reorganization proceedings might affect a prospective party, not how a particular reorganization plan actually affects that party. . . . Practically, the insurance neutrality doctrine is too limited in its scope. It zooms in on the insurer's prepetition obligations and policy rights. That wrongly ignores all the other ways in which bankruptcy proceedings and reorganization plans can alter and impose obligations on insurers.

California Supreme Court Rules That First-Level Excess Policies Are Triggered Upon Exhaustion Of Directly Underlying Primary Coverage

HOLDING

Reversing an intermediate appellate court, the California Supreme Court ruled that a primary insurer is permitted to access excess insurance policies after primary policies covering the same policy period and directly underlying the excess policies are exhausted. *Truck Ins. Exch. v. Kaiser Cement and Gypsum Corp.*, 2024 Cal. LEXIS 3271 (Cal. June 17, 2024).

BACKGROUND

Kaiser Cement, a manufacturer of asbestos-containing products, was named as a defendant in thousands of product liability suits. During the relevant time period, Kaiser Cement was insured under a primary general liability policy issued by Truck Insurance. In 2001, Truck Insurance filed suit to determine its defense and indemnity obligations to Kaiser Cement.

While litigation in this matter has generated numerous decisions relating to the scope and availability of insurance coverage, including the United States Supreme Court decision discussed above, Truck Insurance's present appeal focused on a single issue: whether it was entitled to contribution from various insurers that issued first-level excess policies to Kaiser Cement during the relevant time frame. Each of the excess policies in question sat atop a primary policy (issued by a non-Truck Insurance company) that had been exhausted.

Truck Insurance argued that each first-level excess insurer's indemnity obligation attached upon exhaustion of the directly underlying primary policy (an approach known as "vertical exhaustion"). Truck Insurance further claimed that because the excess coverage obligations had been triggered, it was entitled to equitable contribution from the excess insurers. A trial court denied Truck Insurance's contribution claim, ruling that "other insurance" provisions in the excess policies required horizontal exhaustion (*i.e.*, exhaustion of all primary policies in effect during the period of continuous injury). An intermediate appellate court affirmed and the California Supreme Court reversed.

DECISION

The California Supreme Court relied on its ruling in *Montrose Chemical Corp. of California v. Superior Court*, 9 Cal.5th 215 (2020), which endorsed a vertical exhaustion approach for excess policies that sat atop other excess policies in the context of ongoing environmental property damage claims. In *Montrose*, the court rejected the argument that "other insurance" provisions in excess policies required horizontal exhaustion. The court reasoned that language in those provisions (which varied by policy but generally speaking, required exhaustion of other or underlying insurance prior to accessing excess coverage) did not require exhaustion of insurance policies purchased in different policy periods. Rather, as the court noted, "other insurance" provisions have been typically construed to govern allocation questions with respect to overlapping concurrent policies. Additionally, the decision in *Montrose* emphasized that when construing the excess policies "as a whole," including language referring to specific underlying policies or attachment points, it is clear that the exhaustion requirements were intended to apply to directly underlying insurance, not to coverage purchased in other policy periods.

The court rejected the excess insurers' assertion that *Montrose* was limited to cases involving successive layers of excess insurance and did not govern the exhaustion analysis for excess policies that sit atop primary policies. The court stated: "the qualitative distinctions between primary and excess insurance do not justify assigning an entirely different meaning to standardized 'other insurance' clauses merely because the excess policy sits over primary insurance rather than another level of excess insurance.

COMMENTS

While the decision resolved the appropriate method for exhaustion of first-level excess policies, it did not rule that Truck Insurance was entitled to contribution from the excess insurers. The court emphasized that contribution claims among insurers implicate "equitable principles designed to accomplish ultimate justice in the bearing of a specific burden." The court remanded the matter to the appellate court, noting that:

> [a]lthough we have concluded that the qualitative distinctions between primary and excess insurance do not present a sufficient basis to depart from the interpretation of "other insurance" provisions that we adopted in *Montrose III* (*i.e.*, that such provisions impose only a rule of vertical exhaustion on the insured), whether those distinctions might have more salience in the context of equitable contribution between insurers remains an open question.

Cedent Is Responsible For Two Retention Payments Under Reinsurance Treaties, Says Alabama Court

HOLDING

An Alabama district court ruled that a cedent was required to pay two retentions under reinsurance treaties, finding that the conduct giving rise to the underlying insured's liability was not a single "Wrongful Act" subject to a single retention. *Ala. Mun. Ins. Corp. v. Munich Reinsurance America, Inc.*, 2024 U.S. Dist. LEXIS 9247 (M.D. Ala. May 23, 2024).

BACKGROUND

Alabama Municipal Insurance Corporation ("AMIC") insured cities, towns and subsidiary corporate entities in Alabama. Between 2005 and 2015, AMIC entered into a series of excess of loss reinsurance treaties with Munich Reinsurance under which Munich Reinsurance accepted a portion of AMIC's risk in exchange for a portion of the premiums AMIC received from its insureds. During this time frame, AMIC issued two identical public official liability policies to the City of Fairhope. Under the treaties, Munich Reinsurance was obligated to cover AMIC's ultimate net loss in excess of $350,000.

AMIC submitted a claim to Munich Reinsurance for expenses it incurred (above the $350,000 retention) in defending Fairhope in a 2008 suit. The suit alleged that the city and mayor breached a prior settlement agreement relating to the claimant's development of certain property. The suit alleged that Fairhope breached the settlement agreement in 2006 by approving a zoning proposal to develop nearby property into a competing village center and again in 2008 by approving measures to change the flow of traffic around the property.

Munich Reinsurance argued that AMIC was required to pay two $350,000 retentions because the events giving rise to the underlying lawsuit occurred in two different policy periods, a 2006 policy period and a 2008 policy period. Munich Reinsurance noted that each policy was reinsured by a separate treaty, each requiring a $350,000 retention. In ensuing litigation, the court granted Munich Reinsurance's summary judgment motion.

DECISION

AMIC's liability policies to Fairhope covered damages because of "Wrongful Acts" and stated that "All Claims and Damages arising out of the same or substantially same or continuous or repeated Wrongful Acts will be considered as arising out of one Wrongful Act." Thus, the central issue in dispute was whether the 2006 zoning decision and the 2008 traffic flow decision constituted substantially the same or continuous Wrongful Acts, or conversely, two distinct acts. As the court explained, if the actions were part of the same course of conduct, AMIC was entitled to cede all of its losses to the 2008 policy, in which case, only one reinsurance treaty would be triggered and only one retention would apply.

AMIC argued that the underlying suit alleged a single wrongful act, namely, Fairhope's policy and practice of discriminating against the claimant to prevent development of his property. Rejecting this assertion, the court reasoned that the 2008 conduct was not the same or substantially the same as the 2006 conduct, nor continuous to it. The court explained that two actions were not substantially the same simply because they have "the same downstream consequences," particularly where, as here, the actions themselves were "profoundly different." The court deemed an alleged "common motive" with respect to the two different actions to be irrelevant, stating: "The bare allegation of a shared objective does not transform otherwise disparate acts into the same, substantially the same, continuous, or repeated acts. That is especially true here, where the 2006 rezoning decision and 2008 alterations in traffic flow were separated by two years."

Finally, the court rejected AMIC's contention that even if both policies were triggered, nothing in the reinsurance treaties prohibited AMIC from allocating all losses to the 2008 policy. As the court noted, allowing such allocation runs counter to the purpose of retention provisions in multiple distinct policies.

COMMENTS

The decision illustrates the importance of policy language in the context of determining the number of acts or occurrences. AMIC's argument in support of a single course of conduct was premised on the notion that the 2006 conduct and 2008 conduct were "related" or "interrelated." However, as the court emphasized, the Wrongful Act provision did not include the word "related" or any other verbiage permitting the collapsing of multiple wrongful acts into a single act based on relatedness. Rather, that provision required "same or substantially the same or continuous or repeated" acts. While the world "related" appeared in a separate provision concerning the combined limits of coverage, that provision did not modify or replace the Wrongful Act definition.

Reversing Trial Court, Florida Appellate Court Deems Policyholder's Notice Untimely As A Matter Of Law

HOLDING

Reversing a final judgment following a jury trial, a Florida appellate court ruled that a homeowner violated the policy's prompt notice provision as a matter of law. *Sec. First Ins. Co. v. Visca*, 2024 Fla. App. LEXIS 4358 (Fla. Dist. Ct. App. June 5, 2024).

BACKGROUND

Approximately two months after a hurricane made landfall near the homeowner's residence, the homeowner discovered water stains on the ceiling of his home. He repaired a small area of the roof on his own without notifying his property insurer. One year later, the homeowner discovered another leak. He spoke with his neighbor, a public adjuster, who agreed to handle an insurance claim on his behalf. The adjuster did not file a claim with the homeowner's insurer for more than a year. When the claim was finally filed, the insurer denied coverage, citing a policy provision related to excluded "wear and tear" damages. The insurer did not mention late notice as a basis for the coverage denial.

In an ensuing trial, the insurer moved for a directed verdict based on untimely notice. The court denied the motion and the jury found that the homeowner gave prompt notice. Thereafter, the insurer renewed its motion for a directed verdict or alternatively, for a new trial. The trial court denied both motions.

DECISION

Reversing the trial court, the appellate court ruled that the homeowner failed to give "prompt notice," as required by the policy, as a matter of law. The appellate court explained that notice is prompt if it is "given within a reasonable time of the event triggering the insured's duty to notify." As the court noted, this duty is not necessarily triggered when the loss initially occurs or when the policyholder first discovers damage, but rather when a reasonable person would conclude that a claim would arise.

Applying this standard to the undisputed facts of this case, the appellate court concluded that the homeowner waited an unreasonable length of time before notifying his insurer of the damage. While the court took no position on whether the homeowner's initial discovery of water stains triggered the policy's notice provision, it ruled that a duty to provide notice unequivocally arose after the second leak was discovered and a public adjuster became

involved. As such, the appellate court ruled that the insurer was entitled to a directed verdict on the untimely notice defense. The court remanded the matter for a new trial on whether the untimely notice prejudiced the insurer.

COMMENTS

The decision is notable in other respects. The court rejected the homeowner's assertion that the insurer waived its right to assert an untimely notice defense by failing to raise it in the initial coverage denial. The court stated:

> by denying a claim based on a policy exclusion, a property insurer asserts that the claim falls entirely outside the policy's scope. In that instance, the insurer's conduct does not clearly demonstrate an intent to otherwise relinquish its contractual right to prompt notice of the loss, as necessary to support an implied waiver.

The court further emphasized that the insurer asserted untimely notice as an affirmative defense early on in the litigation. Importantly, the waiver analysis for property insurers is different from that for liability insurers; under Florida statutory law, liability insurers waive coverage defenses that are not timely raised in a reservation of rights.

California Appellate Court Rules That Email Impersonation Scheme Did Not Result In "Direct Financial Loss" Under Cyber Policy

HOLDING

A California appellate court ruled that an insured did not allege a "direct financial loss" and was therefore not entitled to coverage under a provision in a cybersecurity policy that required such loss. *Door Sys., Inc. v. CFC Underwriting Ltd.*, 2024 Cal. App. Unpub. LEXIS 3441 (Cal. Ct. App. June 3, 2024).

BACKGROUND

A hacker, impersonating the president of Door Systems, sent an email to a client of the company providing new wire transfer instructions. The client followed those instructions and sent $395,000 for goods purchased to the hacker, believing it was sending the funds to Door Systems. After the fraud was discovered, Door Systems recovered approximately $160,000 and sought coverage for the balance from its insurer.

The insurer denied the claim under the policy's "Corporate Identity Theft" coverage, which had a $250,000 limit, but accepted the claim under the "Push Payment Fraud" coverage, which had a $50,000 limit.

Door Systems filed suit, alleging that the insurer breached the contract and the covenant of good faith and fair dealing by refusing to provide coverage under the Corporate Identity Theft provision. That provision covered "loss . . . arising as a direct result of the fraudulent use or misuse of your electronic identity." The policy defined "loss" as "any direct financial loss sustained by the company." The insurer argued that there was no requisite loss because the client, rather than Door Systems, was the victim of the scam. After two amended complaints were filed, the trial court ultimately sustained the demurrer and the appellate court affirmed.

DECISION

Door Systems argued that it suffered a direct financial loss as a result of the scam because it shipped $395,000 of goods to the client and therefore had "a direct pecuniary interest in this $395,000.00 that was categorized as an asset of [the insured] in the form of accounts receivable." It further contended that it would be unable to recover the shortfall from the client in light of the "imposter rule," as codified in Sections 3404 and 3406 of California's Commercial Code. Under the imposter rule, a payor who is induced to forward money to an imposter who is impersonating the payee and exercises reasonable care in doing so may be relieved of its obligation to pay the rightful payee.

Rejecting these assertions, the appellate court ruled that the imposter rule did not apply to the case at bar. The court explained that Section 3404 applies only to "negotiable instruments," and not to "money" or "payment orders." Because the court deemed a wire transfer to constitute a payment order, it held that the imposter rule did not apply so as to prevent the insured from recovering the lost funds from the client.

Further, the court noted that because the imposter rule was inapplicable, the complaint failed to state a claim for breach of the insurance policy. As the court explained, the client was still contractually obligated to pay its remaining debt ($235,000) to the insured, notwithstanding its unwitting payment to a fraudulent account. As such, there was no direct financial loss to the insured as a result of the scam.

Finally, while the court agreed with the insurer that coverage was unavailable under the Corporate Identity Theft provision based on the absence of direct financial loss to the insured, it rejected the insurer's contention that a finding of coverage under the Corporate Identity Theft provision would render the Push Payment Fraud provision superfluous. The court noted that an event may trigger coverage under more than one provision without rendering a provision superfluous.

COMMENTS

A New Jersey court, faced with a similar scenario, also ruled that there was no coverage for losses arising out of a client's payment to a hacker's account. *See Posco Daewoo Am. Corp. v. Allnex USA, Inc.*, 2017 U.S. Dist. LEXIS 180069 (D.N.J. Oct. 31, 2017). And along similar lines, courts have denied claims for coverage where the factual record indicated that the policyholder never "held" or had ownership of the of funds at issue, as required by the applicable policy. *See RealPage Inc. v. Nat'l Union Fire Ins. Co.,* 2021 U.S. App. LEXIS 37962 (5th Cir. 2021).

Illinois Appellate Court Rules That Professional Services Exclusion Barred Coverage For All Underlying Claims

HOLDING

An Illinois appellate court ruled that all underlying allegations fell within the scope of a professional services exclusion and that the insurer had no duty to defend. *Allied Design Consultants, Inc. v. Pekin Ins. Co.*, 2024 Ill. App. Unpub. LEXIS 1077 (Ill. App. Ct. May 23, 2024).

BACKGROUND

Allied Design Consultants was hired to perform architecture services related to the construction of an addition to a middle school building, including the design of mechanical systems. After the construction project was completed, a carbon monoxide leak caused injury to occupants of the new structure.

Pekin Insurance Company, Allied's business liability insurer, refused to defend a lawsuit against Allied, arguing that coverage was barred by professional services exclusions in the operative policies. A trial court ruled in Pekin's favor and the appellate court affirmed.

DECISION

Allied argued that the underlying complaint alleged acts of negligence—such as the failure to warn, maintain and repair and to follow manufacturer directions—that did not involve professional services. Rejecting this assertion, the appellate court explained that failures to warn or repair were a direct result of Allied's failure to properly conduct a "Health/Life Safety Survey Report" for the project, which indisputably constituted a professional service. Similarly, the court held that any failure to follow instructions published by product manufacturers constituted a professional architecture service, requiring specialized knowledge and being predominantly intellectual in nature.

The court acknowledged that in other cases, failure to warn allegations have been deemed to fall outside the scope of a professional services exclusion. However, such cases involved factual records in which the operative conduct was primarily physical, rather than professional, in nature, such as the failure of a construction company to post a flagman or adequate warning signs at a roadwork site.

COMMENTS

As the court noted, Illinois courts have adopted an "expansive definition" of the term "professional services" in exclusionary provisions and have applied them to any activity that involves "specialized knowledge, labor, or skill, and is predominantly mental or intellectual as opposed to physical or manual in nature."

Simpson Thacher News

Simpson Thacher has once again been ranked among the leading law firms in the United States in *The Legal 500* United States 2024. The Firm was recognized in 46 practice areas, with a total of 22 rankings in the top tier, including "Insurance: Advice to Insurers." Additionally, the publication recognized the following partners: Bryce Friedman—*Hall of Fame* in "Insurance: Advice to Insurers" and *Leading Lawyer* in "Dispute Resolution: General Commercial Disputes"; Andrew Frankel—*Leading Lawyer* in "Insurance: Advice to Insurers"; Lynn Neuner—*Leading Lawyer* in "Dispute Resolution: General Commercial Disputes" and "Insurance: Advice to Insurers"; Joshua Polster—*Next Generation Partner* in "Insurance: Advice to Insurers." *The Legal 500*, a worldwide legal reference guide, ranks law firms and attorneys based on extensive research surveying corporate counsel and law firm clients throughout the country.

Simpson Thacher was also ranked among the leading law firms in the United States in *Chambers USA* 2024. The Firm or its lawyers were recognized in 76 practice categories, with a total of 37 firm rankings in the top two bands, including a ranking of #1 in "Insurance: Dispute Resolution: Insurer" for both New York and Nationwide.

Matthew Penny and Bryce Friedman authored an article titled, "Pollution Exclusions and PFAS Claims: Reading Tea Leaves From Early Coverage Rulings in New York and Elsewhere," which was published by *New York Law Journal*. The article explores early court decisions on PFAS-related coverage issues and key factors that may drive the resolution of future disputes relating to application of pollution exclusions to PFAS claims.

Joshua Polster participated in AIRROC's Chicago Regional Education Day 2024 on June 6. Joshua's presentation focused on legislative and judicial developments related to the Illinois Biometric Information Privacy Act, including a discussion of the implications of the statute for policyholders, ongoing legislative developments, and key issues of dispute in insurance coverage matters.

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.

Andrew T. Frankel
+1-212-455-3073
afrankel@stblaw.com

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

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

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

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

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

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

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

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

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

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

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

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

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

This edition of the
Insurance Law Alert
was prepared by
Bryce L. Friedman / +1-212-455-2235
bfriedman@stblaw.com
Joshua Polster / +1-212-455-2266
joshua.polster@stblaw.com and
Karen Cestari
kcestari@stblaw.com.

Simpson
Thacher

UNITED STATES

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

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

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

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

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

EUROPE

Brussels
Square de Meeus 1, Floor 7
B-1000 Brussels
Belgium
+32-472-99-42-26

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

ASIA

Beijing
3901 China World Tower A
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

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

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

SOUTH AMERICA

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