Simpson Thacher

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In This Issue

In Climate Change Coverage Suit, Hawaii Supreme Court Rules That Reckless Conduct Can Be An "Occurrence" And That Greenhouse Gases Are Pollutants Within Scope Of Pollution Exclusion

The Hawaii Supreme Court ruled that the reckless conduct alleged in underlying climate change suits constituted an "accident" and thus an "occurrence" within the meaning of the policies, but that greenhouse gases are "pollutants" and therefore that the pollution exclusion bars coverage for damages arising out of greenhouse gas emissions. *Aloha Petroleum, Ltd. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2024 Haw. LEXIS 179 (Oct. 7, 2024). (Click here for full article)

"Simpson Thacher has a sterling reputation and handles complex work."

– *Chambers USA* 2024 (quoting a client)

Alaska Supreme Court Rules That Neither Presence Of Covid-19 Virus Nor Government Restrictions Constitute Direct Physical Loss Of Or Damage To Property

The Alaska Supreme Court ruled that neither the presence of the COVID-19 virus on insured property nor government restrictions on use of insured property constitute "direct physical loss of or damage to" property for purposes of triggering coverage under a commercial property policy. *Baxter Senior Living, LLC v. Zurich Am. Ins. Co.,* 2024 Alas. LEXIS 100 (Sept. 27, 2024). (Click here for full article)

North Dakota Supreme Court Rules That Endorsement Does Not Supersede Policy Exclusion

The North Dakota Supreme Court ruled that a policy endorsement did not supersede a policy exclusion and therefore that the insurer had no duty to provide coverage for the underlying injuries. *Kath v. Farmers Union Mutual Ins. Co.*, No. 2024 ND 190 (N.D. Oct. 10, 2024). (Click here for full article)

Fifth Circuit Reverses Lower Court's Imposition Of Bad Faith Punitive Damages Against Property Insurer

The Fifth Circuit ruled that a district court erred in finding that an insurer's conduct was arbitrary and capricious and in awarding bad faith penalties. *First United Pentecostal Church v. Church Mutual Ins. Co.*, 2024 U.S. App. LEXIS 26295 (5th Cir. Oct. 17, 2024). (Click here for full article)

California Court Rejects Business Owner's Coverage Claim For Pandemic-Related Losses On The Basis Of A Contamination Exclusion

A California district court ruled that a contamination exclusion barred coverage for COVID-19-related business losses, notwithstanding a prior ruling in the case holding that the exclusion was ambiguous and should be construed in favor of coverage. *Sacramento Downtown Arena LLC v. Factory Mutual Ins. Co.*, 2024 U.S. Dist. LEXIS 190980 (E.D. Cal. Oct. 21, 2024). (Click here for full article)

Pennsylvania Supreme Court Declines To Hear Appeal In Computer Hacking Coverage Dispute

The Pennsylvania Supreme Court declined to accept an appeal in a cyber-related coverage dispute, leaving intact an intermediate court ruling that vacated a jury verdict in favor of the policyholder and entered judgment in the insurer's favor. *Watchword Worldwide v. Erie Ins. Exchange*, 2024 Pa. LEXIS 1505 (Oct. 10, 2024). (Click here for full article)

Simpson Thacher News

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In Climate Change Coverage Suit, Hawaii Supreme Court Rules That Reckless Conduct Can Be An "Occurrence" And That Greenhouse Gases Are Pollutants Within Scope Of Pollution Exclusion

HOLDING

The Hawaii Supreme Court ruled for the insurer in a coverage dispute involving underlying alleged harms for climate change. The court ruled that the reckless conduct alleged in the underlying suits constituted an "accident" and thus an "occurrence" within the meaning of the policies. However, the court also ruled greenhouse gases are "pollutants" and therefore that the pollution exclusion bars coverage for damages arising out of greenhouse gas emissions. *Aloha Petroleum, Ltd. v. National Union Fire Ins. Co. of Pittsburgh, PA,* 2024 Haw. LEXIS 179 (Oct. 7, 2024).

BACKGROUND

Suits by Hawaiian municipalities against Aloha and other fossil fuel companies alleged that Aloha's former and current parent companies were on notice that their products would cause catastrophic climate change but concealed and/or denied that knowledge while increasing production of fossil fuels.

Aloha sought a declaration that AIG was obligated to defend the suits. AIG refused, arguing that Aloha's conduct was intentional and was not a covered occurrence and, in any event, that coverage was barred by the policies' pollution exclusions.

The federal district court ruled that the suits alleged reckless conduct—namely, that the defendants acted with "conscious disregard for the probable dangerous consequences of their conduct's and products' foreseeable impact on the rights of others." The district court did not rule on coverage, however, and instead certified the following questions to the Hawaii Supreme Court:

(1) For an insurance policy defining a covered "occurrence" in part as an "accident," can an "accident" include recklessness?

(2) For an "occurrence" insurance policy excluding coverage of "pollution" damages, are greenhouse gases "pollutants," *i.e.*, "gaseous" "irritant[s] or contaminant[s], including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste"?

The Hawaii Supreme Court answered both questions in the affirmative.

DECISION

The court held that "accidents" are both "unexpected and "not intended or practically certain from the insured's standpoint." In finding that an accident may involve reckless conduct, the court emphasized that recklessness requires an awareness of the risk of injury, but not a certainty. The court concluded that "[r]eckless conduct—an awareness of risk of harm—falls short of practical certainty." The court stated: "When the risk crosses the line into 'practical certainty,' it is no longer an 'accident.'"

In so holding, the court harmonized prior Hawaii precedent, which the district court had found to be in conflict. The Hawaii Supreme Court found no tension between its intended or "practical certainty" standard, previously articulated in *Tri-S Corp. v. Western World Ins. Co.,* 135 P.2d 103 (Haw. 2006) and earlier precedent holding that an occurrence-based policy does not cover the "expected or reasonably foreseeable result of the insured's own intentional acts or omissions." *See AIG Haw. Ins. Co., Inc. v. Est. of Caraang*, 851 P.2d 321 (Haw. 1993).

The court explained: "We clarify what *Caraang* meant by 'reasonably foreseeable.' In that case's context, *Caraang* referred to the reasonably foreseeable results of an insured's intentionally harmful conduct. *Carrang* used 'reasonably foreseeable" as another way of invoking the intentional conduct exception to coverage." Having cabined *Caraang's* reasonable foreseeability standard to apply to the insured's intent alone, and not to the insured's expectations, the court held that "when an insured perceives a risk of harm, its conduct is an 'accident' unless it intended to cause harm or expected harm with practical certainty." Finding no such practical certainty here given the recklessness allegations in the underlying suits, the court concluded that the allegations against Aloha could constitute a covered occurrence.

With respect to the pollution exclusion, the court first addressed whether a pollution exclusion is limited to "traditional environmental pollution" or extends to non-traditional contexts, such as small-scale harm to an individual in a limited or enclosed capacity. Noting that jurisdictions are split on this issue, the court endorsed the former position, finding that what makes a substance a "pollutant" subject to a pollution exclusion is whether it causes damage to the environment.

Having reached that conclusion, the court held that greenhouse gases are clearly traditional environmental pollution. The court emphasized that "reducing [greenhouse gas] emissions is the most consequential environmental pollution issue our species has faced." The court cited numerous government studies and state regulations identifying greenhouse gases as "pollutants" to buttress the "common sense" understanding that the term encompasses harmful gases emitted into the environment.

The court rejected Aloha's argument that its products were used legally and in the ordinary course of business and that "contamination" should be limited to accidental scenarios, such as an oil spill. The court also stated that "[t]he legality, ordinariness, and intent of a product's use is irrelevant" because "the operative question is whether a substance causes pollution to the environment." As such, the court held that the exclusion was unambiguous and that any expectation of coverage on the part of Aloha for harm arising from greenhouse gas emissions was not reasonable.

COMMENTS

The other state supreme court to address the "occurrence" issue in the context of climate change coverage litigation reached a different conclusion. In *AES Corp. v. Steadfast Ins. Co.*, 725 S.E.2d 532 (Va. 2012), the Virginia Supreme Court held that the insured's conduct could not be deemed "accidental" because climate change was the "natural or probable consequence" of that conduct. *AES* ruled that under Virginia law, an accident requires conduct that is "unexpected from the viewpoint of the insured"—precluding coverage for reasonably foreseeable harms, as AIG urged the court to find in *Aloha Petroleum*. However, the Hawaii Supreme Court distinguished *AES* based Hawaii law differing from Virginia law. In Hawaii, "practical certainty"—not mere reasonable foreseeability—is required for unintended consequences to fall outside the meaning of "accident."

Aloha Petroleum leaves unresolved the consequences of the absence of a pollution exclusion from certain long-ago policies issued to Aloha Petroleum. The Hawaii Supreme Court noted that two policies from the 1980s lacked pollution exclusions, but left it for the district court to determine whether AIG must defend the underlying suits. Resolution of this question may turn, according to the court, on the extent of the damages allegations in the underlying suit that relate to the time period in which the policies lacking pollution exclusions were issued.

Alaska Supreme Court Rules That Neither Presence Of COVID-19 Virus Nor Government Restrictions Constitute Direct Physical Loss Of Or Damage To Property

HOLDING

The Alaska Supreme Court ruled that neither the presence of the COVID-19 virus on insured property nor government restrictions on use of insured property constitute "direct physical loss of or damage to" property for purposes of triggering coverage under a commercial property policy. *Baxter Senior Living, LLC v. Zurich Am. Ins. Co.*, 2024 Alas. LEXIS 100 (Sept. 27, 2024).

BACKGROUND

Baxter Senior Living sought coverage for business losses incurred during the COVID-19 pandemic. Baxter alleged that the presence of the virus at its facility, as well as the government directives that limited its ability to conduct full business operations, constituted direct physical loss of or damage to property.

In ensuing coverage litigation, Zurich moved to dismiss. The district court certified the following questions to the Alaska Supreme Court:

(1) Under Alaska law, can the presence of the COVID-19 virus at an insured property constitute "direct physical loss of or damage to" the property for purposes of a commercial insurance policy?

(2) Under Alaska law, can operating restrictions imposed on an insured property by COVID-19 pandemic-related governmental orders constitute "direct physical loss of or damage to" the property for the purposes of a commercial insurance policy?

The Alaska Supreme Court answered both questions in the negative.

DECISION

Addressing this matter of first impression under Alaska law, the court rejected the notion that a loss of use of property can satisfy the "direct physical loss of or damage to" property standard, instead holding that a "tangible or material alteration" of property is required. The court acknowledged that the terms "loss" and "damage" must mean different things given use of the disjunctive term "or," but concluded that both terms require some kind of physical change to (or a deprivation of possession of) property.

The court further held that the presence of virus particles does not constitute such a physical alteration because the virus "merely attaches to property" and can be eliminated with simple cleaning. The court therefore concluded that viral particles do not "give rise to the necessary transformative element of something like fire, water, or smoke."

Additionally, the court rejected Baxter's assertion that two microorganism coverage provisions, and inclusion of the term "virus" in the definition of microorganism, provided coverage. The court explained:

> Baxter misunderstands or misrepresents policy language in its arguments. First, both the Property Coverage for Microorganisms and Microorganisms Coverage for Business Income provisions require that the microorganisms causing "direct physical loss of or damage to" property be "the *result* of a "covered cause of loss," rather than *being* the covered cause of loss.

Finally, the court reasoned that other policy provisions supported its no coverage ruling. In particular, the court ruled a "period of restoration" provision—which refers to removal, repair and replacement of property—confirms that a physical alteration of property is required to trigger coverage.

COMMENTS

This decision joins the overwhelming majority of state and federal court decisions rejecting coverage for business losses incurred in the wake of the COVID-19 pandemic, including the recent Pennsylvania Supreme Court decision discussed in our September 2024 Alert.

Alaska's alignment with this consensus is noteworthy given its tendency to use the so-called "reasonable expectations doctrine." Under Alaska law, insurance policies are generally treated as contracts of adhesion; thus, a policyholder's "objectively reasonable expectations govern, even if painstaking study of the policy provisions would have negated those expectations."

North Dakota Supreme Court Rules That Endorsement Does Not Supersede Policy Exclusion

HOLDING

The North Dakota Supreme Court ruled that a policy endorsement did not supersede a policy exclusion and therefore that the insurer had no duty to provide coverage for the underlying injuries. *Kath v. Farmers Union Mutual Ins. Co.*, No. 2024 ND 190 (N.D. Oct. 10, 2024).

BACKGROUND

The coverage dispute arose out a personal injury suit filed by Torrey Kath against Michael Prochnow. Kath was injured when Prochnow moved a truck while Kath was working underneath a trailer attached to the truck. The parties reached a settlement by which Kath agreed to collect solely from Prochnow's insurers. Thereafter, Kath sued Farmers Union, seeking a declaration of coverage.

The lower court granted Kath's summary judgment motion, ruling that his injuries were covered by a farm employer liability endorsement, which applied to injuries sustained by an employee in the course of employment. In so holding, the court rejected Farmers Union's assertion that a motor vehicle exclusion, which applied to any injury arising out of the use of a motor vehicle, precluded coverage. The North Dakota Supreme Court reversed.

DECISION

The North Dakota Supreme Court ruled that the endorsement did not supersede the exclusion contained in the body of the policy. The court explained that there was no conflict between the endorsement and the exclusion and that "there is no language in the endorsement expressing an intent to override or replace" the exclusion. Further, the court noted that the endorsement also expressly stated that: "All other provisions of this policy apply."

The court rejected Kath's assertion that application of the motor vehicle exclusion would render the endorsement superfluous because the endorsement contained its own subsection of "Additional Exclusions." As the court noted, courts in other jurisdictions have similarly ruled that, unless otherwise stated, exclusions in an endorsement operate to supplement existing exclusions in a policy.

COMMENTS

The decision leaves intact the general principle of contract interpretation that when a conflict exists between an endorsement and other policy provisions, the endorsement prevails. The court deemed this rule of construction inapplicable, however, based on the absence of a conflict between the endorsement and the exclusion at issue.

Fifth Circuit Reverses Lower Court's Imposition Of Bad Faith Punitive Damages Against Property Insurer

HOLDING

The Fifth Circuit ruled that a district court erred in finding that an insurer's conduct was arbitrary and capricious and in awarding bad faith penalties. *First United Pentecostal Church v. Church Mutual Ins. Co.*, 2024 U.S. App. LEXIS 26295 (5th Cir. Oct. 17, 2024).

BACKGROUND

The coverage dispute arose after two hurricanes struck Louisiana in 2020, causing damage to several buildings owned by a church. Church Mutual sent an inspector to the property and notified the church that it would send a $25,000 advance, but for unexplained reasons, never did. Approximately one month after the inspection, the inspector recommended that Church Mutual issue payment in the amount of $169,592.87, but the insurer did not do so. Several weeks later, after Church Mutual received the engineer's report, it issued payment in the amount of $166,090.81. It subsequently issued a second payment of $25,741.47 for "recoverable depreciation owed per the certificate of completion."

The church filed suit, alleging breach of contract based on underpayment of claims as well as violations of state statutory law requiring an insurer to make a written offer to settle any property damage claim and pay the amount of any claim due within 30 days of receipt of proof of loss. *See* Louisiana Revised Statute § 22:1892. Following a bench trial, the district court concluded that Church Mutual acted in bad faith in failing to make timely payments and violated § 22:1892. The court awarded the church its unpaid losses, statutory penalties, and attorneys' fees and costs—totaling over $2 million.

DECISION

The Fifth Circuit reversed in part, ruling that the district court erred in finding the statutory violation and awarding bad faith penalties, and attorneys' fees and costs. Section 22:1892 provides that if an insurer fails to pay a claim due within 30 days after receiving proof of loss, and if "such failure is found to be arbitrary, capricious, or without probable cause," the insurer is subject to penalties, and attorneys' fees and costs.

Applying a manifest error standard, the Fifth Circuit held that the district court erred in finding Church Mutual's conduct to be arbitrary or capricious. The court explained that the phrase "arbitrary, capricious, or without probable cause" means a "vexatious" or "unjustified" refusal to pay, without reasonable cause or excuse. Concluding that this standard was not met, the court emphasized that Church Mutual's internal files indicated uncertainty as to the extent of roof damage and that the insurer was awaiting receipt of the engineer's final report to determine which damage was preexisting as opposed to hurricane related. The court deemed these coverage issues to be substantial, legitimate and reasonable in the context of Church Mutual's failure to pay within the statutory time frame.

COMMENTS

The Fifth Circuit's reversal of the district court's bad faith trial judgment highlights the narrow circumstances in which bad faith penalties are justified against an insurer. As the court emphasized, when reasonable questions exist as to the extent of covered damage, a delay in payment is not a proper basis for a finding bad faith. Additionally, the decision clarifies that "bad faith should not be inferred from an insurer's failure to pay within the statutory time limits."

California Court Rejects Business Owner's Coverage Claim For Pandemic-Related Losses On The Basis Of A Contamination Exclusion

HOLDING

A California district court granted an insurer's summary judgment motion, ruling that a contamination exclusion barred coverage for COVID-19-related business losses, notwithstanding a prior ruling in the case holding that the exclusion was ambiguous and should be construed in favor of coverage. *Sacramento Downtown Arena LLC v. Factory Mutual Ins. Co.*, 2024 U.S. Dist. LEXIS 190980 (E.D. Cal. Oct. 21, 2024).

BACKGROUND

Sacramento Downtown Arena operates a venue that hosts professional basketball games and other events. In March 2020, a game was cancelled after it was determined that the COVID-19 virus was present in the building. Several other events to be held in the arena during this time frame were cancelled as well. Additionally, the government issued numerous orders over the following year that aimed to prevent the spread of COVID-19.

The Arena sought coverage for losses allegedly incurred as a result of the cancellations. The initial proof of loss explained that the claim was for "time element losses that will include, but are not limited to, losses covered by (1) orders issued by a Civil or Military Authority pursuant to the 'Civil or Military Authority' and/or (2) the 'Contingent Time Element Extended' extensions in the Policy and pursuant to all other applicable provisions." In response, Factory Mutual stated that the presence of the virus did not constitute "physical damages," as required by the aforementioned provisions. However, Factory Mutual noted that the losses could be covered by certain Communicable Disease provisions, assuming the conditions of those coverages were met. Factory Mutual ultimately deemed two Communicable Disease provisions applicable and paid $1 million, the annual aggregate sublimit.

The Arena filed suit, alleging breach of contract and bad faith denial of coverage, and seeking declaratory relief. Factory Mutual moved to dismiss, which the court denied. The parties subsequently filed cross-motions for summary judgment and the court ruled in Factory Mutual's favor.

DECISION

A central issue in dispute was whether the court's prior order denying Factory Mutual's motion to dismiss constitutes the "law of the case"—a doctrine which holds that when a court decides upon a rule of law, that decision governs the same issues in subsequent stages of that case. Under the "law of the case" doctrine, a court may revisit a prior decision under certain circumstances, including when an "intervening controlling change in the law warrants reexamination of the prior ruling."

The court held that the doctrine applied here and that its previous interpretation of the policy—including a ruling that a contamination exclusion did not bar coverage—constituted the law of the case. However, the court agreed with Factory Mutual that a recent California appellate decision, *San Jose Sharks, LLC v. Superior Court*, 98 Cal. App. 5th 158 (2023), warranted reconsideration of the prior decision.

In *San Jose Sharks*, the court analyzed a contamination exclusion identical to that at issue here and concluded that it unambiguously excluded physical loss and damage in the form of viral contamination. However, as the court noted, *San Jose Sharks* was decided on appeal from a decision on demurrer and thus did not have a fully developed factual record when it deemed the contamination exclusion unambiguous. Thus, the court in the present case considered extrinsic evidence in determining whether latent ambiguity existed in the contamination exclusion so as to render *San Jose Sharks* non-controlling.

The court concluded that no such ambiguity existed, that *San Jose Sharks* was therefore controlling, and that the contamination exclusion unambiguously bars coverage in the present case.

COMMENTS

The decision represents another win for insurers in COVID-19-related coverage disputes. Even after considering fact-specific extrinsic evidence relating to the Communicable Disease coverage provisions in the policy and various communications between the Arena and Factory Mutual, the court ruled that the contamination exclusion squarely applied to bar coverage for the pandemic-related losses.

Simpson Thacher appeared on behalf of Factory Mutual in this suit.

Pennsylvania Supreme Court Declines To Hear Appeal In Computer Hacking Coverage Dispute

HOLDING

The Pennsylvania Supreme Court declined to accept an appeal in a cyber-related coverage dispute, leaving intact an intermediate court ruling that vacated a jury verdict in favor of the policyholder and entered judgment in the insurer's favor. *Watchword Worldwide v. Erie Ins. Exchange*, 2024 Pa. LEXIS 1505 (Oct. 10, 2024).

BACKGROUND

Watchword produces videos of the New Testament of the Bible and sells those videos to customers' iPhones through servers owned and operated by GoDaddy, Inc and Apple Inc. The process utilizes a mobile application that customers use to pay for the videos, as well as an application programming interface ("API") that authenticates the sale and delivers the video. Watchword paid GoDaddy a fee to use its server to store the videos and API.

In 2017, a hacker deleted Watchword's videos and API from the GoDaddy server. Thereafter, Watchword removed the mobile application from Apple's server to "prevent adverse reactions from customers" and because the mobile application could not work without the videos and API. Watchword then filed a claim with Erie for the loss caused by the deletion of its electronic data from the GoDaddy server. Erie denied coverage, arguing that the loss was not covered because the electronic data that was destroyed was not on Watchword's computers. The operative coverage provision in Erie's policy stated that coverage "is limited to 'electronic data' which is owned by you, licensed or leased to you, [or] originates and resides in your computers."

In jury trial, a verdict was entered in Watchword's favor. The court also entered a non-jury verdict in favor of Watchword on its bad faith claim and issued a punitive damage award. The court denied all of Erie's post-trial motions.

DECISION

An intermediate appellate court vacated the judgements and ruled that Erie was entitled to judgment as a matter of law on both the breach of contract and bad faith claims.

Addressing this matter of first impression under Pennsylvania law, the court ruled that the phrase "your computers" was ambiguous. More specifically, the court explained that "your computers" could be construed to mean only Watchword's own computers, or conversely, to include computers operated by third parties that Watchword used pursuant to a lease or license. Construing this ambiguity in favor of coverage, the court held that the policy provided coverage for Watchword's electronic data that was stored on the GoDaddy server. As such, the appellate court ruled that Erie was not entitled to a judgment notwithstanding the verdict as to the coverage issue.

However, the appellate court ruled that Watchword failed to prove that Erie's failure to pay breached the contract because the evidence at trial revealed that the loss did not exceed the policy's deductible. The evidence indicated that the cost of replacing the deleted electronic data was less than $2,500, the deductible amount. The court held that the amounts Watchword incurred above the deductible—expenses to replace and upgrade the mobile application on the Apple server—could were not necessary expenditures since Watchword had copies of the videos and API on its own computers, and in any event, were expressly excluded by another provision in the policy.

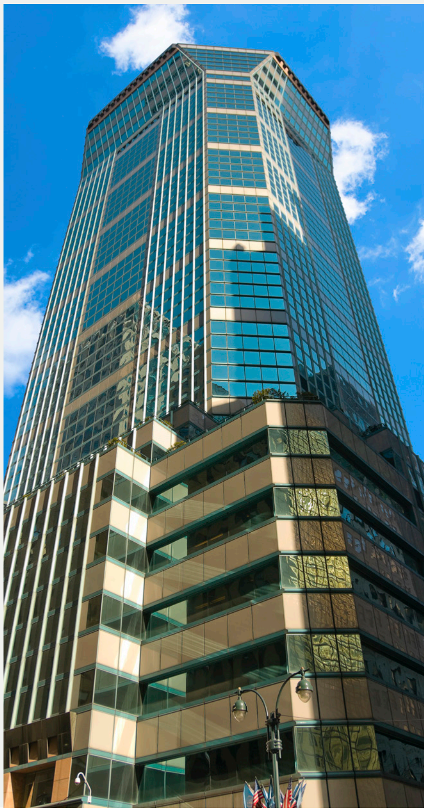
The appellate court also ruled in Erie's favor on the bad faith issue. The court explained that Watchword failed to establish that Erie had no reasonable basis for denying coverage, even if its coverage denial was ultimately deemed erroneous.

This month, the Supreme Court of Pennsylvania denied Watchword's petition for appeal.

COMMENTS

The decision highlights the importance of policy language in cyber-related coverage disputes that require interpretation of terms to novel factual scenarios. Given the frequency with which electronic data is shared among entities through various contractual arrangements in the regular course of business, the parameters of policy phrases such as "resides in your computers" are of paramount importance.

Simpson Thacher News



Euromoney's *Benchmark Litigation* 2025 recognized Simpson Thacher's Litigation Department as Tier 1 across five practice areas, including its Insurance practice. Clients praised Simpson Thacher as "the best national firm we have ever worked with," with a "deep bench of outstanding litigators" who are "strategic thinkers who are incredibly hard working and very responsive" in *Benchmark Litigation*'s guide.

Lynn Neuner was selected for the seventh consecutive year by Euromoney's *Benchmark Litigation* as one of the "Top 100 Trial Lawyers." The list highlights elite trial attorneys in the United States who are selected based on client and peer review.

Andrew Frankel was named as a 2024 *Law360* "MVP" for Insurance. The "MVP" award series honors attorneys who had the biggest wins and made the most significant contributions to their practice groups in the past year.

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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