Simpson Thacher

Insurance Law Alert

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In This Issue

Reversing Lower Court, Pennsylvania Supreme Court Rules That Policyholder Is Not Entitled To Coverage For Pandemic-Related Business Losses

The Pennsylvania Supreme Court ruled that a commercial property insurer had no duty to cover business losses stemming from pandemic-related shutdowns because the policyholder did not suffer any "direct physical loss of or damage to" property. *Ungarean v. CNA and Valley Forge Ins. Co.*, No. J-27A-2024 (Pa. Sept. 26, 2024). (Click here for full article)

"The team is top notch and incredibly strategic in its decision making and execution of its legal services. They are capable of handling the most challenging and sophisticated matters with professionalism and diligence."

– The Legal 500
(quoting a client)

Texas Court Rejects Insurer's Attempt To Seek Reimbursement From Policyholder Pursuant To Allocation Of Recovery Provision

A Texas district court ruled that an insurance company's contractual right to seek reimbursement of funds that its policyholder received from other sources was limited to funds that applied to covered occurrences under the applicable crime policy. *National Union Fire Ins. Co. of Pittsburgh, PA v. RealPage, Inc.*, 2024 U.S. Dist. LEXIS 160399 (N.D. Tex. Sept. 5, 2024). (Click here for full article)

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A New York district court, applying Texas law, ruled that a general liability insurer had no duty to defend a firearm retailer in suits arising out of the alleged sale of components used to make untraceable firearms based on the absence of a covered "occurrence." *Granite State Ins. Co. v. Primary Arms, LLC*, 2024 U.S. Dist. LEXIS 157201 (S.D.N.Y. Aug. 30, 2024). (Click here for full article)

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A Connecticut district court granted a professional liability insurer's summary judgment motion, finding that a subpoena issued to the policyholder did not constitute a "claim" under the policy and that the insurer therefore had no duty to pay the costs incurred in responding to it. *Steadfast Ins. Co. v. Shambaugh & Son, L.P.*, 2024 U.S. Dist. LEXIS 165096 (D. Conn. Sept. 13, 2024). (Click here for full article)

Simpson Thacher News

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Reversing Lower Court, Pennsylvania Supreme Court Rules That Policyholder Is Not Entitled To Coverage For Pandemic-Related Business Losses

HOLDING

The Pennsylvania Supreme Court ruled that a commercial property insurer had no duty to cover business losses stemming from pandemic-related shutdowns because the policyholder did not suffer any "direct physical loss of or damage to" property. *Ungarean v. CNA and Valley Forge Ins. Co.*, No. J-27A-2024 (Pa. Sept. 26, 2024).

BACKGROUND

Ungarean, the owner of a dental practice, filed a claim with CNA to recoup business losses it incurred during the period of government-mandated shutdowns. When CNA denied coverage, Ungarean filed a class action suit seeking a declaration of coverage under the Business Income, Extra Expense and Civil Authority policy endorsements. A trial court granted Ungarean's summary judgment motion, concluding that the loss of use of property due to the COVID-19 restrictions was "direct" and "physical." The trial court rejected CNA's assertion that a "period of restoration" clause in the policy indicated that tangible damage is required to establish "direct physical loss or damage." Additionally, the trial court ruled that coverage was available under the Civil Authority endorsement, notwithstanding the fact that access to the insured property was not entirely prohibited, but rather significantly limited. Finally, the trial court concluded that coverage was not barred by exclusions relating to contamination, consequential loss, or ordinance of law, among others.

An intermediate appellate court affirmed, deeming the phrase "direct physical loss of or damage to" ambiguous and finding Ungarean's interpretation (so as to include "loss of use") to be reasonable. The appellate court also ruled that none of the exclusions precluded coverage.

DECISION

The Pennsylvania Supreme Court reversed, reasoning that "the only reasonable interpretation of the operative phrase 'direct physical loss of or damage to property'" is one that includes a physical alteration to the property. As the court explained, this interpretation is supported by the "period of restoration" language, which contemplates a suspension of operations during the repair, replacement or rebuilding of damaged property. In so ruling, the court rejected the trial court's finding that the "period of restoration" clause is simply a temporal limit on coverage, which ends whenever such measures, if undertaken, would have been reasonably completed.

Applying this standard to the factual record, the court concluded that there was no direct physical loss of or damage to property because the insured property remained intact and accessible for emergency dental procedures. As the court emphasized:

> The only loss Ungarean sustained, rather, was pure economic loss because the government-ordered COVID-19 shutdown prevented Ungarean from operating his Covered Properties at their full potential. That partial closure, however, had nothing to do with the physical attributes of the Covered Properties, as required by the CNA Policy for insurance coverage.

The Pennsylvania Supreme Court also rejected the lower courts' finding that the installation of partitions, hand sanitization stations and other structures were physical changes that would require repair or rebuilding under the "period of restoration" language.

Finally, the court held that Ungarean was not entitled to coverage under the Civil Authority endorsement because that provision similarly required "physical loss of or damage to" property other than the covered premises.

COMMENTS

The decision aligns with the overwhelming majority of decisions across jurisdictions, which have similarly concluded that property insurance is not available for COVID-19 related business losses.

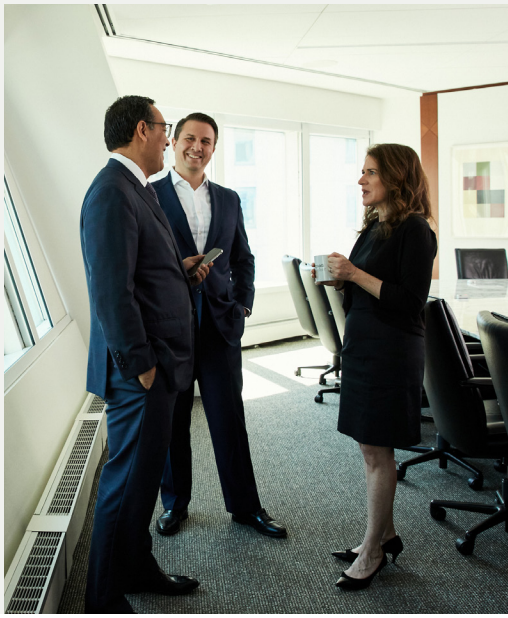
Texas Court Rejects Insurer's Attempt To Seek Reimbursement From Policyholder Pursuant To Allocation Of Recovery Provision

HOLDING

A Texas district court ruled that an insurance company's contractual right to seek reimbursement of funds that its policyholder received from other sources was limited to funds that applied to covered occurrences under the applicable crime policy. *National Union Fire Ins. Co. of Pittsburgh, PA v. RealPage, Inc.*, 2024 U.S. Dist. LEXIS 160399 (N.D. Tex. Sept. 5, 2024).

BACKGROUND

The dispute arose from a phishing attack perpetrated on RealPage in 2018, in which more than $10 million of funds were diverted to hackers' bank accounts. Approximately $9 million of the stolen funds were owed to RealPage's clients and $1 million represented transaction fees owed RealPage. RealPage reimbursed its clients the $9 million and then sought coverage from National Union under a commercial crime policy. National Union paid the $1 million in lost transaction fees but denied coverage for the lost client funds, arguing that RealPage neither owned nor leased the funds that were intended for its clients, as required by the policy. As reported in our January 2022 Alert, the Fifth Circuit ruled in National Union's favor, finding that RealPage never "held" the funds so as to trigger coverage.



Following a government investigation of the crime and a seizure of the stolen funds, RealPage received a $2.9 million payment from the government. Thereafter, National Union sought reimbursement for the $1 million it paid pursuant to an Allocation of Recovery Provision ("ARP") in the policy. When RealPage refused to pay, National Union sued, alleging breach of contract. RealPage asserted a counterclaim seeking a declaration that it did not owe National Union reimbursement pursuant to the ARP. The court granted RealPage's motion for summary judgment on the declaratory judgment claim.

DECISION

The ARP stated that:

> Any recoveries, whether effected before or after any payment under this policy, whether made by us or you, shall be applied net of the expense of such recovery: (a) First, to you in the satisfaction of your covered loss in excess of the amount paid under this policy; (b) Second, to us in satisfaction of amounts paid in settlement of your claim. . . .

National Union argued that the remitted funds constituted "recoveries" subject to the ARP. In contrast, RealPage asserted that the ARP applied only to losses covered by the policy and that because it was unclear whether the remitted funds represented a recovery of the covered transaction fee loss or the uncovered client reimbursement loss, National Union was not entitled to reimbursement under the ARP.

Deeming RealPage's interpretation more plausible, the court concluded that the ARP applied only to "recoveries of losses that result from occurrences that are covered by the Policy and that the Remitted Funds are not subject to the ARP to the extent that those funds consist of amounts stolen from RealPage's landlord-clients."

The court explained that the undefined phrase "any recoveries" should be construed to mean only amounts received in "restoration of a loss that results from an occurrence covered by the Policy," because to find otherwise would "lead to absurd results that would almost certainly be beyond the contemplation of the parties in drafting the ARP." Additionally, the court noted that in various other provisions, the policy makes a clear distinction between losses that result from covered occurrences and all other types of losses, reasoning that it followed that the ARP is likewise limited to the parties' obligations with respect to covered losses.

The court therefore held that to the extent that the remitted funds consist of funds stolen from RealPage's clients, they reflect uncovered losses and are not subject to recovery by National Union under the ARP.

COMMENTS

The court's interpretation of the ARP seems to deviate from the plain language of the provision. In fact, the court acknowledged that a literal reading of the provision "could conceivably be read to give National Union a right to recoveries of losses 'unrelated to the [P]olicy,'" but nonetheless interpreted the provision "in relation to the entire instrument to avoid an interpretation that renders the contract unreasonable, inequitable, and oppressive."

Similar subrogation disputes between insurers and policyholders may yield different outcomes, particularly in light of specific policy language and governing jurisdictional law as it pertains to contractual and/or equitable subrogation.

Hawaii District Court Says Maui Wildfire Coverage Suit Should Be Litigated In State Court

HOLDING

A Hawaii district court dismissed an insurer's declaratory judgment action seeking a ruling as to its duty to defend a suit arising from wildfire-related property damage, reasoning that a state court is best situated to decide the coverage issues. *Great American Ins. Co. v. Assoc. of Apt. Owners of Lahaina Residential Condominium*, No. 24-00075 (D. Haw. Aug. 29, 2024).

BACKGROUND

The dispute arose after Maui wildfires destroyed a condominium development in Lahaina. Several homeowners submitted a demand for mediation to the Association of Apartment Owners of Lahaina Residential Condominium ("AOAO"), which alleged that AOAO breached its statutory duty to obtain replacement property coverage for the building. AOAO, in turn, tendered the demand to Great American under an errors and omissions policy. Great American denied coverage, arguing that the demand was not a "Claim" under the policy and that a property damage exclusion barred coverage. Great American ultimately agreed to reimburse AOAO for its defense costs under a reservation of rights and subsequently filed this action seeking a declaration of no coverage. AOAO moved to dismiss the suit, arguing that the court should decline to exercise jurisdiction because the case raises unsettled questions of state law. The court granted the motion.

DECISION

The district court noted that although it had diversity jurisdiction, it retained discretion to dismiss the suit pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Discretion in this context is governed by several factors, including whether the federal suit would require "needless determination of state law issues." Needless determination of state law may occur when (1) there are parallel state proceedings involving state law issues, (2) Congress expressly reserved the area of law for state resolution, and (3) there is no compelling federal interest.

In dismissing the suit, the court focused on the second factor, emphasizing that insurance law is expressly left to the states by virtue of the McCarran-Ferguson Act. Additionally, the court noted that the case presented unsettled questions under Hawaii law. In particular, the court explained that while Hawaii state courts have interpreted standard policy phrases such as "arising out of" or "destruction of tangible property," state courts have not addressed the more complicated question of whether allegations that an insured entity, such as the AOAO, breached a statutory duty to secure adequate insurance coverage, are subject to a property damage exclusion. As the court observed, AOAO's liability for underinsuring the building could potentially exist independent of the physical property damage caused by the wildfire, in which case the exclusion would not apply.

Additionally, the court held that a question relating to concurrent causation "further risk[ed] federal court entanglement . . . that may impact wildfire litigation in Hawai'i more broadly." More specifically, the court explained that resolution of the coverage issue would entail a proximate causation analysis to determine whether the damages sought by the property owners stemmed independently (or concurrently) from the fire damage and/or the preceding "botched insurance coverage."

Without addressing the merits of the causation issue, the court observed that this case "involves thorny coverage questions related to a fire that caused unprecedented death and destruction on Maui, where the majority of resulting lawsuits remain pending in state court on Maui." As such, and because "the answer to the coverage question is not settled under Hawai'i law and could have immediate ramifications on numerous other insurance coverage disputes related to the fire," the court declined to exercise its discretionary jurisdiction.

COMMENTS

While the court based its ruling primarily on the relegation of insurance law to state courts, the decision provides guidance on the "parallel state proceedings" analysis in evaluating whether a declaratory judgment action should be heard in state court. Here, the parties disputed whether the underlying mediation, as well as a pending state court suit arising out of the fire-related property damage, constituted parallel proceedings. While the court did not expressly rule on this issue, it emphasized that under Ninth Circuit precedent, the phrase "parallel actions" is construed liberally and does not require the two actions to involve the same parties or same issues; rather, "it is enough that the state proceedings arise from the same factual circumstances." The decision also leaves unanswered the question of whether a non-binding mediation could constitute a "parallel proceeding."

Lawsuits Against Firearms Retailer Alleging Sale Of Ghost Gun Components Do Not Trigger Insurer's Duty To Defend, Says New York Court

HOLDING

A New York district court, applying Texas law, ruled that a general liability insurer had no duty to defend a firearm retailer in suits arising out of the alleged sale of components used to make untraceable firearms based on the absence of a covered "occurrence." *Granite State Ins. Co. v. Primary Arms, LLC*, 2024 U.S. Dist. LEXIS 157201 (S.D.N.Y. Aug. 30, 2024).

BACKGROUND

The State of New York and the cities of Buffalo and Rochester filed suits against Primary Arms, alleging that the company sold and shipped unfinished firearm parts that evaded gun control laws, contributing to an increase in gun violence. The complaints alleged that Primary Arms knowingly marketed these products to buyers who would otherwise be prohibited from owning firearms under state regulations, and asserted causes of action for negligence, public nuisance and violation of state statutory law. Granite State denied coverage and sought a declaration as to its defense obligations.

DECISION

The court granted Granite State's summary judgment motion, ruling that the underlying suits did not allege a covered "occurrence," defined by the policy as "an accident, including continuous or repeated exposure to substantially the same conditions." Applying Texas law,

the court held that an insured's actions are not accidental if the insured commits an intentional act that results in damage that would "ordinarily follow from or could be reasonably anticipated from" those actions.

Applying that standard, the court concluded that the claims did not allege any accidental conduct, but rather a series of intentional actions relating to the marketing and selling of firearm components. The court emphasized that Primary Arms allegedly made sales to "unknown and deliberately unchecked individuals," and "failed to exercise any controls on its sales."

In concluding that such allegations could not constitute accidental conduct, the court stated:

> The allegations . . . make clear that the failure to perform any checks regarding Defendant's customers was not a mistake, but rather a deliberate part of Defendant's business and marketing model in order to maximize sales. The claim is not that Defendant forgot to run a background check on certain customers or misplaced its paperwork; rather, the allegations are that Defendant made a deliberate choice not to implement internal controls. The expected result of not implementing controls is that individuals who are prohibited from owning firearms – because their owning firearms poses an increased risk for societal harm – can obtain firearms by purchasing Defendant's products.

COMMENTS

As the decision makes clear, the determinative factor in evaluating whether underlying claims could constitute accidental conduct is the nature of the factual allegations, not the legal theories asserted. The court rejected Primary Arms' contention that the suits alleged accidental conduct because they asserted negligence-based causes of action, noting that Texas law has rejected the assertion that claims sounding in negligence inherently allege "occurrences."

Reversing Trial Court, Illinois Appellate Court Rules That Insurer Has No Duty To Defend BIPA Claims

HOLDING

An Illinois appellate court ruled that an underlying suit alleging violations of the Biometric and Information Privacy Act ("BIPA") do not even potentially fall within the scope of coverage under a Cyber, Data Risk, and Media Insurance Policy and therefore that the insurer had no duty to defend the suit. *Tony's Finer Foods Enterprises, Inc. v. Certain Underwriters at Lloyd's London*, 2024 IL App (1st) 231712 (Ill. App. Ct. Sept. 10, 2024).

BACKGROUND

A class action suit alleged that Tony's Finer Foods ("TFF") violated the BIPA by requiring employees to scan their fingerprints and by utilizing third-party software to maintain a database of that information without employee consent. When Lloyd's denied coverage, TFF sought a declaration as to the duty to defend, arguing that Lloyd's was not permitted to deny coverage, but rather had to either defend under a reservation of rights or alternatively, file its own declaratory judgment claim. In response, Lloyd's claimed that TFF failed to

provide timely notice and that the BIPA suit did not even potentially fall within the coverage provisions of the policy.

The trial court granted TFF's summary judgment motion, finding that the allegations gave rise to the possibility of coverage. The trial court further held that Lloyd's was estopped from asserting policy defenses based on its refusal to defend TFF or file a declaratory judgment action. The appellate court reversed.

DECISION

The appellate court explained that estoppel applies only when an insurer has breached its duty to defend and therefore it was necessary to determine whether Lloyd's had a duty to defend TFF in the first place. Finding no such duty, the appellate court emphasized that the allegations in the underlying suit related only to the collection and storage of employees' fingerprint data. Such allegations did not even potentially fall within the scope of coverage that applies to a "data breach, security failure, or extortion threat" since there were no allegations of improper third-party access or lapses in security.

Additionally, the court found that coverage would be unavailable in any event based on an exclusion that applied to claims arising out of the "collection of information . . . without the knowledge or permission of the persons to whom such information relates . . . ; or use of personally identifiable information by [TFF] . . . in violation of law."

COMMENTS

The decision sets forth important limitations on the scope of phrases such as "data breach" and "security failure." The court rejected TFF's assertion that the underlying claims arguably alleged a data breach or security failure because of a potential for misuse or improper dissemination of the personal information, emphasizing that allegations relating to a hypothetical scenario in which biometric data could be unlawfully accessed is not the same as allegations that such a breach has already occurred.

Connecticut Court Rules That Subpoena Is Not A "Claim" For Purposes Of Insurer's Duty To Reimburse Defense Costs

HOLDING

A Connecticut district court granted a professional liability insurer's summary judgment motion, finding that a subpoena issued to the policyholder did not constitute a "claim" under the policy and that the insurer therefore had no duty to pay the costs incurred in responding to it. *Steadfast Ins. Co. v. Shambaugh & Son, L.P.*, 2024 U.S. Dist. LEXIS 165096 (D. Conn. Sept. 13, 2024).

BACKGROUND

The dispute arose out of multidistrict litigation ("MDL") alleging damage based on the release of aqueous film forming foam ("AFFF"), a fire suppressant. Shambaugh was not named as a defendant in the MDL, but was served a subpoena which called for the production of documents concerning Shambaugh's status as a distributor of AFFF. Additionally, Shambaugh was provided a chart created in connection with the MDL that listed 123 entities, including MDL defendants as well as other non-defendant manufacturers and distributors of AFFF, and that identified Shambaugh as an entity "potentially affiliated" with the defendants. A column in the chart with the heading "Likely Role in the Litigation" stated that "Upon information and belief, Shambaugh & Son LP was a distributor of 3M AFFF products from approximately 1955 to 2000."

Steadfast denied coverage for the costs of responding to the subpoena, arguing it was not a "Claim," defined by the policy as "a demand received by an Insured seeking a remedy and alleging liability or responsibility on the part of the Named Insured for loss." In ensuing litigation, the court granted Steadfast's motion for summary judgment.

DECISION

The court rejected the assertion that the subpoena and chart together alleged liability and responsibility on the part of Shambaugh. The court explained that even assuming that both documents state or suggest that Shambaugh distributed products containing AFFF, such statements do not rise to an "allegation of liability or responsibility for loss." In so ruling, the court rejected Shambaugh's argument that the designation of "distributor" implied strict product liability. Further, the court held that while the information requested in the subpoena might give rise to a future allegation of liability, the request for documents itself is not an allegation.

Shambaugh also contended that the subpoena alleges "responsibility for a loss" because it required Shambaugh to incur attorneys' fees and costs in order to comply with it. Rejecting this argument, the court explained that incurring expenses is not the same as alleging responsibility for a "loss," which is defined by the policy to include several categories of payments, none of which encompass attorneys' fees not authorized by Steadfast.

COMMENTS

While other courts have ruled that a subpoena does constitute a "claim," those rulings were driven by the particular factual circumstances as well as applicable policy language. For example, the court distinguished cases in which "claim" was defined to include any demand for non-monetary relief. Similarly, the court distinguished cases involving policies that included a duty to defend, which only required a potential for coverage in order for defense obligations to be triggered.

Simpson Thacher News

Simpson Thacher has been recognized by *The New York Law Journal* ("*NYLJ*") as its 2024 "Litigation Department of the Year" in the category of Insurance. The Firm was honored this month at the New York Legal Awards in New York City. The New York Legal Awards honor the attorneys, judges and teams who have made a remarkable difference in the legal profession in New York. The *NYLJ* previously named Simpson Thacher its "Litigation Department of the Year" in the Insurance category in 2023, 2020 and 2018.

In an article published by *NYLJ*, Head of the Firm's Insurance and Reinsurance Practice Andy Frankel spoke about the Firm's significant victories in various high-stakes cases over the past year.

Chet Kronenberg participated in a Strafford Publication webinar titled, "Handling an Insurance Liability Claim: Roadmap for New Attorneys: Identifying and Analyzing the Policy, the Insured, and the Loss." The webinar provided guidance to new attorneys on systematically analyzing necessary documents and laws when handling liability insurance claims, and emphasized the importance of understanding relevant statutes and case law, in addition to having a structured system in place to avoid overlooking complex issues.

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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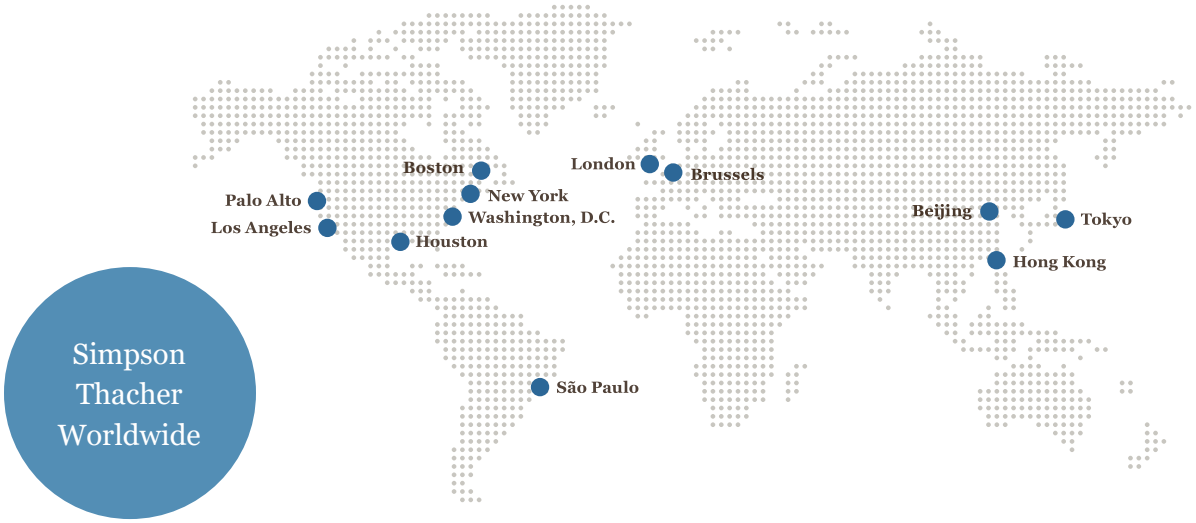

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