



## MESSAGE FROM THE CHAIR

### TO THE FRIENDS OF COZEN O'CONNOR:

In this issue, we identify key coverage developments from the year 2008. We summarize recent court decisions dealing with coverage for toxic torts, environmental losses, construction defect and property losses. We also address new decisions in the areas of insolvency and reinsurance.

We feature an article on international developments related to global warming by [William Stewart](#) (West Conshohocken), reporting on his attendance at the United Nations' 14th Annual Conference on Climate Change in Poznań, Poland. Bill co-chairs our Climate Change/Global Warming Practice Area, and his work has been featured by NBC News, *The Wall Street Journal*, and insurance industry publications.

On other emerging issues, we present an article on liabilities arising from cellphone use and products manufactured from BPA, by [Kevin Haas](#) (New York). Additionally, we address an anticipated change in international trade law that may soon supplant the United States' Carriage of Goods by Sea Act, in an article by [Rod Fonda](#) (Seattle).

Finally, we provide a special report on factors to consider in deciding whether to pursue an appeal, authored by [Melissa O'Loughlin White](#) (Seattle), who co-leads the Appellate Practice Area of the Global Insurance Group.

We hope the information contained in this issue will be useful to you. As always, we look forward to continuing to meet your needs in these areas and others. At the end of this issue are listings of upcoming events in which attorneys from Cozen O'Connor's Global Insurance Group will be making presentations. We'd love to see you there.

Best regards,

**William P. Shelley**

Chair, Global Insurance Group  
215.665.4142 | wshelley@cozen.com

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## KEY DEVELOPMENTS IN COVERAGE LITIGATION 2008: TOXIC TORT

Helen A. Boyer, Laura J. Hawes and Laura L. Edwards (Seattle)

### ODORS FROM COMPOST FACILITY ARE POLLUTANTS WITHIN MEANING OF EXCLUSION

*Cold Creek Compost, Inc. v. State Farm Fire & Cas. Co.*, 156 Cal. App. 4th 1469 (Ct. App. 2008)

In *Cold Creek Compost*, the California Court of Appeals held that odors from a compost facility were pollutants under the terms of the policy. The facility composted organic materials such as grape pomace and yard trimmings. The primary issue in the case was whether a pollution exclusion in the insured's liability insurance policies barred coverage for liability for offensive and injurious odors emanating from the insured's compost facility and spreading over a mile away. The court concluded that the insurer had no duty under the policies to defend or indemnify the insured, holding that "[t]he odors emanating from Cold Creek's facility were unquestionably an 'impurity, something objectionable and unwanted' in the air ... the odors 'polluted' the air, as the term 'pollute' is commonly understood." The widespread dissemination of offensive and injurious odors from the facility was environmental pollution and thus excluded from coverage by the pollution exclusion.

### POLLUTION EXCLUSION APPLIES TO METHANE GAS PRODUCED FROM CONSTRUCTION DEBRIS

*James River Ins. Co. v. Ground Down Engineering, Inc.*, 540 F.3d 1270 (11th Cir. 2008)

In *James River*, the Eleventh Circuit, applying Florida law, considered whether the pollution exclusion applied to methane gas produced from construction debris. The insureds argued that the pollution exclusion should not apply to construction debris because it is not a pollutant (defined in the exclusion as an "irritant or contaminant"). However, the court stated, the insureds' argument failed because the pollution exclusion was not actually limited to irritants or contaminants. The definition for pollutants states that 'irritants or contaminants' covers 'waste' which includes 'all . . . materials to be disposed of, recycled, stored, reconditioned, or reclaimed.' The court stated that only a strained reading of this language would exclude construction debris causing higher levels of methane gas from this definition. The court therefore held that the pollution exclusion applied to the claims asserted.

### COMBUSTIBLE VAPORS ARE "POLLUTANTS"; POLLUTION EXCLUSION APPLIES

*Noble Energy, Inc. v. Bituminous Cas. Co.*, 529 F.3d 642 (5th Cir. 2008)

In *Noble Energy*, the Fifth Circuit, applying Texas law, held that combustible vapors emanating from sediment and water in petroleum storage tanks that caused an explosion were "pollutants" as defined by a general liability policy. In addition, the court noted that the alleged bodily injuries arose out of the discharge, release, or escape of a pollutant. Therefore, the pollution exclusion clause precluded coverage for the claims.

### POLLUTION EXCLUSION CLAUSE APPLIES OVER COMPETING FELA INCLUSIONS

*Columbia Cas. Co. v. Georgia and Florida Railnet, Inc.*, 542 F.3d 106 (5th Cir. 2008)

In *Florida Railnet*, a former locomotive engineer alleged he contracted severe respiratory damage, including chronic obstructive pulmonary disease and reactive airways dysfunction, as a result of exposure to high levels of exhaust fumes. He alleged that poorly maintained locomotives caused high levels of exhaust fumes and hazardous dusts to accumulate in the locomotive cab. Georgia & Florida Railnet unsuccessfully argued that two Federal Employer's Liability Act (FELA) inclusions should trump the pollution exclusion in the insurance policy. The Fifth Circuit, applying Texas law, ultimately ruled that despite the two exceptions expressly stating that coverage is provided in FELA bodily injury claims, the pollution exclusion applied because those claims arose out of the release of pollutants.

### SALTWATER IS IMPURITY WHEN INTRODUCED TO AGRICULTURAL LAND; POLLUTION EXCLUSION APPLIED

*National Fire Ins. Co. v. Martinelli*, 07-CV-01056-AWI-GSA, 2008 U.S. Dist. LEXIS 52911, 2008 WL 2725070 (E.D. Cal. July 11, 2008)

In *Martinelli*, the court held that a massive flood of saltwater after a levee broke was an "impurity" that polluted groves of olive trees and grape vines. The court noted that an "impurity" could be "chemical, toxic or a hazardous waste, or even natural." Further, the court considered the nature of the contamina-

tion under the circumstances. In this case, the widespread flooding from a commercial processing pond onto adjacent agricultural land was “pollution,” and the pollution exclusions in the liability policies barred coverage.

### POLLUTION EXCLUSION TRUMPS CONTRACTOR'S LIMITATION ENDORSEMENT

*United Nat'l Ins. Co. v. Hydro Tank, Inc.*, 497 F.3d 445 (5th Cir. 2007)

In *Hydro Tank*, the Fifth Circuit Court of Appeals interpreted an umbrella policy's pollution exclusion clause and a contractor's limitation endorsement (CLE) clause. Three workers were injured while removing petroleum-byproduct sludge from a mixing tank owned and operated by the appellant insured. The insurer determined that the injuries arising out of the tank-cleaning incident fell within the policy's pollution exclusion clause. The court agreed, holding that the workers alleged they were injured, in whole or in part, by the release of hydrogen sulfide, a pollutant, and thus the policy's pollution exclusion applied. Because the CLE could not trump the pollution exclusion and create coverage where it would otherwise not have existed, the insured's claim for indemnity failed.

### LEAD PAINT MANUFACTURERS NOT SUBJECT TO PUBLIC NUISANCE CAUSE OF ACTION

*State of Rhode Island v. Lead Industries Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008)

In *Lead Industries*, the Rhode Island Supreme Court held the State could not bring a common law public nuisance claim against former lead pigment manufacturers because the State could not prove the manufacturers interfered with a public right or were in control of the lead pigment they manufactured when it caused harm to Rhode Island children. After examining the elements of a public nuisance claim, the court noted control at the time the damage occurs is a critical factor, and the complaint did not allege facts that would support an argument that the defendants were in control of the lead pigment at the time the harm occurred. Further, the court declined to expand the term “public right” to include the State's allegation that the manufacturers interfered with the “health, safety, peace, comfort or convenience of the residents of the state,” since to do so would expand public nuisance law beyond what was intended. Thus, the proper cause of

action for those harmed is a products liability action, not a public nuisance claim.

### POLLUTION EXCLUSION AT ODDS WITH POLLUTION CLEANUP CLAUSE

*SeaSpecialties, Inc. v. Westport Ins. Corp.*, 2008 U.S. Dist. LEXIS 90836, 2008 WL 4845037 (S.D. Fla. Nov. 7, 2008)

In *SeaSpecialties*, the United States District Court for the Southern District of Florida held that the presence of a pollution cleanup clause in a policy containing a pollution exclusion creates ambiguity with respect to coverage for a food contamination claim. *SeaSpecialties Inc.* sought coverage under an all-risk policy after it was discovered that its smoked salmon product carried bacteria and was recalled, and sued *Westport* for breach of contract and bad faith after the insurer refused coverage. *Westport* moved to dismiss the complaint based upon the policy's pollution exclusion, but the court denied the motion because the two clauses appeared to be at odds. The pollution exclusion excluded coverage for pollutant damage unless it was covered elsewhere in the policy, while the cleanup provision provided coverage for cleanup and removal of pollutants unless the policy otherwise excluded it.

### CELLPHONE RADIATION ALLEGATIONS TRIGGER DUTY TO DEFEND

*Zurich American Ins. Co. v. Nokia, Inc.*, No. 06-1030, 2008 WL 3991183 (Tex. Aug. 29, 2008); *Federal Ins. Co. v. Samsung Electronics America*, No. 06-1040, 2008 WL 4000812 (Tex. Aug. 29, 2008); *Trinity Universal Ins. Co. v. Cellular One Group*, No. 07-0140, 2008 WL 4000811 (Tex. Aug. 29, 2008)

In these three companion cases—*Nokia*, *Samsung*, and *Cellular One*—the Texas Supreme Court held insurers had a duty to defend an underlying lawsuit alleging cellphone radiation and bodily injury resulting therefrom. The court rejected the insurers' argument that the underlying plaintiffs were seeking only to recover the cost of headsets they claimed should have been furnished with the purchase of their cellphones to reduce the risk of cellphone radiation. The court noted the suits sought damages for bodily injury, not just the cost of the headsets. For an expanded discussion of these cases, go to [Emerging Issues: Consumer Class Actions: Defining the Limits of “Bodily Injury”](#) in this issue.

### BUSINESS RISK EXCLUSION APPLIES TO CONTAMINATED BREAD CLAIM

*Lavoi Corp., Inc. v. National Fire Ins. of Hartford*, 666 S.E.2d 387 (Ga.App. 2008)

In *Lavoi*, the Georgia Court of Appeals upheld an insurer's denial of coverage for claims related to the use of contaminated bread through application of the impaired property exclusion. Lavoi Corporation had provided contaminated bread to a franchise sandwich restaurant, and the restaurant asserted several causes of action against Lavoi. Hartford, Lavoi's insurer, denied coverage, citing the impaired property exclusion. The trial court entered summary judgment in the insurer's favor, but on appeal, Lavoi argued that the restaurant may have been able to prove that the contaminated bread caused property damage to the restaurant and bodily injury to its customers. The court rejected this argument and affirmed summary judgment in Hartford's favor because the definition of "impaired property" unambiguously included the contaminated bread the restaurant used in its sandwiches.

This decision is significant because the court applied a business risk exclusion in concluding that there was no coverage for claims arising from the insured's contaminated product.

### POTENTIAL BODILY INJURY CLAIM IS SUFFICIENT TO TRIGGER DUTY TO DEFEND

*Plantronics, Inc. v. American Home Assur. Co.*, No. C07-6038 PVT, 2008 U.S. Dist. LEXIS 88921 (N.D. Cal. Oct. 20, 2008)

In *Plantronics*, the court held that it was sufficient to trigger an insurer's duty to defend if the underlying complaint alleges potential bodily injury. Even though the underlying plaintiffs did not seek damages for bodily injury, the underlying complaint alleged Bluetooth Headsets can cause noise induced hearing loss. Noting that an insurer's duty to defend is not limited to what is stated in the complaint, the district court stated that the California Supreme Court has held there is a duty to defend even where a complaint was never amended to include a covered cause of action. Here, the ability for the plaintiffs to amend their complaints to allege bodily injury was sufficient to trigger the duty to defend.

## KEY DEVELOPMENTS IN COVERAGE LITIGATION 2008: ENVIRONMENTAL

*Peter Mintzer and Megan Kirk (Seattle)*

### COVERAGE FOR REMEDIATION AND PROPERTY DAMAGE CAUSED BY HEATING OIL LEAKS BARRED IN MASSACHUSETTS

*Nascimento v. Preferred Mut. Ins. Co.*, 513 F.3d 273 (1st Cir. Jan. 18, 2008) (Massachusetts)

In *Nascimento*, the court concluded a total pollution exclusion barred coverage for cleanup costs and property damage resulting from home heating oil that had leaked out of an underground storage tank on property previously occupied by the insured. The court rejected the district court's reliance on the "remedial action" component of the APE in the policy, section f(2)(a), which excluded "Any loss, cost or expense arising out of any ... Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants." Rather, the court held that section f(1)(a), which excluded "'property damage' arising out of the

actual ... discharge, dispersal, seepage, migration, release or escape of pollutants ... at or from any premises, site, or location ... which is or was at any time ... occupied by ... any insured," precluded coverage for the claim for both remediation and non-remediation damages. The court also concluded the insurer had no duty to defend or indemnify the insured.

*Greco v. Harleysville Worcester Ins. Co.*, 24 Mass.L.Rep. 431, 2008 Mass. Super. LEXIS 261 (Mass. Super. August 15, 2008)

In *Greco*, the Massachusetts Superior Court rejected the insured property owner's contention that the discharge of heating oil in her basement was a covered cause of loss where the release of oil was caused by decay or deterioration of an oil tank. The "Additional Coverages" clause in the policy that the insured relied upon only provided for clean up and removal of pollutants if the discharge resulted from a covered cause of loss. Deterioration and decay were specifically excluded causes of loss under the policy.

### ABSOLUTE POLLUTION EXCLUSION DOES NOT BAR COVERAGE FOR INDOOR HEATING OIL LEAK

*Whitmore v. Liberty Mut. Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 76049 (E.D. Pa. Sept. 30, 2008)

In *Whitmore*, the United States District Court for the Eastern District of Pennsylvania held that an absolute pollution exclusion did not bar coverage for a heating oil spill in the insured's basement. Although the heating oil "contaminated" the insured's basement, because it was not released into the environment, the heating oil did not constitute a "pollutant" and the claim was held to be beyond the scope of the absolute pollution exclusion clause.

### DIESEL FUEL QUALIFIES AS A "POLLUTANT" FOR PURPOSES OF THE ABSOLUTE POLLUTION EXCLUSION

*Montana Petroleum Tank Release Compensation Board v. Crumley's, Inc.*, 174 P.3d 948 (Mont. Jan. 3, 2008)

The Montana Supreme Court held that diesel and other motor fuels are included within the scope of the absolute pollution exclusion clause's definition of "pollutant." The court based its decision on the objective viewpoint of a consumer with "average intelligence," and concluded that such a consumer would consider diesel a pollutant when it leaks into the ground and contaminates soil and groundwater.

### GASOLINE QUALIFIES AS A "POLLUTANT" FOR PURPOSES OF AN ABSOLUTE POLLUTION EXCLUSION

*Whittier Properties, Inc. v. Alaska Nat'l Ins. Co.*, 185 P.3d 84 (Alaska June 13, 2008)

In *Whittier Properties*, the Alaska Supreme Court held that gasoline released from an underground storage tank is a "pollutant" within the meaning of the Absolute Pollution Exclusion. The Court rejected the insured's argument that gasoline was not a "pollutant." Instead, the Court concluded that although gasoline is a "product" under other portions of the insurance policy while the gasoline is in an underground storage tank, when the gasoline escapes or reaches a location where it is no longer a useful product and causes pollution, it is fairly considered a "pollutant" within the scope of the APE.

### EVEN "GREEN" BUSINESSES CAN BE SUBJECT TO THE ABSOLUTE POLLUTION EXCLUSION

*Larson v. Composting Concepts, Inc.*, 2008 Minn. App. Unpub. LEXIS 551 (Minn. Ct. App. May 13, 2008)

In *Larson*, the insured operated a composting business. Neighbors brought a claim for nuisance and other causes of action. In the coverage litigation that followed, the Minnesota Court of Appeals agreed with the insurer's contention that "living organisms, mold, bacteria, and bioaerosols" allegedly dispersed from the insured's composting site fell within the policy's definition of "pollutants." Because the living organisms, mold, bacteria and bioaerosols were alleged to have infiltrated claimants' homes and bodies, the court held that they were "contaminants" and "irritants," and that they therefore triggered application of the pollution exclusion. Thus, coverage for the claims was unavailable under the terms of the policy.

### QUALIFIED POLLUTION EXCLUSION DID NOT RELIEVE INSURER OF DUTY TO DEFEND WHERE THERE WAS SOME EVIDENCE OF A "SUDDEN AND ACCIDENTAL" DISCHARGE OF POLLUTANTS

*Industrial Enterprises, Inc. v. Penn America Ins. Co.*, 2008 U.S. Dist. LEXIS 67657 (D. Md. Sept. 2, 2008)

In *Industrial Enterprises*, the United States District Court in Maryland held that a qualified pollution exclusion did not relieve an insurer from its duty to defend an insured against an EPA demand letter alleging soil and water contamination. Although the comments the insured provided to the EPA in response to its proposal to place the insured's site on the National Priority List described continuous discharges on the site (which would not have triggered coverage because they were not "sudden and accidental"), there was also evidence of a discrete oil spill during the relevant policy period that the insured maintained the EPA had specifically relied upon in its decision to issue a demand letter. The Court concluded the insurer was obligated to provide a defense unless and until it could demonstrate the "spill" was not being relied upon by the EPA as a basis for the claim, or that the spill was not a "sudden and accidental" event.

### AN ACTION SEEKING CONTRIBUTION FOR "VOLUNTARY" RESPONSE COSTS IS NOT A "SUIT" SEEKING "DAMAGES" UNDER LIABILITY POLICIES

*Aggio v. Estate of Joseph Aggio*, 2008 U.S. Dist. LEXIS 49368 (N.D. Cal. June 19, 2008)

In *Aggio*, the United States District Court for the Northern District of California held that the liability insurer of a former owner of contaminated property had no duty to indemnify the insured against a contribution claim filed by the subsequent property owner, where that action sought contribution for "voluntarily-incurred" response costs. Although the soil contamination that occurred while the insured owned the property was "property damage," a judgment against the insured compelling contribution to the cost of remediating the property damage would not result in "damages" awarded in a "suit" as required to trigger the duty to indemnify under the policy. The court reasoned voluntarily-assumed response costs incurred by the plaintiff property owner were not "money ordered by a court" for which the insured was liable, and, as such, there was no potential for coverage under the policy under California law.

### POLLUTION EXCLUSION BARS COVERAGE FOR THORIUM CONTAMINATION IN CITY SEWER

*Precision Castparts Corp. v. Hartford Acc. & Indem. Co.*, 2008 U.S. Dist. LEXIS 46361 (D. Or. June 12, 2008)

In *Precision Castparts*, the United States District Court in Oregon held that a pollution exclusion applied to bar coverage for the cost of removing thorium from biofilms coating the inside of City sewers where the insured had intentionally disposed of thorium in the sewer system. In so holding, the Court rejected the insured's creative contention that although its initial release of thorium into the sewer was intentional, the thorium was also released a second time into the biofilms that coat the sewer pipes, and that second release was sudden and accidental for purposes of the pollution exclusion. The Court reasoned that the insured's discharge of thorium was expected and intended (and thus not sudden and accidental), and the biofilms where the thorium attached were within the sewer system, thus there was no separate "sudden and accidental" release.

Cozen O'Connor attorneys [Doug Tuffley](#), [Thomas M. Jones](#) and [Helen Boyer](#) of the Seattle office represented one of the prevailing insurers.

### INSURER HELD TO HAVE DUTY TO DEFEND UNDER CALIFORNIA LAW

*Employers Ins. Co. of Wausau v. California Water Service Co.*, 2008 U.S. Dist. LEXIS 65433 (N.D. Cal. August 25, 2008)

In *California Water Service*, the United States District Court for the Northern District of California held that qualified pollution exclusions did not eliminate the insurer's duty to defend California Water against claims that its wells had contributed to the dispersal of perchloroethylene (PCE) in the aquifer beneath Chico, California. Although the dispersal of contaminants caused by the operation of California Water's pumps was not sudden and accidental, the allegation of PCE spills by dry cleaners provided enough to defeat the insurer's motion for summary judgment on the duty to defend. The Court rejected the insurer's argument that coverage was barred by the "care, custody, and control" exclusion in the policies because the lawsuit against the insured sought damages for contamination of the aquifer, not water in California Water's system. The Court also rejected the insurer's argument that consent decrees between the insured and the California Department of Toxic Substance Control did not impose any financial obligations on the insured beyond its ordinary business operating costs. Because the consent decrees required the insured to design, build and maintain additional components of the water system to treat contaminated water, there were costs which the insured would not have incurred but for the contamination, and those costs constitute damages covered under the insurance policies.

### VERMONT SUPREME COURT ADOPTS CONTINUOUS TRIGGER AND TIME ON THE RISK ALLOCATION

*Towns v. Northern Security Ins. Co.*, 2008 VT 98, 2008 Vt. LEXIS 96 (Vt. August 1, 2008)

In *Towns*, the Vermont Supreme Court adopted the continuous trigger test, rather than a manifestation test, to determine whether an injury-producing occurrence gave rise to coverage for an environmental damage claim. The Court also held that "time on the risk" allocation is the appropriate basis to allocate the insurer's liability for defense and remediation expenses for an environmental loss. Thus, a homeowner's policy provided coverage for damage caused by pollution that occurred during the policy period, even though the property damage did not manifest until after the policy period had ended. Also, the liability for defense and indemnity costs was properly allocated between the insurer and the insured based

on each party's time on the risk. The insured was responsible for the portion of defense and indemnity costs corresponding to the time that he was self-insured. The Court also held the owned property exclusion did not bar coverage for groundwater contamination, and groundwater contamination constitutes "property damage," even if it does not reach levels that exceed state or federal clean water laws and regulations governing safe drinking water.

#### QUALIFIED POLLUTION EXCLUSION DOES NOT BAR COVERAGE FOR LOSS CAUSED BY BOTH GRADUAL AND SUDDEN AND ACCIDENTAL DISCHARGES WHERE INSURERS FAILED TO PROVE THAT GRADUAL RELEASES WERE THE "OVERRIDING" CAUSE OF DAMAGES

*Goodrich Corp. v. Commercial Union Ins. Co.*, 2008 Ohio 3200, 2008 Ohio App. LEXIS 2716 (Ohio App. June 30, 2008)

In *Goodrich*, the Ohio Court of Appeals held that motions for directed verdict based on qualified pollution exclusions were properly denied where the damages from sudden and accidental releases were indivisible from damages from gradual releases of contaminants. The Court rejected the insurers' contentions that the insured failed to prove any damages fell under the "sudden and accidental" exception because the insured could not demonstrate how much of the contamination was directly attributable to sudden and accidental releases. The Court concluded that where both sudden and accidental and gradual causes of loss were proven, the burden shifted back to the insurers to prove that the excluded gradual releases of contamination were the overriding cause of damages; the insured was not required to prove that the sudden and accidental releases it identified were the sole or primary cause of damages.

## KEY DEVELOPMENTS IN COVERAGE LITIGATION 2008: CONSTRUCTION DEFECT

*William F. Knowles (Seattle)*

#### INSURERS BOUND BY SETTLEMENT APPROVED AT REASONABLENESS HEARING WHERE COVERAGE TURNS UPON SAME FACTS OR LAW AT ISSUE IN UNDERLYING DISPUTE

*Mutual of Enumclaw Ins. Co. v. T & G Constr., et al.*, 2008 WL 4670256 (Wash. 2008)

In *T & G*, the Washington Supreme Court held that if a coverage question turns upon the same facts or law at issue in the

#### ANTI-ASSIGNMENT CLAUSE IN GENERAL LIABILITY POLICY BARS COVERAGE FOR ALLEGED CORPORATE SUCCESSOR'S LIABILITY FOR A SOIL AND GROUNDWATER CONTAMINATION LOSS

*Del Monte Fresh Produce, Inc. v. Fireman's Fund Ins. Co., et al.*, 183 P.3d 734 (Haw. Dec. 26, 2007)

In *Del Monte Fresh Produce*, the Hawaii Supreme Court held that anti-assignment clauses in liability policies issued to Del Monte Corp. barred coverage for a contamination claim against Del Monte Fresh. Del Monte Corp., the named insured on liability policies issued by the defendant insurers, owned and operated a pineapple plantation in Hawaii from the 1940s until 1989. In 1989, Del Monte Corp. transferred the assets and liabilities associated with its Hawaii operations to Del Monte Fresh. Del Monte Corp. did not seek or receive consent from its insurers to assign its rights under its insurance policies to Del Monte Fresh.

In 1995, the EPA issued special notice letters to Del Monte Fresh and Del Monte Corp. as potentially responsible parties for fumigant contamination in the soil and groundwater on the plantation. Del Monte Fresh responded to the EPA and entered into an Administrative Consent Order with the EPA and the State of Hawaii whereby Del Monte Fresh undertook investigation and remediation of the site. Del Monte Fresh tendered defense of the EPA claim to all liability insurers of the plantation land since the 1940s. The Hawaii Supreme Court held that the policies did not provide coverage for alleged successor Del Monte Fresh's liability because the insurers did not consent to an assignment of Del Monte Corp.'s rights under the policies to Del Monte Fresh.

underlying dispute between the claimant and the insured, the insurer will be bound by the results of a trial or settlement judicially approved as reasonable, absent a showing of collusion or fraud. The Court made clear, however, that simply because presumptive damages are approved in a reasonableness hearing does not mean the damages are covered under the insurance policy.

### MONTROSE ENDORSEMENT BARS COVERAGE FOR PROPERTY DAMAGE KNOWN TO INSURED PRIOR TO POLICY PERIOD

*Trinity Universal Ins. Co. v. Northland Ins. Co.*, 2008 WL 4386760 (W.D. Wash. Sept. 23, 2008)

In *Trinity Universal*, United States District Court Judge John Coughenour granted an insurer's motion to dismiss claims for breach of contract and contribution based on the insured's knowledge of the relevant damage prior to the inception of the policy period. Although the Court cited and relied upon a 2002 Washington Supreme Court case interpreting different policy language, *Trinity Universal* is notable as perhaps the first court decision applying the "Montrose Endorsement" as insurers intended.

### INJURY IN FACT TRIGGER APPLIES TO LATENT PROPERTY DAMAGE

*Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008)

In *Don's Building Supply*, the Texas Supreme Court resolved differences among the Texas courts by holding property damage "occurs" for purposes of an occurrence-based commercial general liability insurance policy when it happens, applying an "injury-in-fact trigger" to the underlying latent EIFS property damage claims. The Court rejected the argument that a manifestation trigger applied to latent property damage claims.

### REASONABLENESS HEARING IN CONTRACT ACTION NOT SUBJECT TO SAME FACTORS AS REASONABLENESS HEARING IN TORT ACTION

*The Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 187 P.3d 306 (Wash. App. 2008)

In *Heights*, the Washington State Court of Appeals rejected an intervening insurer's appeal from a reasonableness hearing, holding that such a hearing in a contract action is not subject to the same factors as a reasonableness hearing in a tort action. The insurer argued the trial court erred when it approved a settlement as reasonable, apparently in violation of certain reasonableness factors applicable to tort settlements. The Court held that those tort factors are not applicable when reviewing the reasonableness of a settlement in a contract action.

### ONGOING OPERATIONS LIMITATION IN ADDITIONAL INSURED ENDORSEMENT BARS COVERAGE FOR CONSTRUCTION DEFECT/COMPLETED OPERATIONS

*Hartford Ins. Co. v. Ohio Cas. Ins. Co., et al.*, 189 P.3d 198 (Wash.App.2008)

In *Hartford*, the Washington Court of Appeals upheld summary judgment in favor of American States, holding that the ongoing operations limitation in the additional insured endorsement bars coverage for construction defect/completed operations claims. In so holding, the Court cited a recent similar decision, *Weitz Co., LLC v. Mid-Century Ins. Co.*, 181 P.3d 309 (Colo.App. 2007).

### SIR IS NOT "INSURANCE" IN SUBROGATION CONTEXT AND DEFENSE COSTS PAID BY THE INSURED CONCURRENTLY SATISFY SIRs IN SUCCESSIVE PRIMARY POLICIES

*Bordeaux, Inc. v. American Safety Ins. Co.*, 186 P.3d 1188 (Wash.App. 2008)

In *Bordeaux*, the Washington Court of Appeals affirmed a trial court ruling that an SIR is not considered primary insurance for purposes of subrogation, and thus the developers were entitled to be made whole from any third-party recoveries prior to the insurer. Moreover, an insurer is not entitled to apportion defense costs between two policies where the insured's duty to defend is triggered under both policies. Thus, the insured satisfied its SIR obligations under both its liability policies by paying its defense costs in excess of a single SIR amount.

### INSURER PRECLUDED FROM DENYING COVERAGE BECAUSE OF DELAYED RESERVATION OF RIGHTS

*Pueblo Santa Fe Townhomes Owners' Ass'n Inc. v. Transcontinental Ins. Co. and Transportation Ins. Co.*, 178 P.3d 485 (Ariz. App. 2008)

In *Pueblo Santa Fe*, an Arizona appellate court refused to apply the "your work" exclusion where an insurer delayed 18 months in reserving its right to deny coverage. The Court invoked long-standing precedent in concluding that an insurer is equitably estopped from denying coverage because of its delay in issuing a reservation of rights letter, even where the insured has insulated itself from all liability by virtue of its

agreement with the Association. Thus, while the Court emphasized that prejudice to the insured is required to apply the estoppel doctrine, the prejudice established in this action was merely superficial because the insured was not exposed to any liability.

### CGL INSURERS OWE NO DUTY TO DEFEND OR INDEMNIFY HOMEBUILDERS AGAINST CONSTRUCTION DEFECT CLAIMS

*Millers Capital Ins. Co. v. Gambone Brothers Development Co., Inc.*, 2007 PA Super 403, 941 A.2d 706 (Pa. Super. 2007), *app. denied*, 2008 Pa. Lexis 2345 (Pa. Dec. 30, 2008)

In *Gambone*, the Pennsylvania Superior Court unanimously confirmed that an insurer has no duty to defend or indemnify a builder under a CGL policy for water intrusion damage to a home due to faulty workmanship. The decision affirmed two prior summary judgment rulings by the Montgomery County Court of Common Pleas and follows the Pennsylvania Supreme Court's decision in *Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006), where the Court declared that construction defect claims do not constitute "accidents" or "occurrences" for purposes of coverage under CGL policies. Gambone originally sought CGL coverage in connection with lawsuits and contractual arbitration demands from over 100 homeowners who claimed extensive mold and water damage to both exterior and interior elements of their home allegedly due to defective construction of the stucco exteriors of their homes by Gambone and/or its subcontractors. In affirming summary judgment for Millers, the Superior Court declared that "damage caused by rainfall that seeps through faulty home exterior work to damage the interior of a home is not a fortuitous event that would trigger [liability] coverage." The Pennsylvania Supreme Court denied the insured's Petition for Allowance of Appeal, leaving the Superior Court's carefully-reasoned opinion intact.

Cozen O'Connor's [Jacob Cohn](#) and [Joseph Arnold](#), assisted at the trial court level by [Joshua Broudy](#) and [Michael Metzger](#) (Philadelphia), represented the prevailing insurer. For additional discussion, see [Recent Victories](#), in this issue.

### DEFAULT ORDER SET ASIDE IN PART BECAUSE INSURER HAD STRONG DEFENSES BASED ON "ONGOING OPERATIONS" ENDORSEMENT, COVERAGE GRANT AND EXCLUSIONS

*Sacotte Construction, Inc. v. National Fire & Marine Ins. Co., et al.*, 177 P.3d 410 (Wash.App. 2008)

In *Sacotte*, the Washington Court of Appeals held that an attorney's telephone call to opposing counsel, which was acknowledged in two contemporaneous e-mails, constituted substantial compliance with appearance requirements such that the opposing party was required to provide actual notice of its motion for default. The Court also held that the trial court should have set aside the default order because the insurer had strong defenses based on the additional insured endorsement language and other coverage defenses.

### ENFORCEMENT OF PRETRIAL STIPULATED JUDGMENTS AGAINST LIABILITY INSURERS; PREJUDGMENT INTEREST AWARDED FOR PERSONAL INJURY CLAIMS IS NOT A SUPPLEMENTARY PAYMENT

*Old Republic Ins. Co. v. Ross*, 180 P.3d 427 (Colo. 2008)

In *Ross*, the Colorado Supreme Court left the door open for Colorado plaintiffs and insured-defendants to enter into pretrial stipulated judgments, and then to enforce those stipulated judgments against the insured-defendant's liability insurer. Historically, Colorado Courts of Appeals have refused to enforce pretrial stipulated judgments against insurers because of concerns that such judgments may not represent arm's length determinations of the worth of a plaintiff's claim. However, the Colorado Supreme Court stated that pretrial stipulated judgments are not per se unenforceable against insurers, and may be enforceable in situations where an insurer breaches its duty to defend its insured, acts in bad faith, or otherwise breaches its insurance contract. The Court also held prejudgment interest is an element of compensatory damages for personal injury claims, and therefore reduces the limits available for such claims.

**INSOLVENCY PROVISIONS IN EXCESS POLICY ENFORCEABLE; ATTORNEY'S FEES ARE NOT SUPPLEMENTAL PAYMENTS; PREJUDGMENT INTEREST IS OWED BY NON-CONTRIBUTING INSURER; ATTORNEY'S FEES NOT RECOVERABLE**

*Polygon Northwest Co. v. American Nat'l Fire Ins. Co.*, 189 P.3d 777 (Wash.App. 2008)

Polygon involves a complex set of facts and issues ultimately decided in the context of a contribution action among several insurers, including insurers that funded settlement of the underlying construction defect claim and an insurer that

refused to fund. The Washington Court of Appeals held that: (1) an excess insurer's indemnity obligation does not commence until the insured's liability exceeds the limits of all underlying insurance, including the limits of an insolvent primary insurer's policy; (2) attorney's fees do not constitute "costs taxed against the insured," within the meaning of a "supplemental payments" provision; (3) prejudgment interest may be awarded against insurers failing to pay their equitable share in funding a settlement; and, (4) an insurer may not recover attorney's fees in an equitable subrogation action.

**KEY DEVELOPMENTS IN COVERAGE LITIGATION 2008: PROPERTY**

*Richard M. Mackowsky (Philadelphia)*

**CONSEQUENTIAL DAMAGE CLAIMS AGAINST BUSINESS INTERRUPTION INSURER WERE UPHELD FOR ALLEGED BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING**

*Bi-Economy Market, Inc. v. Harleysville Ins. Co.*, 10 N.Y. 3d 187, 856 N.Y.S. 2d 505 (2008)

The highest state court in New York allowed claims alleging consequential damages against a commercial property insurer under a business interruption insurance policy based on the insured's claim that its business collapsed due to the insurer's conduct. After fire destroyed the insured's food inventory and caused structural damage to the insured building and equipment, the amount of the loss was disputed, and the insurer offered to pay only seven months of lost income even though the policy provided coverage for twelve months. According to the court, claims for consequential damages were reasonably foreseeable, and the policy's exclusion of certain consequential losses did not preclude the policyholder's consequential damage claims arising out of loss of its business. More recently, a lower state court emphasized that *Bi-Economy* does not bolster a claim for punitive damages. See *Silverman v. State Farm Fire & Cas. Co.*, No. 7699/08, 2008 WL 5005229 (N.Y. Sup. Oct. 8, 2008).

**COVERAGE FOR CIVIL AUTHORITY ENDS WHEN ACCESS TO THE PREMISES IS ALLOWED**

*Magee v. National Fire Ins. Co.*, 977 So. 2d 304, 2007-0474 (La. App. 2008) (Table), text available at 2008 WL 426285 (Feb. 8, 2008)

In a case arising out of Hurricane Katrina for coverage under the civil authority provision of a business insurance policy, the Louisiana Court of Appeal held that business interruption coverage for the insured law firm ended when an evacuation order was lifted. The court rejected the insured's argument that coverage continued for ongoing business income losses after the evacuation order was lifted, because civil authority coverage requires that the insured show an "action of civil authority that prohibits access to the described premises," a requirement that was absent once the evacuation order was lifted.

**COVERED BUSINESS INCOME LOSSES COULD NOT BE OFFSET BY RENTAL INCOME DERIVED FROM EXCLUDED PROPERTY**

*Chalmette Retail Center L.L.C. v. Lafayette Ins. Co.*, 974 So. 2d 822 (La. App. 2008)

The Louisiana Court of Appeal held that an insurer was not entitled to an offset or credit towards business interruption coverage based on rental income at a parking lot received by the policyholder from FEMA following Hurricane Katrina. The

parking lot itself was excluded from coverage under the commercial property insurance policy. Therefore rents derived from the parking lot pursuant to leases entered into after the hurricane could not be applied towards the business interruption/loss of rental income claimed by the insured on indoor commercial retail space that was covered.

#### **EVACUATION ORDER NOT BASED ON PROPERTY DAMAGE DOES NOT SUPPORT LOST REVENUE CLAIM**

*South Texas Medical Clinics P.A. v. CNA Financial Corp.*, No. H-06-4041, 2008 WL 450012 (S.D. Tex. Feb. 15, 2008)

The federal district court rejected a claim for lost revenue under the civil authority coverage of a business interruption insurance policy where, although a mandatory evacuation order was issued based on projections that Hurricane Rita would make landfall in the area, neither the insured's property nor property nearby was damaged. The policy required that the civil authority order must be one that "prohibits access to the described premises due to direct physical loss or damage to property." The evacuation order in this case was issued due to anticipated threat of damage, rather than due to property damage that had occurred, therefore the claimed business interruption losses were not covered.

#### **LOUISIANA VALUED POLICY LAW WAS INAPPLICABLE TO A TOTAL LOSS NOT CAUSED BY A COVERED PERIL**

*Elloie v. Allstate Ins. Co.*, No. 07-4434, 2008 WL 2794726 (E.D. La. July 18, 2008)

The federal district court held that the Louisiana Valued Policy Law (VPL) was inapplicable where the insured home was rendered a total loss as a result of wind, a covered peril under the homeowner's insurance policy, as well as flood, which was excluded. Citing Louisiana state court decisions, the court held that the VPL requires an insurer to pay the agreed face value of the insured property only if the property is rendered a total loss as a result of a covered peril.

#### **MOLD STAINING ON EXTERIOR HOME SIDING IS NOT "PHYSICAL INJURY."**

*Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 884 N.E.2d 1130 (2008)

Reversing the trial court in *Mastellone*, the Court of Appeals of Ohio held that the insured homeowners failed to show that mold on the exterior siding of their house constituted "physical damage" or "physical injury" as required by their homeowner's insurance policy. The mold, which was present

only on the surface of the siding and could be removed with no harm to the wood, did not alter or affect the structural integrity of the siding, therefore an award for damages to the exterior of the home was reversed.

#### **"ABSOLUTE" MOLD EXCLUSION DID NOT CONFLICT WITH THE CALIFORNIA PROXIMATE CAUSE STATUTE**

*De Bruyn v. Superior Court of Los Angeles*, 158 Cal.App. 4th 1213, 70 Cal. Rptr.3d 652 (2008)

Mold contamination which resulted from water damage caused by an overflowed toilet was effectively excluded where the all-risk homeowner's insurance policy provided that mold and any resulting loss is always excluded "however caused." The policy clearly stated that mold damage caused by a sudden and accidental release of water was excluded, although water damage caused by a sudden and accidental release of water was covered. The exclusion did not violate Cal. Ins. Code § 503 or the efficient proximate cause doctrine.

#### **REPLACEMENT COST COVERAGE DOES NOT REQUIRE IDENTICAL ROOF SHINGLES OR REPLACEMENT OF THE ENTIRE ROOF**

*Greene v. United Services Automobile Ass'n*, 936 A.2d 1178 (Pa. Super. 2007), *app. denied*, 954 A.2d 577 (Pa. 2008)

The Pennsylvania Court of Common Pleas held that, under a homeowner's insurance policy providing replacement cost coverage for the part of the building damaged, the insurer was not required to replace the entire roof of the home where only one slope of the homeowner's multi-sloped roof was damaged. Also, the insurer satisfied its obligation by repairing the damaged slope with shingles that were similar to the damaged shingles in function, color and shape where the exact shingles that were damaged were no longer available.

#### **INSURED'S APPRAISAL DEMAND WAS REJECTED WHERE CAUSATION AND COVERAGE WERE DISPUTED**

*Caribbean I Owner Ass'n v. Great American Ins. Co.*, Slip Copy, CIVA No. 07-0829-WS-B, 2008 WL 687381 (S.D. Ala. Mar. 10, 2008)

Following recent Alabama state court precedent, the federal district court held that an appraisal demand by the insured condominium association, following property damage as a result of wind-driven rain from Hurricane Ivan, was unenforceable. Appraisal is available only to decide valuation, not causation and coverage issues, both of which were disputed in this case.

### POLLUTION EXCLUSION WAS AMBIGUOUS IN THE CONTEXT OF WORLD TRADE CENTER PARTICULATE DAMAGE

*Ocean Partners, LLC v. North River Ins. Co.*, 546 F. Supp.2d 101 (S.D.N.Y. 2008)

The federal district court held that a pollution exclusion was ambiguous with respect to damage caused when a cloud of

particulate, including insulation and fire proofing materials, moved through the insured building's HVAC, mechanical and electrical pathways following the collapse of the World Trade Center. The court agreed it was unclear whether "contamination," which according to the court was a broad term in this context, applied to particulate, therefore this issue would be resolved by the fact finder.

## KEY DEVELOPMENTS IN COVERAGE LITIGATION 2008: INSOLVENCY AND REINSURANCE

*William Brody and Laurance Shapiro (New York)*

### MISSISSIPPI UNDERWRITERS ASSOCIATION DECLARED A PRIVATE ORGANIZATION NOT ENTITLED TO PUBLIC IMMUNITY FROM SUIT

*Association Cas. Ins. Co. v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 54197, 2008 WL 2954977 (S.D. Miss. July 15, 2008)

In *Association Casualty v. Allstate*, four members of the Mississippi Windstorm Underwriters Association ("MWUA") sought to sue MWUA's Board of Directors for its failure to purchase "adequate and reasonable" reinsurance to cover MWUA's losses as a result of Hurricane Katrina, an alleged breach of MWUA's fiduciary duty.

MWUA is an association created by the Mississippi Legislature to provide an adequate market for windstorm and hail insurance to coastal Mississippi. All property and casualty insurers writing direct business in Mississippi are obligated to be members of MWUA. In seeking immunity from the suit, the MWUA Board argued, *inter alia*, that it was an "instrumentality of the state." The Southern District rejected this argument and held that because MWUA is a private organization administering private funds it is not an instrumentality of the state and, therefore, not entitled to public immunity from suit.

### CLAIM AGAINST NEW YORK SUPERINTENDENT AS REHABILITATOR PERMITTED TO PROCEED

*Callon Petroleum Co. v. Superintendent of Insurance of the State of New York*, 53 A.D. 3d 845, 863 N.Y.S. 2d 92 (App. Div. Third Dept. 2008)

The Appellate Division, Third Department, of the New York Supreme Court found that the Superintendent of Insurance as Rehabilitator of Frontier Insurance Company had acted in

such an arbitrary and capricious manner toward a claimant that the claimant's application in the rehabilitation proceeding against the Rehabilitator for satisfaction of a money judgment should not be dismissed. The validity of a default judgment in favor of the petitioner, Callon Petroleum, against Frontier had been upheld by state and federal courts and the value of the claim had been fixed in the Frontier rehabilitation proceeding. The Court directed the Rehabilitator to take "some affirmative action with respect to petitioner's claim."

### GUARANTORS OF REINSURER ORDERED TO SATISFY OBLIGATIONS OF REINSURER

*Everest Nat'l Ins. Co. v. Sutton*, 2008 U.S. Dist. LEXIS 62081 (D.N.J. Aug. 11, 2008)

In *Sutton*, the United States District Court for the District of New Jersey enforced guaranties made by the CEO of an underwriter and servicer of subprime auto loans and by other guarantors, given as a condition for procuring insurance for the lender. Sutton, the CEO of the lender, made the guaranties to secure the obligations of a reinsurer (also owned by Sutton) as an incentive for the insurer to provide default protection insurance for the lender. When the reinsurer ultimately failed to post security as required by an arbitration order, the insurer sought summary judgment from the Court ordering the Guarantors of the reinsurer's obligation, including Sutton, to satisfy the reinsurer's obligation. The Court granted partial summary judgment ordering the Guarantors to post security in the amount set forth in the award, and dismissed the defendants' claims that the terms of the guaranties were unenforceable because they were either fraudulently induced or executed under economic duress.

## REINSURER OF THE HOME INSURANCE COMPANY PERMITTED BY LIQUIDATOR TO OFFSET AMOUNTS OWED THE HOME

*In the Matter of the Liquidation of the Home Ins. Co.*, 157 N.H. 543; 953 A.2d 443 (N.H. July 25, 2008)

The Supreme Court of New Hampshire resolved a dispute between the Liquidator of the Home Insurance Company and a reinsurer of the Home. At issue was whether the reinsurer, Century Indemnity Company (CIC), could set off amounts payable to CIC's affiliates by the Home against amounts owed by CIC to the Home as a reinsurer of the Home. The affiliates had assigned their rights to those reinsurance recoverables to CIC. Finding that the assignment of the recoverables to CIC was absolute and not just for purposes of collection, the Court held that CIC could offset amounts owed to its affiliates by the Home against amounts owed by CIC to the Home.

## REINSURED MAY NOT PURSUE CLAIM FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AGAINST REINSURER

*California Joint Powers Ins. Auth. v. Munich Reinsurance America, Inc.*, 2008 U.S. Dist. LEXIS 56654, 2008 WL 1885754 (C.D. Cal. Apr. 21, 2008)

In *California Joint Powers Insurance Authority*, the United States District Court for the Central District of California dismissed the defendant reinsured's cause of action, holding that the reinsured may not recover damages under a tort theory for its reinsurer's alleged breach of the implied covenant of

good faith and fair dealing. The Court held that the California Supreme Court would not find the imposition of tort liability to be appropriate in the reinsurance context, because public policy considerations supporting tort liability in the insurance context do not apply in the reinsurance context.

## CAUSE OF ACTION AGAINST LIQUIDATED INSURANCE COMPANY'S PARENT COMPANY ALLOWED TO PROCEED

*Drury Development Corp. v. Foundation Ins. Co.*, 380 S.C. 97, 668 S.E.2d 798 (S.C. Nov. 3, 2008)

Answering a question certified by the United States District Court for the District of South Carolina, the South Carolina Supreme Court ruled that a judgment against a corporation is not a prerequisite to an alter ego claim. The plaintiff's claim against the Foundation Insurance Company had not been paid when Foundation was placed into liquidation. The plaintiff sued Foundation's parent company and the shareholders of the parent company to recover the damages that were no longer available from Foundation because it was in liquidation. The Court cautioned that its holding allowing the action to proceed against the parent company and its shareholders without a prior judgment against Foundation "should not be construed to undermine the legislature's determination that 'no action at law or equity may be brought against the insurer or liquidator' once an order of liquidation has been issued."

## EMERGING ISSUES: GLOBAL WARMING INSURANCE TAKES THE STAGE AT UNITED NATIONS CLIMATE CHANGE TALKS

*William F. Stewart (West Conshohocken)*

In early December, negotiators from 192 nations gathered in Poznań, Poland, to participate in the United Nations' 14th Annual Conference on Climate Change. Although progress came frustratingly slow, some advancement was achieved -- including a breakthrough regarding the role of

insurance in combating the effects of global warming. Specifically, negotiators showed great enthusiasm for a proposal promoting the use of new insurance products to assist developing nations in adapting to climate change.

*The Status of International Climate Change Negotiations*  
Humanity faces an unprecedented global dilemma. On the one hand, a consensus of scientists predict that if we continue to emit massive amounts of greenhouse gases into the atmosphere, our planet will be vulnerable to cataclysmic climate change. On the other hand, the task of achieving the

"necessary" emission reductions will require a forfeiture of our nation's energy and economic sovereignty, an unpredictable loss of productivity and wealth, and a redefined world order. In 1992, in an attempt to reconcile these spectacularly unappealing alternatives, the United Nations created a framework for international negotiations on emission reductions.

Pursuant to that United Nations framework, each year, negotiators and diplomats convene at an international Conference of Parties (COP) to discuss greenhouse gas (GHG) restrictions. The third UN Conference (COP-3), held in Kyoto, Japan, resulted in the world's first legally binding international agreement to reduce GHG emissions (the "Kyoto Protocol"). Because the Kyoto Protocol expires in 2012, and because no successor agreement has been ratified, there is a growing sense of urgency in the international community. At COP-13, held in Bali (2007), world leaders agreed to conclude negotiations on a post-2012 treaty by COP-15 in Copenhagen (December, 2009). Thus, COP-14 in Poznań represented the crucial halfway point on the Bali roadmap to Copenhagen. Despite high expectations, however, Poznań yielded as much retreat as advance.

### *The "Shared Vision" Debate*

Popular wisdom says that the United States stands virtually alone in refusing to ratify the Kyoto Protocol. Although technically true, that statement is somewhat misleading. First, many of the 39 participating "industrialized nations" have never met their negotiated Kyoto reductions. Second, the participation of the 153 "developing nations" (like China, India, Brazil, and Mexico) is limited to *receiving* investments and technology transfer. In other words, more than 75% of the treaty's participants are beneficiaries with no obligation to make any sacrifice. At Bali (COP-13), the developing nations agreed to initiate negotiations to reduce their own emissions -- with each nation recognizing its "common but differentiated" responsibilities. These broader negotiations between industrialized and developing nations, referred to as "shared vision," were scheduled to commence in Poznań.

On its opening day, however, Algeria, Saudi Arabia, China, and other developing nations, rocked the Conference by insisting that any discussion of shared vision was premature. These delegations expressed the view that, until those nations with "historical responsibility" and "high per-capita emissions" get their own houses in order, there is little to talk about. As the Conference proceeded, these nations made it clear that any

discussion of emission limits in developing nations must also include negotiations about how much technology transfer, infrastructure financing, and funding of adaptation projects the industrialized nations are prepared to provide.

Whether this unexpected exchange represents a serious step backward or merely pre-Copenhagen posturing is unclear. What is clear, however, is that with developing nations now accounting for 45% of world emissions, a solution without a shared vision is not possible.

### *Unreasonable Expectations?*

Realistically, any successor agreement to the Kyoto Protocol is likely to involve:

- (1) significant emission cuts by the United States and other industrialized nations (probably in the range of 20% by 2020);
- (2) continuing *increases* in emissions by developing nations over the next two decades;
- (3) significant investment by industrialized nations in the energy infrastructure of developing nations;
- (4) mandatory funding of adaptation projects in developing nations by industrialized nations to confront the physical manifestations of climate change; and
- (5) a massive transfer of technology-based intellectual property from the industrialized nations to the developing nations. That means that, for a deal to get done, technology, jobs, and money will have to flow from nations like the United States to countries like China and India.

The confluence of the current financial crisis, existing concerns over the loss of United States manufacturing jobs, a populace still relatively split on the issue of climate change, and a uniquely energy-driven suburban society, all will serve as obstacles to American participation in such a global deal. To add to this quandary, international expectations concerning concessions by the new United States administration to a post Kyoto treaty are extremely high. In effect, United States climate change negotiators in 2009 will be faced with the perfect storm.

### *Some Good News From an Unexpected Source – The Insurance Industry*

The United Nations has historically recognized that the insurance industry has a role to play in developing climate change solutions. The Poznań Conference, however, represented an epic step forward in that regard. On December 4, 2008, negotiators received presentations and comments on potential

insurance solutions from multiple sources, including the Munich Climate Insurance Industry (MCII). The MCII proposal to the United Nations “piggybacked” off of the existing understanding (memorialized in the Bali Action Plan) that industrialized nations will financially assist developing nations in adapting to climate change. Specifically, the MCII proposed that some portion of the United Nations adaptation fund be used to purchase drought insurance, micro-insurance, and weather index products in developing nations. These products, provided either free or at a discount, would permit local farmers to survive droughts and floods. In turn, the new-found stability would permit farmers to expand crop yields, negotiate long-term agreements, and obtain loans. The MCII estimates that a pilot program, in which insurance is utilized as a adaptation mechanism, could be funded for \$10 billion. Such a program would not only create a growing new market for insurers, but it would also permit participating insurers to gain a foothold in new, increasingly stable, geographic locations.

## EMERGING ISSUES: CELLPHONES, BPA

### CONSUMER CLASS ACTIONS: DEFINING THE LIMITS OF “BODILY INJURY”

*Kevin Haas (New York)*

**T**he CGL policy requires the insurer to “pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ . . . to which this insurance applies,” and provides that the insurer has “the right and duty to defend the insured against any ‘suit’ seeking those damages.” (ISO Commercial General Liability Coverage Form, 2000). The CGL policy defines “bodily injury” to mean “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” (*Id.*) Recent cases involving cellphones and plastic baby bottles challenge the limits of these provisions.

In *Zurich American Ins. Co. v. Nokia, Inc.*, 2008 WL 3991183 (Tex. 2008) (“*Nokia*”), the Texas Supreme Court held that there was a duty to defend certain “putative class actions alleging that radiation emitted by phones caused biological injury,” because

### *The Coming Year*

Successful implementation of any post-2012 climate treaty will fundamentally alter international economics -- and in so doing, will create a broad range of hardship and opportunity. The coming year will be critical, both domestically and internationally, with regard to climate legislation and agreements. Organizations which proactively evaluate, anticipate, and respond to these changes will secure a substantial competitive advantage over those that do not.

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such “suits seek damages because of bodily injury.” *Id.*, slip op. at p. 3. Conversely, we believe the putative class actions filed in the Bisphenol-A (“BPA”) Multi-District Litigation (“MDL”) in the United States District Court for the Western District of Missouri will not be found to seek “damages because of bodily injury.”

### *The Nokia Case*

In the *Nokia* case, “[n]one of the [underlying] complaints” used “the term ‘bodily injury’; all [were] phrased in terms of ‘biological injury’ or ‘biological effects.’” *Nokia*, slip op. at p. 5. However, the court searched the complaints and found allegations of “adverse cellular reaction and/or cellular dysfunction,” assertions that plaintiffs “sustained biological injuries,” and allegations that plaintiffs “sustained repeated biological injuries and/or harm.” *Id.* The court concluded that “the biological injuries alleged by plaintiffs potentially state a claim for bodily injuries under the policies.” *Id.*, slip op. at p. 6.

The court further determined that the plaintiffs sought “damages because of bodily injury,” because, although the plaintiffs sought to require Nokia to provide headsets, the plaintiffs’

claims for relief were not limited to such relief and included claims for “monetary damages,” “actual damages . . . not limited to the costs of purchasing headsets,” and language of a similar nature. *Id.*, slip op. at p. 7. While the court stopped short of holding that the costs of purchasing headsets alone constituted “damages,” the court concluded that the plaintiffs sought other damages based on their physical exposure to radiation from the cellphones.” *Id.*

It is important to note that the *Nokia* court addressed the duty to defend, only. The court stressed that the duty to defend is broader than the duty to indemnify, and resolved “all doubts regarding the duty to defend in favor of the duty,” while construing “the pleadings liberally.” *Id.*, slip op. at p. 4. Furthermore, the court was influenced by decisions from other courts, including two federal circuit courts, that “analyzed in . . . detail the duty to defend the identical claims . . . [and] held that such a duty exists.” *Id.*, slip op. at p. 9. (citing *VoiceStream Wireless Corp. v. Fed. Ins. Co.*, 112 F. App’x 553, 557 (9th Cir. 2004); *Northern Ins. Co. v. Baltimore Bus. Communications, Inc.*, 68 F. App’x 414, 422 n.11 (4th Cir. 2003); *Ericsson v. St. Paul Fire & Marine Ins. Co.*, 423 F. Supp. 2d 587 (N.D. Tex. 2006); *Motorola, Inc. v. Associated Indem. Co.*, 878 So.2d 824, 837 (La. Ct. App. 2004), writ denied, 888 So.2d 207 (La. 2004)). The court reasoned that to fail “to recognize the duty [to defend] . . . would mean that Nokia . . . [a] Texas corporation . . . would be deprived of a defense to which other parties in other jurisdictions are entitled.” *Id.*, slip op. at p. 9. The Texas Supreme Court declined to construe Texas duty to defend law more narrowly than the duty to defend law of other jurisdictions.

Consequently, the *Nokia* court extended the duty to defend to complaints in which plaintiffs allege current biological injuries and seek unspecified “damages based on their physical exposure to radiation” from cellphones. *Id.*, slip op. at p. 7.

### *The BPA Complaints*

Earlier this year, a series of class action complaints were filed in several federal courts alleging that manufacturers of plastic baby bottles, bottle liners and plastic training cups improperly failed to disclose that the products contained Bisphenol A (“BPA”), the base chemical, or monomer, used to make polycarbonate plastic, which has been linked to various medical problems in several laboratory animal studies. The BPA Complaints have been consolidated in Multi-District Litigation in the Western District of Missouri. See *In Re: Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation*, MDL No. 1967.

The plaintiffs in the BPA Complaints are the parents of the children who used the products, and the parents/plaintiffs bring no claims on behalf of their children. Rather, the plaintiffs claim that they would not have purchased the products had the manufacturers disclosed that they contained BPA, and the plaintiffs seek to recoup amounts spent to purchase the BPA-containing products, as well as amounts incurred to purchase BPA-free products. Other equitable relief and unspecified damages are generally sought.

In our view, the BPA Complaints are distinguishable from the cellphone complaints because the plaintiffs allege only a “risk” or “threat” of future injury, and such “risk” or “threat” is not one of future injury to the plaintiffs themselves, but to their children, who are not plaintiffs.

In the *Nokia* case, the dissent stated the “obvious answer” to the following question: why did the underlying claimants specifically allege “biological injury,” rather than “bodily injury”?

The cases are putative class actions. None of the named plaintiffs claims damages for personal injuries caused by cellphone radiation. Their damage claims are for not having been furnished headsets with their phones, at most a few dollars, certainly not worth the freight of the litigation. None of the cases has any value unless a class is certified aggregating millions of claims for headsets. A class cannot be certified if questions common to the class members do not predominate. Questions common to class members cannot predominate if class members claim individualized bodily injuries. If the cases are to have any value, the pleadings must never breathe the words “bodily injury”. They never do.

This truism is, if anything, clearer in the BPA Complaints. No plaintiff alleges “bodily injury”; indeed, the only “potential plaintiffs” facing a “risk” or “threat” of future injury are absent from the pleadings. We believe this removes the BPA Complaints from the scope of the *Nokia* decision. There can be no duty to defend a suit where no claimant has alleged “bodily injury”, and no “damages” can be awarded in consequence.

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*For questions regarding exposure for cellphone or BPA claims, contact Kevin Haas (New York).*

## EMERGING ISSUES: MARITIME LAW

### A REPLACEMENT FOR COGSA IN 2009?

*Rod Fonda (Seattle)*

The Carriage of Goods by Sea Act (COGSA), 46 U.S.C. app. §§1300 *et seq.*, has provided the legal framework for ocean cargo shipments to and from the United States since the Act was passed in 1936. Unfortunately COGSA has never been amended, notwithstanding the monumental changes in global trade which have occurred in the last 72 years. In 1936, it was still 15 years before Sea-Land began to experiment with a single "container" which could be used not only on a ship, but also for inland transportation on a truck or railroad. COGSA provides a \$500 per package limitation, notwithstanding the fact that \$500 today is worth what \$32.09 was in 1936. Somehow the entire legislative package was enacted in 1936 without anyone considering the effect of electronic bills of lading transmitted by computers around the world.

A new uniform law which would replace COGSA and similar statutes in other countries is creeping closer to actuality. Provisionally named the "Rotterdam Rules," the United Nations General Assembly recently adopted without dissent the Convention which had been hammered out over a 10 year period by the United Nations Commission on International Trade Law (known as UNCITRAL). A celebration event has already been scheduled for September 21-23, 2009 in Rotterdam to honor the new system. The pre-planning group assumes that by September at least 20 countries will adopt the plan, the minimum necessary to make it effective where enacted.

In past years Congress has declined to adopt other, post-COGSA, measures which international groups proposed, such as the Hague-Visby Amendments of 1968 and the Hamburg Rules of 1978. It took 12 years for Congress to pass COGSA, which was essentially the same plan as what was called the Hague Rules in other countries, after that Convention was proposed in 1924. There is hope, however, that this time around Congress might move a little more swiftly, because United States groups representing a broad spectrum of involved industries actively participated in the UNCITRAL process.

In addition to an increase in the \$500 per package limitation, the proposed Rotterdam Rules include a number of substantive changes, including elimination of the Error in Navigation defense. The proposed Rules would render moot most of the restrictions allowed by the U.S. Supreme Court's 1995 *Sky Reefer* decision (*Vimar Seguros y Reaseguros v. M/V SKY REEFER*, 515 U.S. 528), which authorized enforcement of forum jurisdiction clauses hidden in the fine print on the reverse side of bills of lading. The proposed Rules would also provide guidance for modern industry practices, including multi-modal shipments, electronic documentation, and service contracts. Overall, they are a comprehensive and thoughtful update of a system which has desperately needed one.

When/if Congress decides to adopt the Rotterdam Rules, in their entirety or with amendments, the maritime lawyers at Cozen O'Connor will be issuing further updates to address the substance of the changes.

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*For questions on developments in maritime law, contact Rod Fonda (Seattle) or David Loh (New York).*

## SPECIAL REPORTS: APPEALS

### CONSIDERING WHETHER TO APPEAL

*Melissa O'Loughlin White (Seattle)*

**A**fter a jury renders its verdict or a summary judgment ruling that disposes of the case, one party is a big winner. At the same time, the other party is an equally big loser. Considerable amounts of time and energy have been devoted to the case and emotions are high. The losing

party instinctively holds out hope for vindication while the prevailing party feels confident and validated in its position. Neither party is in a mood to compromise. Despite this, there are times when it is best for the losing party not to appeal. It even makes sense sometimes for the winning party to do whatever it can to avoid facing an appeal.

Appeals are fundamentally different from trials in that appeals involve no live testimony and no juries, and are decided in an academic fashion by a panel of judges reviewing the under-

lying proceedings in search of legal errors. Moreover, appellate decisions are publicly available and, if published, have far-reaching consequences that shape the law throughout any given industry. For these reasons, it is imperative that the decision of whether to appeal or whether to settle be given careful and serious consideration. If a determination is made that an appeal should not be taken (or your opponent's appeal avoided), then these same factors can be used as leverage to negotiate a settlement.

#### *How Much Deference Must the Appellate Court Give to the Decisions Being Appealed?*

Certain decisions, such as summary judgment orders and other legal rulings, are reviewed *de novo* by the appellate court. This means that the appellate court affords no deference whatsoever to the trial court's ruling. Instead, the appellate court considers and decides the issues as if doing so for the first time. This means that the party that won on summary judgment has to start all over at the appellate level and attempt to persuade the panel of appellate judges that it is entitled to summary judgment as a matter of law.

By contrast, appellate judges review other types of rulings for an abuse of discretion. This means the appellate judges afford a high level of deference to the trial judge's decision, and will only reverse if they determine that the trial court made a severe mistake. Examples of rulings that fall within this category are determinations of credibility. If a trial judge or a jury finds one witness credible and another witness not credible, it is rare that the court of appeals would disturb these determinations.

If the trial court decision is in the latter category, then it is more likely that the trial court decision will stand and less likely it will be reversed on appeal. By contrast, if the trial court decision is in the former category, then the legal arguments essentially begin anew albeit before a different audience focused on broader, more academic perspectives.

#### *How Well Developed is the Evidentiary Record and the Underlying Briefing?*

Because the appellate judges cannot consider new evidence, the evidence preserved at the trial level is all that exists for the purposes of deciding an appeal. No matter how favorable certain witnesses' testimony may be to a party's case, if that witness did not already testify or submit a sworn declaration to the trial court then it cannot be considered by the court of appeals. Likewise, in most cases if legal issues are

not raised to the trial court, parties are prohibited from raising them for the first time on appeal.

At times even the most favorable of trial decisions do not necessarily make good cases to appeal if, for example, legal issues were not preserved at the trial level and/or evidence was not entered into the written trial court record. Sometimes, events transpire in the trial court that are not captured in the record and may be perceived in a different way by the appellate court. While a well-developed evidentiary record and strong trial level briefing are usually essential to a strong case on appeal, a party can also benefit from an opponent's failure to provide documentation and/or raise issues. A complete assessment of the record and issues raised is essential in determining whether a case is a good one to appeal.

#### *What Are the Broader Implications of an Appellate Decision?*

Both winning and losing parties must take an honest and thoughtful look at the broader implications of an appellate decision, including other related appellate decisions, legal trends, and the political climate. If the trial court ruling addresses an issue that is in need of clarification under the law, then the avoidance of uncertainty may weigh in favor of appealing. By contrast, if recent appellate court decisions display a trend adverse to the position being advocated, this may be an indication that the appeal should be avoided so as to allow that position to remain a viable possibility in the next case.

#### *Are the Strengths of the Case Academic, Practical, or Emotional?*

Identifying the strengths of the case is imperative to determining whether this is a good case to appeal. Given the tendency of appellate courts to provide in-depth legal analysis in an academic manner, issues that involve scholarly legal analysis and debate are well-suited to the court of appeals. By contrast, cases that are strongest due to their practicality or emotional pull are generally not as persuasive to an appellate court.

#### *Is the Status Quo Tolerable Pending Appeal?*

The duration of an appeal is lengthy. The appellate record must be compiled that includes documents submitted to the trial court as well as transcripts of hearings. Thereafter, extensive briefing must be filed, followed by oral argument. A panel of judges then decides the case and drafts an opinion. The timelines vary greatly among courts, but it is not uncommon for the process to take two years. Another appeal to a higher court could follow.

Whether it is a court order to do or refrain from doing something, or a money judgment, the winning party technically is entitled to its benefits on appeal. As a practicality, however, enforcement of the decision is usually stayed pending appellate resolution. If it is a money judgment, the party ordered to pay must in most cases post a bond in order to halt collection of the full amount. In certain types of cases, reverting to the status quo is acceptable, possibly even beneficial. In other types of cases, proceeding without the benefit of the trial ruling is a huge sacrifice. The specific facts of the case must be analyzed closely in order to ascertain the value of waiting for an appellate ruling.

#### *Could a Cross-Appeal Lead to a Worse Result?*

If the trial court's decision provided each party with partial relief, then serious consideration must be given to whether

more could be lost if an appeal is pursued. In many instances, a party that largely prevails is not inclined to seek appellate review of unfavorable rulings that were issued in the case. This sentiment often changes when the prevailing party realizes that the case is headed to the appellate court anyway. It is therefore imperative to consider how the case could change on appeal if there is a cross-appeal, especially when there may be far-reaching implications of a published decision on legally interesting issues that could become the focus of the published opinion.

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*For questions on appeals, contact Melissa O'Loughlin White (Seattle) at 206.373.7240 or [mwhite@cozen.com](mailto:mwhite@cozen.com), or Jacob Cohn (Philadelphia) at 215.665.2147 or [jcohn@cozen.com](mailto:jcohn@cozen.com), who are co-leaders of the Global Insurance Group's Appellate Practice Area.*

## RECENT VICTORIES: APPEALS

### D.C. CIRCUIT AFFIRMS JUDGMENT ALLOWING INSURERS TO BRING SUIT AGAINST LIBYA IN SUBROGATION ACTION

*La Reunion Aeriennne v. The Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837 (D.C. Cir. 2008)

The United States Court of Appeals for the D.C. Circuit agreed with Christopher B. Kende and Edward Hayum (both New York) and affirmed the District Court, confirming that a subrogated insurer "steps into the shoes" of paid victims and that, even if the insurer is a foreign entity and would not otherwise have been entitled to assert the rights of a United States victim, as subrogee, it acquires those rights. The Cozen team represented the insurers of an aircraft, UTA Flight 772, which was blown up over Chad, West Africa in 1989, by the same terrorist group responsible for the 1988 Pan Am Flight 103 Lockerbie tragedy. The action was filed against Libya and its police agency, LESO, for recovery of about \$40 million, plus interest, paid to the owner of the destroyed aircraft, as well as the survivors of the eight United States passengers who were killed in the attack. Libya moved to dismiss the complaint on jurisdictional grounds, claiming that the insurers were not the direct "victims" and that therefore they could

not avail themselves of the exception to the Foreign Sovereign Immunity Act for terrorist acts committed by states on the list of terrorist states maintained by the State Department. The Court of Appeals affirmed the District Court's denial of the motion, holding that the insurers "stood in the shoes" of the victims and, therefore, could assert the claim against Libya under the Foreign Sovereign Immunity Act exception. This case will certainly impact other suits against terrorist states under the Act.

### SUPREME COURT OF PENNSYLVANIA DENIES INSURED'S PETITION FOR ALLOWANCE OF APPEAL

*Millers Capital Ins. Co. v. Gambone Brothers Development Co., Inc.*, 2007 PA Super 403, 941 A.2d 706 (Pa. Super. 2007), *app. denied*, 2008 Pa. Lexis 2345 (Pa. Dec. 30, 2008)

Jacob C. Cohn and Joseph A. Arnold, assisted at the trial court level by Joshua Broudy and Michael Metzger (all Philadelphia) persuaded the Supreme Court of Pennsylvania to deny an insured's Petition for Allowance of Appeal, leaving intact the Superior Court's carefully-reasoned, precedential opinion. The Superior Court's decision affirmed two prior summary judgment rulings by the Montgomery County Court of

Common Pleas which held that Millers Capital had no duty to defend or indemnify the insured in connection with two lawsuits brought by various homeowners seeking damages for their leaky homes. Gambone originally sought commercial general liability coverage in connection with lawsuits and contractual arbitration demands from over 100 homeowners who claimed extensive mold and water damage to both exterior and interior elements of their homes allegedly due to defective construction of the stucco exteriors of their homes by Gambone and/or its subcontractors. Millers Capital filed two declaratory judgment actions: one sought a declaration that it had no obligation to indemnify Gambone against a \$1.1 million arbitration award in favor of four original homeowners; the second asked for a declaration that Millers Capital had no duty to defend or indemnify against a separate lawsuit brought by another homeowner. In affirming summary judgment for Millers Capital, the Superior Court declared that “damage caused by rainfall that seeps through faulty home exterior work to damage the interior of a home is not a fortuitous event that would trigger [liability] coverage.” For additional discussion, go to [Key Developments: Construction Defect](#), in this issue.

#### TEXAS SUPREME COURT UPHOLDS AS PRIVILEGED THE PRE-SUIT COMMUNICATIONS BETWEEN ATTORNEY AND CARRIER

*Oakwood Apartments, L.L.C. v. Everest Nat’l Ins. Co.*, No. 070944 (Tex. 2008)

Gregory S. Hudson and Ronald E. Tigner (both Houston) succeeded in convincing the Texas Supreme Court and the intermediate appellate court not to overturn the order of the trial court holding that communications between an insurer and attorneys were privileged. The insured, an apartment complex, sought discovery of the pre-suit communications between the insurer and its attorneys generated during a pre-suit claim investigation, contending that such communications were relevant to its bad faith claims. The insured claimed that the communications were either not privileged or that privilege had been waived. The trial court found that such materials were privileged and therefore exempt from discovery. The insured petitioned for a writ of mandamus first to the intermediate appellate court and finally to the Texas Supreme Court. The Cozen attorneys vigorously and successfully defended the actions of the insurer throughout the litigation in these circumstances of first impression.

## RECENT VICTORIES: TRIAL COURT DECISIONS

#### MDL MASS DISMISSAL IN HUMAN TISSUE LITIGATION

Denise B. Bense (West Conshohocken), John T. Salvucci (Philadelphia), Denise H. Houghton (Philadelphia), Rick E. Wegryn (West Conshohocken), and Greg A. Delfiner (West Conshohocken) joined forces to win summary judgment resulting in the dismissal of almost 400 federal cases in an MDL for human tissue litigation before Judge Martini in Newark, New Jersey. The litigation involved claims that human tissue distributed by the client was tainted. After deposing 18 experts around the country, the Cozen O’Connor litigators demonstrated for the defense that the human tissue at issue was disease-free even though it had been taken without consent by a convicted criminal. The court issued a 102-page opinion following the Cozen O’Connor team’s arguments.

#### DISTRICT COURT GRANTS SUMMARY JUDGMENT AND HOLDS THAT A BREACH OF WARRANTY IS NOT AN OCCURRENCE

Joseph A. Ziemianski, Joanna Nelson, and Tyler D. Henkel (all Houston) won a motion for summary judgment for an insurer in a declaratory judgment action in the United States District Court of the Southern District of Texas. The issue was whether, under Missouri law, a breach of warranty claim constituted an occurrence. Over \$10 million was at issue for claims of a failed casing product. The court held that the only clearly articulated claim was for breach of warranty, and that, under Missouri law, a breach of warranty did not constitute an occurrence. The insured moved for reconsideration of the ruling on the motion for summary judgment, and was defeated a second time.

### DISTRICT COURT ENFORCES COINSURANCE CLAUSE, THEFT EXCLUSION AND FINDS FAILURE TO COOPERATE

The United States District Court for the Southern District of Texas agreed with [Ronald E. Tigner](#) and [Gregory S. Hudson](#) (both Houston) in this declaratory judgment action. The insured, a commercial office complex, contended that unknown persons first vandalized and then stole copper AC coils from roof-mounted air conditioning units, causing other vandalism damages along the way. The Court found that the act of vandalism and the act of theft were one and the same, and enforced the theft exclusion contained in the policy. The Court further found that the insured drastically underinsured the property, causing the coinsurance penalty to apply to any covered loss. Finally, the Court found that the insured had no claim for statutory or common law bad faith claims, in part because the insured failed to cooperate with the claim investigation. The Court awarded the insurer \$170,000 in attorney fees.

### DISTRICT COURT ENFORCES WINDSTORM EXCLUSION AND GRANTS SUMMARY JUDGMENT

[Gregory S. Hudson](#) (Houston) convinced the United States District Court for the Eastern District of Texas to grant summary judgment for an insurer in a declaratory judgment action regarding an insurance policy. The insured contended that her home was damaged during Hurricane Rita, but evidence indicated that the insured had attempted to claim unrelated damages as being hurricane-related. Based on requests for admission, the insured admitted that claimed damages were not covered and that the insurer complied with the policy. In two motions for summary judgment, the Court first enforced the wind exclusion in the insured's policy and then granted summary judgment as to all other damages claimed by the insured.

### DISTRICT COURT ENTERS JUDGMENT ON BEHALF OF INSURER BASED ON "DUAL ENTITY" EXCLUSION

[Michael J. Smith](#) (West Conshohocken) prevailed on a Motion for Judgment on the Pleadings in a Declaratory Judgment Action in the United States District Court for the Eastern District of Pennsylvania on behalf of an insurer seeking a declaration that it had neither a duty to defend nor indemnify an insured under an accountant's professional liability policy for an underlying claim alleging that the accounting firm, its principal and

employee aided a company president in misappropriating funds. The declaratory judgment was based on the "dual entity" exclusion, which relates to any insured's involvement in an entity not named in the declarations. In the case, the accounting firm employee was also an employee of the plaintiff corporation. The judge granted the insurer's motion for judgment on the pleadings, adopted Mike's reasoning that the "dual entity" exclusion precluded coverage, and entered judgment in favor of the insurer.

### DISTRICT COURT DISMISSES MEDICAL PROVIDERS' CLASS ACTION CHALLENGING MEDICAL BILL REVIEW SOFTWARE

[William P. Shelley](#), [Jacob C. Cohn](#) and [Joseph A. Arnold](#) (all Philadelphia) obtained dismissal of a class action claim against an insurer in the United States District Court for the District of New Jersey. The representative plaintiff disputed an insurer's alleged method for calculating "reasonable" reimbursement rates for medical claims under the personal injury protection ("PIP") coverage in automobile insurance policies. It sought to maintain a nationwide class for breach of contract and Consumer Fraud Act violations by arguing that the insurer impermissibly reduced payments to medical providers using computer software to determine the reasonableness of expenses. Tracking the arguments in the Cozen O'Connor brief, the district court ruled that the claims were subject to mandatory arbitration and that common issues did not predominate because of differences in state law applicable to the plaintiffs' claims and because of the need to evaluate reasonableness on a case-by-case basis. Currently, the matter is on appeal in the Third Circuit.

### DISTRICT COURT GRANTS DISMISSAL OF CONTRACT AND BAD FAITH CLAIMS

[Michael F. Henry](#) and [Lauren A. Tulli](#) (both Philadelphia) obtained a dismissal for an insurer in a \$750,000 first-party contract claim, before the United States District Court for the Eastern District of Pennsylvania. The insured switched counsel multiple times and delayed producing business records. When the two-year suit limitation clause was about to run, the insured filed a summons. Michael convinced counsel for the insured to withdraw the summons, and in a formal contract granted a 120-day extension of the suit limitation clause, which would begin to run at the time the claim was decided.

The claim was then rejected. When suit was reinstated the insured moved to dismiss, arguing that the suit limitation clause was breached because the suit was not filed within that 120-day time frame. Despite the inherent difficulty of convincing a Court to consider extraneous documents in the filing of a F.R.C.P. 12(b)(6) motion, the Court dismissed the \$750,000 contractual claims for building, business personal property, and loss of income coverage, based on the formal contract granting 120 days to file suit. The court held that the parties could modify the suit limitation provision, and plaintiffs received consideration for the agreement, since the insurer could pay the claim, in whole or in part, and thus litigation would be unnecessary. Additionally, the court held that the insured's withdrawal of a timely filed summons under the suit limitation clause did not trigger the four-year statute of limitations. Finally, the court dismissed a bad faith claim without prejudice, holding that alleged violations of the Unfair Insurance Practices Act were insufficient to plead a bad faith claim.

#### TRIAL COURT GRANTS SUMMARY JUDGMENT AND DENIES DOUBLE PAYMENT FOR INSURED

[Matthew T. Walsh](#) (Chicago) obtained summary judgment for an insurer in a class action filed by an insured claiming that he and other class members were entitled to "double" payment for certain automobile property damage. Following an accident that caused damage to the left side of his vehicle, the insured presented a claim to his auto insurer. The insurer adjusted the insured's claim and issued payment for the estimated damage, minus the applicable deductible. Prior to having the damage repaired, however, the insured was involved in a second accident which resulted in damage to the same part of the vehicle. The insured made a second claim based on a damage estimate prepared following the second accident. Because the damage from the first accident was not repaired, the subsequent estimate included repair of the damage caused by the first accident. The insurer issued payment, but reduced the second claim by the amount of damage it deemed was the result of the first accident, and then applied the applicable deductible. The insured argued that the insurer's reduction of the overlapping damage was improper and that he was entitled to the full amount of both repair estimates because he was assessed two separate deductibles. The court rejected the insured's request for a double recovery and denied him a monetary windfall, stating that the policy required that the

insurer only pay for repairs to have an insured's vehicle restored to the condition it was in prior to each separate accident.

#### TRIAL COURT GRANTS SUMMARY JUDGMENT FOR INSURER BASED ON SUIT LIMITATION PROVISION

[Melissa Brill](#) (New York) won summary judgment for an insurer in Hudson County Superior Court in a first party coverage case with allegations of bad faith. The policyholder was a homeowner whose house was vandalized and stripped. The policyholder brought suit against the insurer for breach of contract and bad faith. Melissa moved for summary judgment, relying on the policy's suit limitation provision. The policyholder opposed, arguing that he had never received the policy and that the insurer had not referenced the provision in its correspondence. In reply on behalf of the insurer, and at oral argument, Melissa convinced the court that the New Jersey cases cited by the policyholder were distinguishable, and that the insurer should not be estopped from relying on its suit limitation provision. The court granted summary judgment for the insurer.

#### TRIAL COURT GRANTS SUMMARY JUDGMENT BASED ON JEWELRY THEFT SUB-LIMIT

The Circuit Court of Cook County agreed with [Daniel R. Johnson](#) and [Gregory D. Hopp](#) (both Chicago) and granted summary judgment for an insurer with respect to a claim for insurance coverage in connection with the theft of jewelry from an insured retail store. The policy at issue contained a loss-of-jewelry sub-limit. After evaluating the claim, the insurer issued a check for the amount of the sub-limit. The insured filed suit, claiming that it was entitled to the retail amount of the stolen jewelry. After the Cozen O'Connor team conducted written discovery and took the plaintiff's deposition, it filed a motion for summary judgment showing both that the insured read the policy's unambiguous loss-of-jewelry sub-limit and that the insurer fulfilled its contractual obligation by tendering a check for the \$2,500 sub-limit. The court tracked the arguments made in the motion for summary judgment and issued a written opinion granting the motion.

#### INSURED VOLUNTARILY AGREES TO DISMISS CLAIM

[Thomas M. Jones](#), [Helen A. Boyer](#), and [Laura Hawes](#) (Seattle) obtained dismissals for their insurer client in an Indiana state environmental court and in an associated action in Wisconsin state court. The insured alleged a duty to defend and

indemnify for claims arising from investigation and remediation costs imposed by the Indiana Department of Environmental Management, and from damage allegedly incurred by two private homeowners when contamination migrated onto their property from the insured's site. The policy at issue was claims-made, with a retroactive date of June 9, 2001. Contamination

at the site was first documented in May 1997. At the latest, the insured had notice of the claim by December 2000 when it was named a "responsible party," but it did not provide notice of the claims until 2008. The Cozen O'Connor team was able to negotiate the agreed dismissals based in part on the insured's late notice of the claims.

## RECENT VICTORIES: PRO BONO

### PERMANENT RESIDENCE CARD AWARDED TO POLITICAL REFUGEE

Molly Siebert Eckman (Seattle) obtained a permanent resident card for a pro bono client, who came to the United States from the Democratic Republic of Congo after suffer-

ing persecution there for her actions as a journalist. Molly was able to persuasively explain why the client needed to use another person's identification in order to escape persecution. Previously, Molly obtained asylum for this client.

## NOTEWORTHY HONORS, APPOINTMENTS AND PUBLICATIONS

### HONORS

Stephen A. Cozen, William P. Shelley, and Deborah Minkoff (all Philadelphia), and Christopher Clemenson (Denver) were selected to be included in the 2009 edition of *The Best Lawyers in America* in the area of Insurance Law. The selection is based on a rigorous peer-review survey and interview process.

Stephen A. Cozen, William P. Shelley, Joshua Wall, Michael F. Henry, and F. Warren Jacoby (all Philadelphia), William Broudy, Christopher B. Kende, and Christopher Raleigh (all New York), Thomas M. Jones, William F. Knowles, J.C. Ditzler, and Robert A. Meyers (all Seattle), Kenan Loomis (Atlanta), Thomas McKay III (Cherry Hill), and Joann Selleck (San Diego) have been named "Super Lawyers" for 2008-09.

Ilan Rosenberg and Matthew Siegel (both Philadelphia), Melissa O'Loughlin White, Katina Thornock, Megan Kirk, Maggie Diefenbach, and Matthew D. Taylor (all Seattle), and Kendall K. Hayden (Dallas) have been recognized as "Rising Stars" for 2008-2009.

Kendall K. Hayden (Dallas) has been selected as a member of the inaugural 2008-2009 class of Leadership State Bar of Texas. Only nineteen attorneys across the state were chosen to receive special leadership training to better serve their profession and communities.

### APPOINTMENTS

Melissa O'Loughlin White (Seattle) was appointed to serve on the Washington State Bar Association's Judicial Recommendation Committee. The Committee screens and interviews candidates who seek appointment to state Court of Appeals and Supreme Court vacancies, and then makes recommendations to the Governor.

Kelley J.W. Muller (Cherry Hill) was appointed Chair-Elect of the Property Insurance Law Committee Spring Meeting for 2010. The Committee is part of the Tort Trial and Insurance Practice Section of the ABA.

Kelley J.W. Muller (Cherry Hill) was also reappointed a Vice Chair of the Property Insurance Law Committee for 2008-2009, for which she serves as Editor of the PILC Newsletter.

### PUBLICATIONS

Francine L. Semaya, with the assistance of William K. Broudy and Laurance Shapiro (all New York), is a contributing editor of the ABA/TIPS *Reference Handbook on Insurance Company Runoff and Receiverships, Property/Casualty & Life/Health* (Fifth Edition), scheduled for publication in 2009.

Helen A. Boyer, Laura J. Hawes, and Laura Edwards (all Seattle) authored a white paper entitled “*What is a Pollutant in the Context of the Application of the Absolute and Total Pollution Exclusions?*”. The paper includes two multijurisdictional reference charts, one organized by state and one by allegedly polluting substance. The paper was distributed in January 2008 and will be periodically updated as this area of environmental coverage law continues to develop.

Kendall Hayden and Larry Bowman (Dallas) recently published an article with Lexis Nexis, “A Practical Guide to Evaluating Contingent Business Interruption Losses,” *New Appleman on Insurance: Current Critical Issues in Insurance Law* (Dec. 2008).

Kellyn J.W. Muller (Cherry Hill) co-authored “Recent Developments in Property Insurance Law,” which appeared in the Spring 2008 edition of the *Tort Trial and Insurance Practice Law Journal*, Volume 43, Number 3, published by the ABA.

## COVERAGE ATTORNEYS “IN THE SPOTLIGHT”

### PAST EVENTS

*For a copy of materials or other related information, we invite you to contact the listed speakers at their respective offices at the numbers listed on the back page of this issue.*

Cozen O'Connor's Global Insurance Group hosted its annual seminar at the New York Marriott Downtown on October 29, 2008. Presentations included “Coverage for Climate Change Claims” by William Stewart (West Conshohocken), “Lessons Learned from Hurricanes Katrina & Rita” by Richard Bennett (Philadelphia), “A Primer on the Bermuda Form” by Joseph Ziemianski (Houston), “Emerging Coverage Issues Including Nanotechnology, Welding Rods, Diacetyl, Benzene, BPA and MTBE” by Kevin Haas (New York), “Product Liability Litigation: It's Not What It Used to Be” by Russell Wheeler (New York), and “Life After Recent Significant Coverage Decisions from the Texas Supreme Court” by Gene Creely (Houston) and Kendall Hayden (Dallas).

The Global Insurance Group presented its Insurance Seminar on September 25, 2008 in Seattle, Washington, chaired by Jodi McDougall. Seattle attorneys gave presentations that included “Smoke on the Water: A Case Study of Product Liability Under Maritime Law” by Mark S. Anderson, “It's Hot in the Kitchen: Coverage for Climate Change Claims” by Peter Mintzer, “Insolvency, Excess, and Settlement: Sorting Out Allocation and Contribution Among Insurers” by Matthew D. Taylor, “Pacific Northwest Coverage Update” by William F. Knowles, “Cargo Claims Reversed: Liability Issues When It's the Cargo that Causes the Claim” by Rodney Q. Fonda, “Beware of Oncoming Laws: Insurance Issues Pending Before the Washington Supreme

Court” by Melissa O'Loughlin White, “The Insurance Fair Conduct Act—What's Happened and What Lies Ahead” by Michael D. Handler, and “Tort Law Update” by Kevin A. Michael.

William P. Shelley (Philadelphia) co-chaired the BVR Legal/Mealey's Bad Faith Litigation Conference held on November 6-7, 2008 in New York City. The conference addressed recent verdicts and decisions, new liability theories, damages, challenging jurisdictions, building a record, preparing witnesses, and ethical dilemmas for defense counsel. Wes Vines (Dallas) spoke on ethical issues arising out of the tripartite relationship between the insured, the insurer and defense counsel, and under the Model Rules of Professional Responsibility.

Francine L. Semaya (New York), president of the International Association of Insurance Receivers (IAIR), moderated a speaker panel on the topic of “The AIG Fallout” at the 2009 Post-Inaugural IAIR Insolvency Conference, January 21-23, 2009 in Tampa, Florida.

Francine L. Semaya (New York) moderated a Roundtable of Insurance Commissioners at the 35th Annual TIPS Midwinter Symposium on Insurance, Employment and Benefits: Emerging Issues and Litigation Relating to Life, Health and Disability Insurance, Insurance Regulation, Employee Benefits and Reinsurance. It was held on January 15-18, 2009 in Bonita Springs, Florida.

Francine L. Semaya (New York) participated in a panel discussion entitled “The Great Debate” on November 18, 2008 at the 12th Annual Insurance Forum in Chicago. The discussion addressed challenges facing the insurance industry, federal vs. state regulation of insurance, and topical insolvency issues.

**Francine L. Semaya** (New York) participated in a webinar entitled, "The New Regulatory Reality" for *Business Insurance* and *Industry Focus* magazines on November 12, 2008.

**Francine L. Semaya** (New York) shared the podium with the President of the National Conference of Insurance Guaranty Funds (NCIGF) on the topic of "Leading the Way: A Conversation with IAIR and the NCIGF" at the joint NCIGF and IAIR insolvency conference. The conference, Tipping Points: Exploring the Insolvency Process, was held on November 4-8, 2008 in Scottsdale, Arizona.

**Denise B. Bense** (West Conshohocken) spoke on "The Case for Considering Science First" at the ABA Litigation Section seminar on Current Issues in Medical Device Litigation on October 7, 2008 in Fort Worth, Texas.

**Helen A. Boyer** (Seattle) was a panelist in a BVR Legal/Mealey's webinar on July 8, 2008 on the Top 5 Coverage Developments of 2008. **Megan K. Kirk** and **Laura J. Hawes** (both Seattle) assisted in preparing the materials. Helen's topic was "Environmental Coverage Update and the Transition to Pollution Insurance Products."

**Erik M. Kowalewsky** (London) gave a presentation entitled "Emerging Third-Party Risks—And the United States" at the Liability Underwriting Group Conference in Cambridge, England on September 3, 2008.

**Kellyn J.W. Muller** (Cherry Hill) gave a presentation entitled "How Policy Acquisition Can Affect a Claim" at the 2008 ABA

Property Insurance Law Committee's Spring CLE Meeting. The meeting, which was held in Carlsbad, California on April 3-5, 2008, addressed the topic of Rescission of Property Insurance Policies.

#### UPCOMING EVENTS

*We invite your attendance at the following events. For information, you may contact the speaker at his or her office at the numbers listed on the back page of this issue.*

**Thomas M. Jones** (Seattle) is Program Chair of the DRI Electronic Discovery Seminar that will take place on May 7-8, 2009 in New York City. Tom will moderate a Judicial Roundtable on the topic of "Emerging E-Discovery Issues." Credit is available and registration information is at [www.dri.org](http://www.dri.org) or (312) 795-1101.

**Jacob Cohn** (Philadelphia) will speak at the Annual Claims Meeting of the Pennsylvania Association of Mutual Insurance Companies regarding the impact on construction defect claims in Pennsylvania of the cases *Millers Capital Ins. Co. v. Gambone Brothers Development Co.* and *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.* Both cases were successfully litigated by Cozen O'Connor. (See reports in this issue in the [Key Developments – Construction Defect and Recent Victories](#) sections.) The meeting is scheduled for April 2, 2009 at Eden Resort in Lancaster, PA. More information is available at [www.pamic.com](http://www.pamic.com).



MARK YOUR CALENDAR FOR THIS  
UPCOMING EMERGING ISSUES SEMINAR  
*presented by Cozen O'Connor's Global Insurance Group*

**APRIL 30** - New York, NY

*For more information regarding  
any of these events, please contact Trisha Ross  
at 215.665.2187 or [pross@cozen.com](mailto:pross@cozen.com).*

#### INSURANCE COVERAGE OBSERVER AND ALERT! EDITORS

**Helen Boyer** (Seattle)  
206.373.7204  
[hboyer@cozen.com](mailto:hboyer@cozen.com)

**Marianne May** (Newark)  
212.9081238  
[mmay@cozen.com](mailto:mmay@cozen.com)

**Kellyn J.W. Muller** (Cherry Hill)  
856.910.5063  
[kmuller@cozen.com](mailto:kmuller@cozen.com)

**Daniel R. Johnson** (Chicago)  
312.382.3188  
[djohnson@cozen.com](mailto:djohnson@cozen.com)

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## DIRECTORY OF OFFICES

### PRINCIPAL OFFICE: PHILADELPHIA

1900 Market Street • Philadelphia, PA 19103-3508

P: 215.665.2000 or 800.523.2900

F: 215.665.2013

*For general information please contact:*

Joseph A. Gerber

### ATLANTA

SunTrust Plaza  
303 Peachtree Street, NE  
Suite 2200  
Atlanta, GA 30308-3264  
P: 404.572.2000 or 800.890.1393  
F: 404.572.2199  
Contact: Kenan G. Loomis

### CHARLOTTE

301 South College Street  
One Wachovia Center, Suite 2100  
Charlotte, NC 28202-6037  
P: 704.376.3400 or 800.762.3575  
F: 704.334.3351  
Contact: T. David Higgins, Jr.

### CHERRY HILL

LibertyView  
457 Haddonfield Road, Suite 300,  
P.O. Box 5459  
Cherry Hill, NJ 08002-2220  
P: 856.910.5000 or 800.989.0499  
F: 856.910.5075  
Contact: Thomas McKay, III

### CHICAGO

222 South Riverside Plaza, Suite 1500  
Chicago, IL 60606-6000  
P: 312.382.3100 or 877.992.6036  
F: 312.382.8910  
Contact: Tia C. Ghattas

### DALLAS

2300 Bank One Center  
1717 Main Street  
Dallas, TX 75201-7335  
P: 214.462.3000 or 800.448.1207  
F: 214.462.3299  
Contact: Anne L. Cook

### DENVER

707 17th Street, Suite 3100  
Denver, CO 80202-3400  
P: 720.479.3900 or 877.467.0305  
F: 720.479.3890  
Contact: Brad W. Breslau

### HOUSTON

One Houston Center  
1221 McKinney Street, Suite 2900  
Houston, TX 77010-2009  
P: 832.214.3900 or 800.448.8502  
F: 832.214.3905  
Contact: Joseph A. Ziemianski

### LONDON

9th Floor, Fountain House  
130 Fenchurch Street  
London, UK  
EC3M 5DJ  
P: 011.44.20.7864.2000  
F: 011.44.20.7864.2013  
Contact: Simon D. Jones

### LOS ANGELES

777 South Figueroa Street  
Suite 2850  
Los Angeles, CA 90017-5800  
P: 213.892.7900 or 800.563.1027  
F: 213.892.7999  
Contact: Huey P. Cotton

### MIAMI

Wachovia Financial Center  
200 South Biscayne Boulevard  
Suite 4410  
Miami, FL 33131  
P: 305.704.5940 or 800.215.2137  
F: 305.704.5955  
Contact: Richard M. Dunn

### NEW YORK

45 Broadway Atrium, Suite 1600  
New York, NY 10006-3792  
P: 212.509.9400 or 800.437.7040  
F: 212.509.9492  
Contact: Geoffrey D. Ferrer

### NEWARK

One Gateway Center, Suite 2600  
Newark, NJ 07102-5211  
P: 973.353.8400 or 888.200.9521  
F: 973.353.8404  
Contact: Rafael Perez

### SAN DIEGO

501 West Broadway, Suite 1610  
San Diego, CA 92101-3536  
P: 619.234.1700 or 800.782.3366  
F: 619.234.7831  
Contact: Blanca Quintero

### SANTA FE

125 Lincoln Avenue, Suite 400  
Santa Fe, NM 87501-2055  
P: 505.820.3346 or 866.231.0144  
F: 505.820.3347  
Contact: Harvey Fruman

### SEATTLE

Washington Mutual Tower  
1201 Third Avenue, Suite 5200  
Seattle, WA 98101-3071  
P: 206.340.1000 or 800.423.1950  
F: 206.621.8783  
Contact: Jodi McDougall

### TORONTO

One Queen Street East, Suite 1920  
Toronto, Ontario M5C 2W5  
P: 416.361.3200 or 888.727.9948  
F: 416.361.1405  
Contact: Christopher Reain

### TRENTON

144-B West State Street  
Trenton, NJ 08608  
P: 609.989.8620  
Contact: Rafael Perez

### WASHINGTON, DC

The Army and Navy Building  
1627 I Street, NW, Suite 1100  
Washington, DC 20006-4007  
P: 202.912.4800 or 800.540.1355  
F: 202.912.4830  
Contact: Barry Boss

### WEST CONSHOHOCKEN

200 Four Falls Corporate Center  
Suite 400, P.O. Box 800  
West Conshohocken, PA 19428-0800  
P: 610.941.5400 or 800.379.0695  
F: 610.941.0711  
Contact: Ross Weiss

### WILMINGTON

Chase Manhattan Centre, Suite 1400  
1201 North Market Street  
Wilmington, DE 19801-1147  
P: 302.295.2000 or 888.207.2440  
F: 302.295.2013  
Contact: Mark E. Felger

PLEASE CONTACT ANY OF OUR OFFICES FOR ADDITIONAL INFORMATION OR VISIT US ONLINE AT [WWW.COZEN.COM](http://WWW.COZEN.COM)