COZEN O'CONNOR®

INSURANCE COVERAGE OBSERVER

NEWS ON CONTEMPORARY ISSUES

SUMMER 2005

Message from the Chair 1

When Are Settlement and Damage Payments Not "Loss" Under D&O Policy 3

Insurers To Be Reimbursed for Settlement Payments Absent Coverage (Texas) 10

Recent Victories 11

Noteworthy Honors, Appointments and Publications . .16

Coverage Attorneys "In the Spotlight" 18

MESSAGE FROM THE CHAIR

DEAR CLIENTS AND FRIENDS:

Cozen O'Connor's Toronto office opened in May 2005, incorporating the practice of Poss & Halfnight, Barristers & Solicitors, a specialized insurance litigation firm which has advised clients in Canada and the United States since 1974. **Jamieson Halfnight** joins Cozen O'Connor as a member and chair of the Toronto subrogation and recovery practice. **Sheila McKinlay** joins as a member and managing partner of the office. **Harvey Poss** joins as a counsel to the firm. **Christopher Reain**, **Brett Rideout**, **Clarence Lui**, **Christopher McKibbin** and **Iain Peck** join as associates.

Jamieson Halfnight has been listed for years by *Lexpert /American Lawyer Media Guide* as among the 500 leading lawyers in Canada. He concentrates his practice in insurance litigation with special emphasis on property insurance, commercial general liability and fidelity insurance. He has appeared at all levels of Canadian trial and appellate courts, including the Supreme Court of Canada. Jamie is a former director of the Advocates Society, chairing its insurance committee, and a member of the Coalition Against Insurance Fraud, International Association of Arson Investigators, Defense Research Institute and Canadian Defence Lawyers. A *magna cum laude* graduate of Princeton University (A.B., 1971), Jamie earned his bachelor of laws degree from the University of Toronto (LL.B., *dean's key*, 1974) and his master's of law degree from the University of London, England (LL.M., 1975).

continued on page 2

Coming Up: Cozen O'Connor Events

Mark your calendar for Cozen O'Connor-sponsored events in 2005:

2005 Toronto Subrogation/Insurance Seminar
9/20/05 Design Exchange

2005 Seattle Subrogation/Insurance Seminar
9/21/05 Fairmount Olympic Hotel

2005 New York Insurance Seminar
Fall 2005

PHILADELPHIA
ATLANTA
CHARLOTTE
CHERRY HILL
CHICAGO
DALLAS
DENVER
HOUSTON
LAS VEGAS*
LONDON
LOS ANGELES
NEW YORK DOWNTOWN
NEW YORK MIDTOWN
NEWARK
SAN DIEGO
SAN FRANCISCO
SANTA FE
SEATTLE
TORONTO
TRENTON
WASHINGTON, DC
W. CONSHOHOCKEN
WICHITA
WILMINGTON

www.cozen.com

* Affiliated with the offices of J. Goldberg & D. Grossman

MESSAGE FROM THE CHAIR *(continued from page 1)*

Sheila McKinlay has more than 20 years of experience in insurance litigation and coverage advice. An experienced trial and appellate counsel in the Ontario courts, her practice has focused on assisting insurers with the challenges presented by the investigation and defense of fraudulent first-party claims, and in the litigation of disputes under property and liability policies. Sheila has spoken at continuing legal education conferences, and presented in-house seminars for the firm's insurance clients to assist them in developing effective claim-handling procedures for the current insurance and legal environments. A member of the Advocates Society, Canadian Defence Lawyers and Defense Research Institute, she spent her undergraduate years and earned her bachelor's degree at the University of Toronto (LL.B., 1979).

Harvey Poss has spent more than 35 years litigating insurance and commercial cases in the Ontario courts, the last 20 years as a Queen's Counsel. In his role as counsel, he will continue to provide effective representation to clients, as well as advice and guidance to the firm's members and associates. A graduate of the University of Toronto (B.A., 1961), Harvey earned his graduate degree from the University of Toronto School of Architecture (1965), and his bachelor of law degree from Osgoode Hall Law School of York University (LL.B., 1968).

We also welcome **Fran Roggenbaum** (Philadelphia) as a member to our Insurance, Corporate and Regulatory Practice Group. Fran will provide regulatory advice to our insurance company clients and assist businesses in their self-insurance and risk management strategies. She has extensive experience working for insurers, reinsurers, alternative risk entities, insurance producers and other insurance intermediaries on multistate regulatory issues, including licensing requirements, coverage mandates and filings, investment limitations, and transactional and financial reporting. Fran is a Chartered Property Casualty Underwriter and a Certified Structured Settlement Consultant. She earned her undergraduate degree from Millersville University and her law degree from Widener University School of Law.

We are proud to welcome these talented advocates and counselors to the firm, and invite you to call on them to assist you.

Thomas M. Jones, Co-Chair
National Insurance Coverage Practice Group
Seattle, WA
tjones@cozen.com or 206.224.1242

Joshua Wall, Co-Chair
National Insurance Coverage Practice Group
Philadelphia, PA
jwall@cozen.com or 215.665.2065

To suggest topics or for questions, please contact Helen Boyer, Co-Editor at 206.373.7204 or hboyer@cozen.com, Michael Hamilton, Co-Editor at 215.665.2751 or mhamilton@cozen.com or Marianne Gaul, Co-Editor at 973.286.1275 or mgaul@cozen.com. To obtain additional copies, permission to reprint articles, or to change mailing information, please contact Lori Scheetz 800.523.2900, or at lscheetz@cozen.com.

WHEN ARE SETTLEMENT AND DAMAGE PAYMENTS NOT "LOSS" UNDER A D&O POLICY?

By: Richard J. Bortnick, Cozen O'Connor, Philadelphia and Perry S. Granof, Vice President, Chubb & Son, Chicago

All directors' and officers' (D&O) liability insurance policies include, among other provisions, a definition of the term "loss," which must be satisfied in order for coverage to attach. Many policyholders and insurance brokers consider the term "loss" to equate to an open checkbook, subject to only one limitation: the policy's limit of liability. Of course, this is not the case. To the contrary, "loss," as typically defined in D&O policies, is of limited scope.

There is no uniform definition of "loss." One typical D&O policy defines it to mean:

> …(T)he total amount which any Insured becomes legally obligated to pay on account of each Claim and for all Claims in each Policy Period and the Extended Reporting Period, if exercised, made against them for Wrongful Acts for which coverage applies, including, but not limited to, damages, judgments, settlements, costs and Defense Costs. Loss does not include (i) any amount not indemnified by the Insured Organization for which the Insured Person is absolved from payment by reason of any covenant, agreement or court order, (ii) any amount incurred by the Insured Organization (including its board of directors or any committee of the board of directors) in connection with the investigation or evaluation of any Claim or potential Claim by or on behalf of the Insured Organization, (iii) fines, penalties imposed by law or the multiple portion of any multiplied damage award, or (iv) matters uninsurable under the law pursuant to which this coverage section is construed.

Specimen Executive Protection Policy, Federal Insurance Company, Form 14-02-0943 (Ed. 1/92).

The limited scope of what constitutes "loss" has become more than a simple academic or marketing exercise. Indeed, an increasing number of securities fraud actions seek remedies such as restitution, rescission, disgorgement, the return of ill-gotten gain, and the like. In such cases, both insureds and their D&O insurers face the complex question of whether the damages attendant to such remedies constitute reimbursable "loss" under a D&O policy. Resolution of this issue is dependent on the relevant facts, the applicable law, and, perhaps most importantly, the relevant D&O policy's definition of the term "loss." Accordingly, the parties to the insurance contract may have to determine the quantum assessable to each element of damage.

By way of example, the question of whether a loss is insurable has arisen where an acquired company's former shareholders allege that the acquiring company must compensate them for ill-gotten gain, including the payment of "damages" where the acquiring company originally had paid "inadequate consideration" for the acquired company's stock or other assets. In such situations, the acquired company's shareholders may allege that an insured or the acquiring corporation itself wrongfully profited or wrongfully failed to account for, and pay, a sufficient "take-over" premium.

The following authorities instruct that, irrespective of whether a payment takes the form of damages, settlement proceeds or other remuneration, such payments may not constitute "loss," as defined in a D&O policy.

1. Reliance Group Holdings, Inc. v. National Union Fire Insurance Co.

In *Reliance Group Holdings, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 594 N.Y.S. 2d 20, 188 A.D. 2d 47 (App. Div,. 1 Dept.), *leave to appeal dismissed in part, denied in part*, 82 N.Y. 2d 704, 619 N.E. 2d 656,

Continued on page 4

SETTLEMENT AND DAMAGE PAYMENTS *(continued from page 5)*

601 N.Y.S. 2d 578 (N.Y. 1993), the New York Appellate Division ruled that a settlement in which an insured agreed to return approximately $21 million of a "greenmail" payment was not covered under Reliance's D&O policies.

In 1984, Reliance had commenced a hostile takeover of The Disney Corporation by acquiring 12.2 percent of Disney's stock and announcing its intent to obtain additional stock. Disney responded by offering to repurchase Reliance's stock holdings at an inflated price (greenmail), in return for which Reliance agreed to discontinue its takeover attempt. Upon learning of this offer, Reliance's shareholders initiated a series of derivative actions against Reliance, its chairman, Saul Steinberg, and others, alleging that the defendants had breached their respective fiduciary duties by abandoning Reliance's takeover attempt of Disney in exchange for the greenmail payments. The actions settled with the Reliance defendants paying $21.1 million. Reliance and Steinberg thereafter sued Reliance's primary and excess D&O insurers for reimbursement of the settlement amount, as to which Reliance allegedly had indemnified Steinberg.

On these facts, the *Reliance* court determined that Reliance had not sustained a "loss," as defined in the relevant D&O policy, because it had not paid "damages." Instead, the *Reliance* court determined that Reliance had provided its shareholders with "restitution" for property Steinberg had wrongfully acquired:

> Reliance did not pay or incur any "damages" on behalf of Steinberg, and there was accordingly no basis for his purported indemnification. Reliance sustained no "loss" as defined in the policy, but rather realized a profit of approximately $74 million in connection with its Disney takeover attempt….

Of course, any repayment by an insured under such circumstances would not constitute "loss" because the insured had no right to possess the funds in the first place. *See also Nortex Oil & Gas Corp. v. Harbor Ins. Co.*, 456 S.W. 2d 489, 409-91 & 493 (Texas Civ. App. 1970) (an insured does not sustain a covered loss by returning to its rightful owners property which the insured, having no right thereto, has inadvertently acquired). This decision set the foundation where, in the current corporate environment, issues of restitution and ill-gotten gains have been the subjects of several D&O coverage cases.

2. Safeway Stores, Inc v. National Union Fire Insurance Co.

In *Safeway Stores, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 64 F. 3d 1282 (9th Cir. 1995), the Ninth Circuit Court of Appeals was emphatic that Safeway's early pay-out of an $11.5 million dividend in connection with a leveraged buyout did not constitute "loss" under the relevant D&O policy:

> It is difficult to see how a corporation's payment of a dividend could ever be a "loss" under the terms of an insurance policy. Neither the owners of that corporation nor its directors suffered a loss. The effect of a dividend is simply to transfer corporate profits from one part of the corporation to another, that is, from the purse of the corporate entity into the pockets of the corporation's owners, the shareholders.

In so ruling, the *Safeway* court concluded that a corporation's fulfillment of its regular obligation to pay dividends in due course was not "loss."

3. Level 3 Communications, Inc. v. Federal Insurance Co.

Following the trend established in *Reliance* and *Safeway*, the Seventh Circuit Court of Appeals held in *Level 3 Communications, Inc. v. Federal Insurance Co.*, 272 F.3d 908 (7th Cir. 2001), that restitutionary payments are not "loss" under a D&O policy. Instead, the Seventh Circuit, using the same logic employed in *Reliance* and *Safeway* ruled that an $11.8 million securities fraud settlement represented the policyholders' restitution of "ill-gotten gain," and therefore were not covered "loss," as defined in the D&O policy at issue.

In *Level 3,* the corporate entity, Level 3 Communications, sought coverage for claims alleging that it had bought shares in MFS Telecom (MFS) from the plaintiffs for an unfairly low price. In the underlying litigation, the plaintiff shareholders had alleged that Level 3 violated federal securities laws by wrongfully failing to disclose material information prior to the date it purchased plaintiffs' shares. As a result, the shareholders claimed, the consideration they received was inadequate. On this basis, they sought to rescind the transaction and recover the monetary value of the disputed stock.

In the resulting coverage litigation, Level 3's primary D&O insurer argued that the settlement payment was not "loss," since Level 3, in essence, had stolen cash from the underlying plaintiffs. The insurer further asserted that its D&O policy did not insure a thief against the cost of disgorging stolen proceeds.

The Seventh Circuit ratified the insurer's position, holding that Level 3's settlement payment did not represent "loss" under the relevant D&O policy, which defined "loss" in pertinent part as: "damages, judgments, settlements and Defense Costs ….":

> [The plaintiffs in the underlying action] were seeking the difference between the value of the stock at the time of trial and the price they had received for the stock from Level 3. That is standard damages relief in a securities-fraud case. *But it is restitutionary in character*. It seeks to divest the defendant of the present value of the property obtained by fraud, minus the cost to the defendant of obtaining the property. In other words, it seeks to deprive the defendant of the net benefit of the unlawful act, the value of the unlawfully obtained stock minus the cost to the defendant of obtaining the stock. It is equivalent to seeking to impress a constructive trust on the property in favor of the rightful owner. How the claim or judgment order or settlement is worded is irrelevant. *An insured incurs no loss within the meaning of the insurance contract by being compelled to return the property that it had stolen, even if a more polite word than 'stolen' is used to characterize the claim for the property's return.*

Level 3, 272 F.3d at 910-11 (emphasis added).

According to the Seventh Circuit, the principle "that a 'loss' within the meaning of an insurance contract does not include the restoration of an ill-gotten gain is clearly right." *Level 3*, 272 F. 3d at 910.

4. Conseco, Inc. v. National Union Fire Insurance Co.

In *Conseco, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*, No. 49D130202CP000348, 2002, WL 31961447 (Ind. Cir. Ct. Dec. 31, 2002), an Indiana circuit court, following the natural progression, held in an unpublished opinion that restitutionary damages assessed and/or paid pursuant to Section 11 of the Securities Act of 1933 did not constitute "loss" under the relevant D&O policy. Specifically, the *Conseco* court found the Section 11 portion of a settlement, which also involved claims under Section 10(b) of the Securities Exchange Act of 1934, represented "restitutionary damages" corresponding to consideration it wrongfully took from the investing public.

There, Conseco, Inc. and 15 of its directors or officers sought indemnity for a portion of a $120 million settlement of several securities fraud class actions. Class plaintiffs, who owned Conseco stock, claimed that during the class period, Conseco's officers and directors violated Section 10 and Rule 10b-5 by making material misstatements or omissions about the company's financial health. The shareholders also asserted that Conseco's registration statements and prospectuses contained material misrepresentations or omissions in violation of Section 11. Conseco allegedly reaped $2.3 billion in "ill gotten gains" as a result.

Upon disclosure of the alleged fraud, Conseco's stock price fell over 80 percent. Shortly thereafter, the

Continued on page 6

SETTLEMENT AND DAMAGE PAYMENTS *(continued from page 7)*

shareholders sued Conseco and certain directors and officers, seeking restitution and an Order requiring Conseco to disgorge the portion of the inflated share price attributable to the misrepresentations. The parties ultimately agreed to settle both the Sections 10 and 11 claims for a gross payment of $120 million. Pursuant to the parties' settlement agreement, $81.84 million of the $120 million was allocated to the shareholders' Section 11 claims. In turn, the remaining $38.16 million was allocated to the shareholders' Section 10 claims.

In reviewing the shareholders' allegations and the parties' allocation of settlement funds, Conseco's London-based excess insurers denied coverage, claiming that the Section 11 portion of the settlement ($81.84 million) did not constitute "loss" under their excess D&O policies, which, like the policy in Level 3, defined "loss" in pertinent part as: "damages, judgments, settlements and Defense Costs …." In turn, the excess D&O insurers acknowledged that the settlement amount allocable to the shareholders' Section 10 claims and the policyholders' defense expenses were "loss." Still, the excess D&O insurers found that those elements of the policyholders' claim did not exceed the primary policy's limit of liability. Conseco disagreed and sued.

On these facts, the *Conseco* court agreed with the excess D&O insurers, finding that the Section 11 portion of the settlement was not "loss." Rather, the court found:

> The Section 11 portion of the Securities Litigation settlement represents Conseco's liability to return funds it wrongfully took from the investing public when the securities were sold during the class period. The plaintiffs who advanced the Section 11 allegations in the Securities Litigation, and who will receive $81.84 million of the $120 million settlement, essentially alleged that if Conseco had not disseminated misrepresentations before the securities were sold, the securities would have been worth less when the public bought them from Conseco, and Conseco would not have received $2.3 billion in proceeds when the securities were sold.

The *Conseco* court based its holding on the "axiomatic" principle that "insurance cannot be used to pay an insured for amounts an insured wrongfully acquires and is forced to return, or to pay the corporate obligations of an insured." *See also Snyder Heating Co., Inc. v. Pennsylvania Mfrs. Assoc. Ins. Co.*, 715 A.2d 483, 487 (Pa. Super. Ct. 1998) (an errors and omissions, claims-made policy, like a D&O policy, cannot be treated as a "performance bond" to pay an insured's corporate contractual obligations). The *Conseco* court further explained that insurance cannot be used to unjustly enrich an insured, which is not allowed to profit from its wrongdoing through insurance.

The *Conseco* court focused on the restitutionary character of the settlement, ruling that it makes no difference whether money is paid to settle Section 11 claims subject to essentially a strict liability standard or Section 10 claims, which are subject to a less stringent standard.

The *Conseco* court further explained that it is immaterial whether the ill-gotten gains are acquired innocently or through intentional, fraudulent conduct:

> (A)n insured has no greater right to something wrongfully acquired by mistake or accident than it does to something acquired by fraud - the critical factor is that the money or property does not belong to the insured, and it has to be returned. For example, if a bank makes an innocent calculation error and wrongfully acquires funds from a customer, upon realization of the error the bank cannot then claim reimbursement of the funds through insurance. Otherwise the bank would be unjustly enriched with a windfall and profit from its own - albeit innocent - wrong.

In other words, the *Conseco* court found that it was the restitutionary nature of the claims and the character of the

settlement that controlled, not the intent of the party forced to disgorge ill-gotten gains.

Applying this conclusion to the facts before it, the *Conseco* court embraced the excess D&O insurers' rationale, finding that the $38.16 million allocable to the shareholders' Section 10 claims and the policyholders' defense costs could constitute "loss." At the same time, however, the court recognized that this net figure was well below the excess D&O policies' attachment points. For this reason, the court held that these policies were not obligated to respond for the claim at issue.

5. Vigilant Insurance Co. v. CSFB

Vigilant Insurance Co. v. Credit Suisse First Boston Corp., No. 600854/02 (N.Y. Supreme Ct., New York County July 17, 2003, aff'd, 782 N.Y.S.2d 19 (N.Y. App. Div. 2004), also focused on the restitutionary nature of the claims and settlement at issue. In that case, the Securities and Exchange Commission (SEC) and NASD Regulation, Inc. (NASDR) accused Credit Suisse First Boston Corporation (CSFB) of coercing customers into paying to CSFB a portion of their profits from flipping CSFB-underwritten Initial Public Offerings (IPO) stock.[1] The *Credit Suisse* court held that CSFB's professional liability insurers were not obligated to reimburse CSFB for $70 million in "disgorgement" that CSFB agreed to pay to settle these claims.[2]

In *Credit Suisse*, the SEC and NASDR investigated CSFB's business practices involving the allocation of shares in IPOs that CSFB had underwritten. The SEC commenced a civil action that resulted in a consent judgment against CSFB. In its complaint, the SEC alleged that "[i]n exchange for shares in 'hot' IPOs, CSFB wrongfully extracted from certain customers a large portion of the profits those customers made by flipping their IPO stock." It further alleged that "[f]rom at least April 1999 through June 2000, CSFB employees allocated shares of IPOs to over 100 customers who were willing to funnel between 33 and 66 percent of their profits to CSFB." According to the SEC, the profits were channeled to CSFB in the form of excessive brokerage commissions generated by the customers in unrelated securities trades effected solely to satisfy CSFB's demands of a share of the IPO profits." The SEC's complaint concluded that CSFB's customers funneled tens of millions of dollars in profits to CSFB through improper commission payments.[3]

CSFB settled with the SEC and NASDR. The NASDR settlement consisted of a letter of acceptance, waiver and consent (which did not involve a court filing). As to the SEC, CSFB consented to the entry of an injunctive decree and a final judgment, pursuant to which CSFB paid $70 million in disgorgement. Upon receipt of CSFB's demand for indemnity under an E&O policy covering wrongful acts, Vigilant Insurance Company (Vigilant) denied coverage for the entire $70 million disgorgement payment and commenced coverage litigation.

The *Credit Suisse* court held that CSFB could not recoup the ordered disgorgement payment through its E&O policy with Vigilant because such a result would defeat the purpose of the judgment ordering disgorgement. The *Credit Suisse* court found support for this ruling in the Appellate Division's decision in *Reliance*, *supra*, stating:

> The *Reliance* decision is clear that, in general, a party may not insure against the risk of being ordered to return money that it has obtained improperly. The court in *Reliance* relied on the decision in *Bank of the West [v. Superior Court*, 2 Cal 4th 1254, 1266, 833 P.2d 545, 10 Cal. Rptr. 2d 538 (Cal. 1992)], in which the California Supreme Court [in construing the "advertising injury" provision of a CGL policy] stated that "[w]hen the law requires a wrongdoer to disgorge money or property acquired through a violation of the

Continued on page 8

1. "Flipping" occurs when investors sell the shares they have purchased in an IPO in the immediate after-market to realize a quick profit.

2. The policy at issue in *Credit Suisse*, like those at issue in *Conseco* and *Level 3*, defined "loss" as "all damages, awards, judgments, settlements, costs and Defense Costs . . . ."

3. The SEC alleged that CSFB's actions violated Rules 2110 and 2330 of the NASD Rules of Conduct and Section 17(a) of the Exchange Act, 15 U.S.C. § 78q(a) and Rule 17a-3(a)(6), 17 CFR § 240.17a-3(a)(6).

SETTLEMENT AND DAMAGE PAYMENTS *(continued from page 9)*

> law, to permit the wrongdoer to transfer the cost of disgorgement to an insurer would eliminate the incentive for obeying the law." *Bank of the West*, *supra*, [2 Cal. 4th] at 1269. "Otherwise, the wrongdoer would retain the proceeds of his illegal acts, merely shifting his loss to an insurer." Id.

The *Credit Suisse* court further noted that "disgorgement seeks to deprive a party of ill-gotten gains and to deter improper conduct," and concluded that the effective enforcement of securities laws and the deterrent effect of enforcement actions would be undermined if securities law violators were not required to disgorge illicit profits.

Equally critical, the *Credit Suisse* court rejected as immaterial the fact that CSFB had not admitted to any wrongdoing. Instead, the court focused on the restitutionary nature of the claims and the character of CSFB's disgorgement payment. In this regard, the court reasoned that the purpose of disgorgement was not to compensate CSFB's customers, but to deprive CSFB of money it had obtained unjustly and to deter similar conduct in the future. The *Credit Suisse* court thus found that it would be unfair and would defeat public policy to pass a settlement of that kind on to CSFB's insurer.

On appeal, the New York Supreme Court, Appellate Division, affirmed. Indeed, the Appellate Division went one step further and extended the trial court's ruling to preclude CSFB from obtaining indemnity for its defense costs, even though Vigilant had advanced funds under its policy. According to the Appellate Division, "[w]hile, under certain circumstances, the insurers must advance defense costs incurred by the insured in connection with a claim, the insured is obligated to repay such advance payments upon a finding that it is not entitled 'to payment of such Loss.' Thus, defense costs are only recoverable for covered claims." On this basis, CSFB not only was foreclosed from obtaining indemnity with respect to its settlements with the SEC and NASDR, it was required to reimburse to Vigilant the funds Vigilant had advanced for CSFB's defense.

6. Liss v. Federal Insurance Co.

Most recently, in *Liss v. Federal Insurance Co., et al.*, Docket No. MRS-L-1845-01 (N.J. Super., June 29, 2004), the New Jersey Superior Court held that a D&O insurer's defense that the insureds' payment of restitutionary damages to underlying claimants "is a salutary defense to insurance coverage pursuant to New Jersey public policy, as well as prevailing insurance law. In addition, restitution is an appropriate and valid defense in circumstances such as these where there is no loss within the context of the contractual definition of 'loss.' That is, restitution is a defense to policy coverage if the insured seeks only reimbursement for disgorgement of funds that were intentionally and wrongfully acquired (or retained) in the first instance."

In *Liss*, the underlying plaintiff, a former employee of the insured entity, sued the company when it allegedly refused to redeem stock he had constructively tendered to it. In turn, the entity sued the employee for his alleged breach of an employment agreement. The parties agreed to resolve their differences through binding arbitration after a court addressed the seminal D&O coverage question of whether "a defense of 'restitution' will support denial of coverage...[where] the insured privately held corporation refused to perform a contractual obligation to redeem" the former employee's shares of stock.

The *Liss* court, relying on *Level 3, Reliance* and other decisions, ruled that the touchstone of those courts' rulings was:

> (W)hether or not the insurance claim seeks to reimburse the insured for something that it should not have had in the first place, when the insured is required to provide restitution to the wronged party. Were the insured to be indemnified under those circumstances, the insured would have received a net benefit as a "reward" for its wrongdoing.

The *Liss* court thereupon proceeded to chastise insureds who seek to over-reach and obtain insurance coverage where it was not intended to, and should not, apply:

> Indeed, to permit insurance against consequences of intentional misconduct would encourage insureds to engage in wrongdoing when advantageous, and leave the financial consequences to the insurer. Insurers would then be insuring against risks that are far more likely to occur simply because of the insurance….Were coverage to apply in this case, corporate insureds would be encouraged to decline similar obligations with the resulting shareholder or creditor loss becoming a common phenomenon.

Thus, the court ruled, under New Jersey public policy, the insurer could rely on the salutary principle of restitution to decline coverage, even though this defense did "not arise from a specifically stated policy exclusion," but, rather, from a category of "implied exceptions" to coverage which are "implicit in the nature of the insuring agreement and the circumstances to which it applies."

Most instructively, the *Liss* court held that the claim at issue, "being restitutionary in nature," also was barred from coverage because it was is not within the ambit of the relevant policy's definition of 'loss,' which specifically did not include "matters uninsurable under the law pursuant to which this coverage section is construed."

CONCLUSION

A technical analysis of coverage under a D&O liability policy should include consideration of all facets of a policyholder's coverage request, including the nature of the acts and omissions at issue, the identities of the parties against whom the claim is made, the date the claim was first made and reported, and all other issues bearing on the availability and extent of coverage, if any. In all cases, the technical analysis should include a proactive investigation and analysis of the claims made, the predicate facts, and the types and nature of the damages demanded. Where the damages sought are restitutionary, rescissionary or otherwise based on contract or quasi-contract, coverage counsel, claims professionals, risk managers and insureds alike should consider the implications of *Reliance*, *Safeway*, *Conseco*, *Level 3*, *Vigilant* and *Liss*. Claims professionals in particular should review and understand the scope of these decisions before adopting and memorializing a coverage position. In short, a well-conceived explication and dialogue between the parties to the insurance contract will provide policyholders and their representatives with a fair opportunity to fully consider an insurer's coverage position and, if appropriate, prepare the policyholders to contribute to a settlement well in advance of mediation or other alternative dispute resolution proceeding.

* * *

This article first appeared in March 2005 in Mealey's--Emerging Insurance Disputes and Mealey's-Securities, and is reprinted by permission of the authors.

Richard J. Bortnick *(Philadelphia) counsels clients on a variety of international commercial matters, concentrating in directors' and officers' liability, insurance coverage, and complex business disputes. Richard practices law in courts throughout the United States and frequently serves as a consultant on international litigation matters. For more information, or for a complete copy of the article, contact him at 215.665.7251 or at rbortnick@cozen.com.*

Perry S. Granof is currently Vice President and Claims Counsel with Chubb Specialty Claims. He is responsible for overseeing the direct handling of complex directors' and officers' liability insurance and professional indemnity lawsuits filed against non-U.S. insureds and U.S. insureds sued outside of the United States.

INSURERS TO BE REIMBURSED FOR SETTLEMENT PAYMENTS ABSENT COVERAGE

Excess Underwriters at Lloyd's London, et al. v. Frank's Casing Crew & Rental Tools, Inc., 2005 Tex. LEXIS 418, 2005 WL 1252321 (Tex. May 27, 2005)

By: Kendall Kelly and Jarrett Coleman, Cozen O'Connor, Dallas

In *Excess Underwriters at Lloyd's, London and Certain Companies Subscribing Severally but not Jointly to Policy No. 548/TA4011FO1 v. Frank's Casing Crew & Rental Tools, Inc.*, the Texas Supreme Court considered whether excess insurance carriers that dispute coverage and subsequently settle third-party claims against their insured are entitled to recoup the settlement payments from their insured when it is subsequently determined the claims against the insured are not covered.

In this case, several excess insurance carriers brought an action against defendant insured, Frank's Casing Crew & Rental Tools (Frank's). Frank's had fabricated a drilling platform for ARCO/Vastar (ARCO) in the Gulf of Mexico, which collapsed several months later. ARCO subsequently sued Frank's and other defendants.

Frank's maintained a primary liability policy with limits of $1 million and excess policies with coverage up to $10 million from Certain Companies Subscribing Severally but not Jointly to Policy No. 548/TA4011FO1 and Excess Underwriters at Lloyd's London (collectively "excess underwriters"). Neither the primary nor the excess policies contained an express agreement allowing reimbursement. The excess underwriters issued reservation of rights letters in which they asserted that certain of ARCO's claims against Frank's were not covered.

THE SETTLEMENT

Frank's primary carrier assumed the defense and the excess underwriters retained their own counsel to associate with the primary carrier's defense of ARCO's claims. During trial, Frank's contacted ARCO and requested ARCO make a settlement demand within the policy limits of $7 million. ARCO requested $7.5 million and Frank's communicated to the excess underwriters to accept this offer. The excess underwriters agreed to fund the settlement up to $7.5 million, less any contribution from the primary carrier, provided the underwriters could seek reimbursement from Frank's. Frank's agreed. The underwriters contacted ARCO, orally agreeing to the settlement offer of $7.5 million, and the primary carrier tendered its remaining policy limits of $500,000 to settle the suit. A written agreement among ARCO, Frank's and the excess underwriters preserved "any claims that exist presently" between Frank's and the underwriters.

THE UNDERLYING COVERAGE LITIGATION

In the coverage dispute, the excess underwriters and Frank's filed cross motions for summary judgment. After considering the Texas Supreme Court's opinion in *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*, the court entered a take-nothing judgment against the excess underwriters. The Court of Appeals affirmed, but the Texas Supreme Court reversed.

The Supreme Court scrutinized the lower courts' reliance on *Matagorda County*. In *Matagorda County*, the insurer had the unilateral right to settle claims against the insured without the insured's consent. One of the chief concerns expressed by the Supreme Court in *Matagorda County* was when an insurer has the unilateral right to settle, an insurer can accept a settlement the insured considered out of the insured's financial reach and the insured would be required to reimburse the insurer for that amount.

The Court dismissed the concerns it had previously articulated in *Matagorda County*, stating that this concern was ameliorated when: 1) an insured impliedly accepts a settlement offer, by demanding that its insurer accept a settlement offer that is within the policy limits, such as in Matagorda County; or 2) an insured expressly agrees the settlement offer should be accepted, such as in this case.

THE RIGHT TO BE REIMBURSED

The Court stated, in these situations an insurer has a right to be reimbursed if it has timely asserted its reservation of rights, notified the insured it intends to seek reimbursement and paid to settle claims that were not covered.[1] Because Frank's specifically demanded the excess underwriters accept and fund ARCO's settlement offer, the Court opined, it could not thereafter take the inconsistent position the settlement offer was reasonable if the insurer bore the cost of settling, but unreasonable if the insured ultimately bore the cost. Once the insured asserts a settlement offer, has triggered a *Stowers*[2] duty, and the insurer then accepts that settlement offer or a lower one, the insured is estopped from asserting the settlement is too financially burdensome for the insured to bear if it turns out the claims against the insured are not covered. When the offer is one that a reasonable insurer should accept, it is one that a reasonable insured should also accept, especially when no coverage exists.

* * *

Jarrett Coleman is a member and Kendall Kelly is an associate in the Insurance Coverage Practice Group in our Dallas office. For more information, contact Jarrett Coleman at 214.462.3021 or jcoleman@cozen.com or Kendall Kelly at 214.462.3072 or krkelly@cozen.com.

1. Two other state supreme courts have spoken on this issue this year in the context of defense cost reimbursements. Most recently, the California Supreme Court unanimously held in *Scottsdale Ins. Co. v. MV Transportation*, __ Cal.4th __ (Cal. July 25, 2005) that an insurer which reserved its right to seek reimbursement of defense costs can obtain reimbursement of defense costs if the insurer establishes in a declaratory relief action that there never was any duty to defend. Illinois went the other way in *General Agents Ins. Co. v. Midwest Sporting Goods Co.*, 215 Ill.2d 146, 828 N.E.2d 1092, 1098-1104 (Ill. 2005) (liability insurer is not entitled to reimbursement of defense costs paid before court determined that insurer owed no duty to defend, even though insurer had asserted in reservation of rights letter that it was not waiving right to recoup defense costs; court discusses cases and acknowledges that it is following minority rule).

2. The "*Stowers* duty" refers to that duty, under Texas law, to "exercise that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business." *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved). The duty is not activated by a settlement demand unless 1) the claim against the insured is within the scope of coverage; 2) the demand is within the policy limits; and 3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 848 (Tex. 1994).

RECENT VICTORIES

APPELLATE

John McDonough (New York Downtown), **Elizabeth Chambers Bailey** (Philadelphia) and **Andrew Gibbs** (Newark) prevailed in the New Jersey Supreme Court on behalf of a major domestic rental car company. In a case of first impression in New Jersey, the Cozen O'Connor team convinced the New Jersey Superior Court to overrule the findings of two lower courts in regard to the priority of insurance coverage between the renter's automobile liability carrier and the rental car company as a self-insured lessor. Persuading the court that our client's coverage was excess to that of the renter's own liability policy required establishing that the "other insurance" clause of the rental car contract formed a part of our client's overall self-insurance program, which the court accepted. The issues before the court in this case were of such vital interest to the car rental industry that more than 1,000 rental car companies submitted amicus briefs. We were brought in as "go to" counsel for the Supreme Court appeal, as prior counsel had failed twice in the lower courts to advance the interests of the client.

Continued on page 12

RECENT VICTORIES *(continued from page 13)*

James E. Robinson and **Elizabeth Chambers Bailey** (Philadelphia), defending an aviation component manufacturer, were granted allocatur on an issue of first impression in Pennsylvania on questions of whether collateral orders may be appealed and the applicability of a federal statute of repose, the General Aviation Revitalization Act. The statute extinguishes claims against aviation manufacturers that arise 18 years or more after the aviation component at issue has been put into service. The trial court denied Jim's motion for summary judgment on this basis, without opinion. With guidance from **Ann Thornton Field** (Philadelphia), Jim and Elizabeth appealed this order under Pennsylvania's collateral order doctrine, but the Superior Court dismissed the appeal as interlocutory. Jim and Elizabeth sought allocatur on the jurisdictional claim with the Supreme Court, which remanded the matter to the Superior Court to decide the jurisdictional issue. The Superior Court denied the appeal, stating it had already ruled. Jim and Elizabeth went back to the Supreme Court, however, and obtained allocatur (and a direction to the Superior Court to file an opinion within 60 days).

Bob Reeder (retired) and **Sara Frey** (Philadelphia) won an appeal for a major physicians' insurer in a medical malpractice coverage action. The plaintiff was awarded $4 million in a failure-to-diagnose breast cancer case with liability being split evenly between two radiologists, one insured by our client and one insured by another medical insurer who was insolvent at the time. The insolvent insurer argued that it did not owe any indemnity because the entire judgment was less than our client's policy limits. The trial court agreed, holding that the applicable statute's nonduplication of recovery provision applied. Bob and Sara convinced the appellate court to reverse the trial court.

Zac Chacon and **Leena Soni** (Chicago) obtained a $3 million appellate victory on behalf of a major insurer. After another carrier paid $3 million to settle a personal injury claim against a general contractor, the carrier brought claims for equitable contribution and equitable subrogation against our client, who had insured one of the subcontractors. When we succeeded in getting those claims dismissed in the trial court, the other carrier refiled its claims in a new action, which were also dismissed. Zac and Leena persuaded the First District Illinois Appellate Court that the other carrier's contribution and subrogation claims could not survive.

Thomas M. Jones, **Helen Boyer** and **Melissa O'Loughlin-White** (Seattle) prevailed on an appeal in Oregon state court in which they represented a major domestic insurer in an environmental coverage case. In the trial court, our client was dismissed on summary judgment. The Court of Appeals affirmed, holding that preventive measures, absent a legal obligation to remediate damage to third-party property, were not covered. The policyholder has sought further review in the state supreme court.

TRIAL, ARBITRATION AND ADMINISTRATIVE

Michael A. Hamilton (Philadelphia) obtained dismissal with prejudice of a case against a major Pennsylvania transportation authority. In a case of first impression, Michael persuaded Judge Jackson of the Philadelphia Court of Common Pleas that under the Pennsylvania Motor Vehicle Financial Responsibility Law, doctors who provide medical services to people injured in an accident involving the transit authority must collect from their patients or their patients' lawyers, not the transit authority.

Jennifer Kenchel and **Jarrett Coleman** (Dallas) obtained summary judgment on behalf of a major insurer when a federal district court in Oklahoma held that a business income coverage form did not cover loss of business income to property that did not sustain direct, physical loss. Plaintiff owned a 16-unit apartment complex in Oklahoma City. One unit in the complex suffered damage as a result of fire. The Oklahoma City Building Code mandated that upon repair, the entire apartment complex was required to be equipped with automatic sprinklers, not just the one fire-damaged unit. The insurer's denial of coverage to the insured for its business income loss

associated with the code upgrades in the units that did not suffer direct physical loss was sustained by the court.

Jarrett Coleman (Dallas) obtained a summary judgment dismissal with prejudice of all claims brought by an insured general contractor against our insurer client under a builder's risk policy. The contractor sought $1.2 million under the policy for damage to an asphalt parking lot it constructed, and damages and attorneys' fees for bad faith denial of coverage. The court agreed that the parking lot did not qualify as "covered property" as defined in the policy's insuring agreement. Additional congratulations to **Michelle Castro** (Dallas) who initially analyzed the insured's claim and advised the client to deny coverage on the basis ultimately upheld by the court.

Chris Kende, **Chris Raleigh**, **Ed Hayum**, **Emily Barlow** (New York Downtown) and **Rod Fonda** (Seattle) achieved a dismissal of claims against a ship classification society. The society was sued in federal district court in Washington state by Holland America Line and the owners of a motor sailing yacht for an excess of $50 million, following a total loss of the vessel as a result of a fire. Holland America claimed that the society had negligently surveyed and classed the vessel even though the vessel, the M/S/Y Wind Song, had not conformed to the rules requiring certain electrical cables in the engine room to be fire resistant. The dismissal was based on a forum selection clause in the contract, which the judge held was mandatory and had to be enforced under settled maritime principles. The case is on appeal.

Clarence Jones (Seattle) won summary judgment defending a complex construction defect case. The client, a framer, allegedly failed to install sheathing beneath the siding, improperly installed windows and practiced poor workmanship throughout the 16-building condominium complex, allegedly contributing to actual damages of more than $3 million. Clarence successfully argued and won dismissal for the defendant based upon a partially written, partially oral contract that triggered application of Washington's three-year statute of limitations on oral contracts. Other similarly situated entities had earlier been denied summary judgment on nearly identical facts.

Leena Soni (Chicago) secured the dismissal of a first-party coverage action filed against our insurer client. The suit sought coverage for a structural failure beneath the Chicago Loop, which threatened a major collapse. Leena convinced the court to dismiss the action, brought as a third-party complaint, for improper joinder.

Anita Weinstein (Philadelphia) obtained a summary judgment in favor of a North Carolina limited liability law partnership in a case of first impression in the United States. The trial court granted summary judgment to the defendant lawyers and law firms who were sued by their former clients, asbestos claimants who received settlements from various asbestos manufacturers. The case was filed as a class action on behalf of settling claimants who resided in Pennsylvania, Indiana and Ohio, alleging fraud, misrepresentation and malpractice in failing to secure settlements for these individuals equal to the settlements received by residents of Mississippi. Anita convinced the court to deny plaintiffs' motion to certify the class and subsequently obtained summary judgment dismissal in favor of her client.

Lauren Tulli (Philadelphia) obtained summary judgment for the insurer in a case involving application of a family member exclusion in an auto policy. The insured claimed that an endorsement relied on by the insurer was not a part of the policy actually issued. In less than the five minutes at oral argument, Lauren convinced the judge that there was no need for discovery to determine the terms of the applicable policy and to grant summary judgment to our client.

Tim Headley and **Philip Lamb** (Dallas) obtained summary judgment on behalf of the insurer of a nursing home management company. Our client paid its insured (and co-defendant) for hail damage to various buildings at the premises. The plaintiff owned the nursing home and alleged on the basis of a loss payee endorsement to the

Continued on page 14

RECENT VICTORIES *(continued from page 15)*

policy that our client should have included plaintiff on the insurance check, and demanded payment for the full amount of the claim. Tim and Philip achieved summary judgment on the grounds that the plaintiff was not a loss payee on the date of loss and therefore the insurer was not required to include plaintiff on the payment check.

Denise Houghton (Philadelphia) achieved summary judgment on behalf of a hospital that was sued when a psychiatric aide in its employ allegedly used excessive force in the use of a "therapeutic hold" that resulted in the broken arm of an eight year old. The aide refused to cooperate with the defense and the hospital subsequently filed for reorganization. As a result, it would have been impossible to overcome the allegations at trial since there was literally no one to testify on behalf of the hospital. Compensatory and punitive damage totaling $1.25 million was requested as a result of multiple deficiencies alleged against the hospital, including inadequate staff and poor training. Denise filed a motion for summary judgment under the Pennsylvania Mental Health Procedures Act, which provides immunity from suit based upon care and treatment decisions rendered by mental health "professionals" in the absence of "gross negligence." Denise persuaded the court that plaintiffs had not raised an issue of material fact as to gross negligence and the court granted summary judgment.

Dawn Grossman (San Diego/Las Vegas) won summary judgment on a duty to defend and bad faith case in favor of a major domestic insurer. A purchaser of commercial property complained that the sellers misrepresented the condition of the property. Dawn convinced the judge that the insurer had correctly denied the sellers' claim for a defense. **Brandon Willenberg** (San Diego) and **Christine Field** (Los Angeles) assisted.

Tim Borchers (Seattle) convinced a federal judge to dismiss, on forum non conveniens grounds, claims by a California boat owner against a Victoria, British Columbia shipyard. The Lambada, a high-speed yacht owned by a famous former owner of professional sports franchises and a wealthy benefactor of the arts, was taken for a sea-trial by the shipyard, during which she suffered a major engine casualty. The owner and his insurer sought more than $200,000 for the engine damage. Tim argued that Canadian law governed the claims because the contract was created and performed in Canada and the casualty was in Canada, and that Washington state was not a convenient forum for the suit. The major issue to overcome was Supreme Court precedent stating that the law of the flag presumptively governs maritime choice of law. The district court granted the motion to dismiss and entered a judgment dismissing the case, which will presumably be re-filed in Canada, a more favorable forum for our British Columbia client.

William H. Howard (Philadelphia) achieved summary judgment in favor of our reinsurer client. The plaintiff policyholder sought a defense and indemnity under two law enforcement liability policies, for claims arising out of a civil rights action by a former prisoner who had been convicted of murder and incarcerated for 28 years on the basis of allegedly doctored crime scene evidence and allegedly perjured testimony at trial concerning the use of that evidence. The former prisoner was represented in the underlying action by the late Johnny Cochran. The court accepted Bill's argument that the "wrongful act" policies were "occurrence" policies and that the "occurrence" had taken place at the time of the arrest, or, at the latest, upon the conviction, both of which occurred long before the 1983 inception of the two policies. The court entered summary judgment in favor of our client and three other insurers, adopting our legal analysis.

Ira Megdal and **Douglas Frankenthaler** (Cherry Hill) prevailed in a class action brought against our long-standing client, a major gas company. Ira and Doug persuaded the New Jersey Superior Court to dismiss the class action, which sought injunctive relief and monetary damages related to the placement of natural gas meters

near driveways, parking areas and garage openings. Ira and Doug succeeded in getting the complaint dismissed in its entirety.

Craig Bennion and **Ramona Hunter** (Seattle) obtained summary judgment in favor of multiple property insurer clients in a first-party coverage action filed by a well-known banking institution. The bank evacuated a building on the erroneous advice of a professional engineering firm that the bank subsequently sued for professional malpractice. The engineering firm grossly misdiagnosed the nature and integrity of the bank's post-tension slab and wrongly advised the bank to immediately evacuate the premises, after incorrectly concluding there was considerable threat to the health and safety of the people working inside the building. It was undisputed that nothing was wrong with the building. Craig and Ramona argued that the bank was not entitled to coverage because the bank building did not sustain any actual damage. The court agreed and granted summary judgment in favor of our insurer clients.

Scott Reid (Philadelphia) obtained complete dismissals of two medical device claims involving allegedly defect products. The complaints included a count for consumer fraud.

Paul Reichs (Charlotte) obtained another "no negligence" verdict in a very difficult case on behalf of a physician. The jury agreed with Paul's arguments that his client-physician met the appropriate standard of care. The 43-year old career fireman plaintiff had been admitted to the hospital via the emergency room on a Thursday night for chest pain. Paul's client discharged the plaintiff from the hospital on Sunday for follow-up and further testing on an outpatient basis. Twenty-four hours later the plaintiff suffered a major heart attack that permanently disabled him from further work as a firefighter. The jury found that the discharge decision of Paul's client was within the standard of care.

Ted Bryant and **Jennifer Artiss** (Seattle) successfully defended a challenging personal injury lawsuit. Prior to trial, our client extended an offer of judgment in the amount of $75,000. After a two-week trial, plaintiff asked the jury for $1.87 million. The jury deliberated for two days and awarded a total of $58,000. This was later further reduced during post-trial motions. Plaintiff is currently appealing the jury verdict.

Tia Glass (Chicago) was victorious in defending a personal injury case for our client. Tia convinced a jury in a case involving a six-figure demand to award only $3,000. What made this case particularly satisfying to the client was that Tia had offered to settle the case for $7,000 after the evidence was closed but before the case went to the jury.

Kathie King (Philadelphia), **Ted Pannkoke** (Chicago) and **Maya Hoffman** (Chicago) achieved a unanimous jury verdict for the defense in a Florida nursing home case. The trial court granted defense motions relating to punitive damages and ordered that the case be tried in three phases. Based on the court's acceptance of our constitutional arguments relating to the punitive damage claims, most of plaintiff's prejudicial evidence was kept out of the trial. The trial judge told Kathie that he plans to adopt the three-phased trial for other punitive damage cases.

Jamie Clausen (Seattle) prevailed in a trial in which she defended a slow-speed rear end collision case involving a plaintiff with a history of spinal injury. Based on the extent and pattern of treatment and the speed of the accident, the defendant's insurer determined the suit was most likely fraudulent. The case went to arbitration last year with an arbitration award of $15,000 to the plaintiff. Consistent with their fraud policy, the insurer opted to take the case to trial. At trial, the defendant opted to concede liability for the accident and used a biomechanics expert instead of medical doctors to establish the risk of injury. The plaintiff presented two medical experts and requested $129,000 in special and general damages. The jury deliberated for less than two hours and returned an 11-1 verdict in favor of the plaintiff in the amount of $1,600.

Continued on page 16

RECENT VICTORIES *(continued from page 17)*

Jarrett Coleman (Dallas) successfully arbitrated a claim brought against a major insurer in Tennessee. After another carrier paid $193,251 to settle a construction defect claim against a general contractor, the carrier brought claims for equitable subrogation against our client, and demanded our client reimburse it for the entire amount spent to resolve the underlying claim. The arbitration panel sided with our client's position that it owed no more than 50 percent of the amount spent to resolve the underlying claim.

Jennifer Brown (Seattle) succeeded on an asylum filing on behalf of a Gambian client who was subjected to kidnapping, forced female genital mutilation and rape at the hands of Gambian government soldiers, as a result of her father's connections with the prior government. Gambia is a small country located in West Africa which had the longest running democratic government in Africa prior to a 1994 overthrow. The client hid in her aunt's basement for nine years before escaping to the United States. Jennifer convinced the asylum officer to grant asylum even though the client entered the U.S. on a fraudulent passport and was a minor when she entered.

NOTEWORTHY HONORS, APPOINTMENTS AND PUBLICATIONS

HONORS

Cozen O'Connor Insurance Litigation, Business Litigation and Business Law attorneys were honored this year as Super Lawyers. In Pennsylvania, **Kevin F. Berry**, **Jeffrey L. Braff**, **Dennis L. Cohen**, **Neal D. Colton**, **Stephen A. Cozen**, **Jay A. Dorsch**, **Christopher C. Fallon, Jr.**, **Elliott R. Feldman**, **Mark E. Felger**, **H. Robert Fiebach**, **Mark H. Gallant**, **Henry A. Gladstone**, **James D. Golkow**, **Robert W. Hayes**, **James H. Heller**, **Michael J. Heller**, **Michael F. Henry**, **F. Warren Jacoby**, **Sarah A. Kelly**, **Philip G. Kircher**, **David L. Ladov**, **Jeffrey A. Leonard**, **Patrick J. O'Connor**, **Jeffrey I. Pasek**, **E. Gerald Riesenbach**, **Cheryl Sattin**, **William P. Shelley**, **Margaret Gallagher Thompson**, **John R.Washlick**, **Ross Weiss**, **Thomas G. Wilkinson, Jr**. and **William J. Winning** were selected. In Seattle, the honor went to **Thomas M. Jones**, **William Pelandini**, **J.C. Ditzler**, and **Jodi McDougall**. In Chicago, **Richard Blatt**, **Larry Eaton**, **Rob Hammesfahr**, **Greg Hopp**, **Josh Kantrow**, **Lori Nugent** and **Jim Tarman** were named. **Richard Blatt** was also recommended recently by his peers in a statewide survey to be named among the leading alternative dispute resolution lawyers in Illinois, and **Jim Tarman**, **Catherine Nelson**, **Rob Hammesfahr**, **Zac Chacon**, **Matthew Walsh**, **Larry Eaton**, **Greg Hopp** and **Lori Nugent** were named leading insurance lawyers, according to the Leading Lawyers Network. In New Jersey, **Brian J. Coyle**, **Arthur J. Abramowitz**, **William D. Lavery, Jr. Peter J. Fontaine**, **Ira G. Megdal** and **Thomas McKay, III** were honored as Super Lawyers.

Francine Semaya (New York Downtown) received the inaugural Kirsten Christophe Memorial Award for Excellence in Trial and Insurance Law. Selected by the Tort Trial & Insurance Practice Section (TIPS) of the American Bar Association (ABA), Francine will be presented the award at the 2005 ABA annual meeting in August. The Kirsten Christophe Memorial Award for Excellence in Trial and Insurance Law is named in honor of Kirsten Christophe, a former TIPS council member who perished September 11, 2001 in the World Trade Center attack. The award recognizes a TIPS member or members who demonstrate expertise in an area of trial practice or insurance law, and who personify the exemplary attributes of Christophe—balancing career, profession, and family in life and practice

Linda Kaiser (Philadelphia) received the 2005 Mariellen Whelan Excellence in Education Award, sponsored by the Insurance Society of Philadelphia, for her significant contributions to the continuing education of professionals in the insurance, legal and financial services industries.

Insurance Litigation Department attorneys in Philadelphia

and Seattle were among those honored by Cozen O'Connor's recent receipt of two awards: the 2005 Philadelphia Senior Law Center's Legal Services Award, and the 2005 Northwest Immigrant Rights Project's Amicus Award. For more information about these and other pro bono achievements of Cozen O'Connor attorneys, contact **Peter Rossi** (Philadelphia) at 215.665.2783 or prossi@cozen.com.

APPOINTMENTS

Richard C. Mason (Philadelphia) was appointed editor in chief of the ABA's *Tort Trial & Insurance Practice Law Journal*. Richard served as the *Journal's* executive editor in 2004.

Helen A. Boyer (Seattle) was named a vice chair of the ABA TIPS Insurance Coverage Litigation Committee (ICLC) within the Tort Trial & Insurance Practice section. Helen is slated to edit the ICLC's submission to the 2006 Annual Survey issue of the *Tort Trial & Insurance Practice Law Journal*.

Tim Borchers (Seattle) has been elected to the board of directors of the Marine Insurance Association (MIAS) of Seattle. Tim, who is the only lawyer on the board, has been the chair of the MIAS Day of Education seminar for three years. The seminar is presented to more than 150 marine insurance professionals each spring. The seminar also raises more than $5,000 annually for the MIAS scholarship fund. MIAS is the largest and most prominent association of our maritime clients in the Northwest and has a membership of insurers and related businesses.

PUBLICATIONS

Richard Blatt, **Rob Hammesfahr** and **Lori Nugent** (Chicago) authored Punitive Damages: A State-by-State Guide to Law and Practice (*Thomson West* 2005).

William H. Howard and **Margaret Mackowsky** (Philadelphia) authored "New Issues in Environmental Risk Insurance," an article that was published in the Spring 2005 issue of the ABA's *Tort Trial & Insurance Practice Law Journal*, a publication of the Tort Trial & Insurance Practice section.

Larry Jackson (Philadelphia) published an article in the Spring 2005 ABA *Professionals', Officers' and Directors' Liability Committee News*, titled "Third Circuit Adopts Second Circuit Standard for Pleading Securities Claims Under the PSLRA and In So Doing Raises the Bar for Plaintiffs Who Rely Upon Information Attributed to Documentary Evidence or Unnamed Confidential Sources." The Committee's website coordinator is **Kevin M. Mattessich**.

Helen A. Boyer, **Jamie C. Clausen** (Seattle), **Kellyn J.W. Muller**, **Larry Jackson** (Philadelphia) and **Kendall R. Kelly** (Dallas), with contributions by **Joseph Ziemianski** (Houston), **Charles E. Wheeler** (San Diego), **Stephen R. Bishop** (Philadelphia) and **Jennifer C. Artiss** (Seattle), authored an article, titled "Recent Developments in Insurance Coverage Litigation," that appeared in the ABA's *Tort Trial & Insurance Practice Law Journal* (Winter 2005).

Helen A. Boyer (Seattle) authored a review of the book Liability Insurance in International Arbitration-The Bermuda Form, which appeared in the March 2005 edition of *The Insurance Coverage Law Bulletin*.

Michael A. Hamilton (Philadelphia) and **Richard E. Wegryn** (West Conshohocken) authored an article that appeared in the May 2005 issue of the Defense Research Institute's *For the Defense* magazine, titled "Curtailing The Insured's Unwarranted Requests -- Discovery in Bad Faith Litigation."

Chris Raleigh (New York Downtown) authored an article published in the April 4, 2005 edition of *National Underwriter*, titled "Trucking Deregulation Drives New Risks," which discusses how changes in the trucking business, and deregulation under the I.C.C. Termination Act, affect the potential liability of carriers. The article also suggests a methodology for risk evaluation in light of this new statute.

Continued on page 18

NOTEWORTHY HONORS *(continued from page 19)*

William F. Knowles (Seattle) co-authored an article that appeared in the June 2005 issue of the Defense Research Institute's *For the Defense* magazine, titled "Joint Defense Agreements In Construction Defect Claims."

COVERAGE ATTORNEYS "IN THE SPOTLIGHT"

Sheila McKinlay and **Jamieson Halfnight** (Toronto) recently participated in the Canadian Institute's 5th Annual Conference on Managing and Litigating Insurance Coverage Disputes in Toronto. Sheila spoke at the conference and Jamie co-chaired the two-day event, which provided technical and practical advice from Canada's top insurance lawyers and industry professionals on topics ranging from D&O liability to proposed insurance changes and best practices. In her presentation, titled "Making Sense of the Allocation of Defence Costs," Sheila addressed allocating costs between insurers, disadvantages of partial insurance, recourse availability for a defending insurer and third-party costs.

Chris Kende (New York Downtown) was a panelist at the 16th Biennial Marine Seminar on Marine Insurance Issues in New York, sponsored by the American Institute of Marine Underwriters. His discussion focused on file documentation for underwriters and claims personnel. Chris also presented "Protecting Your Company from Losses Triggered by Class Actions and Mass Tort Claims" at the ACI-sponsored June 23 conference, React 2005 Risk Reward Reinsurance.

Lori Nugent (Chicago) was an instructor at the 2004 Lloyd's of London - Illinois State University Study Tour, which was attended by 21 Lloyd's practitioners who traveled to the U.S. for one week to study current insurance, reinsurance and legal issues.

Denise Bense (West Conshohocken) and **Tia Glass** (Chicago) were speakers at the PLRB conference in San Antonio in April. Denise delivered a presentation that she and **Mike Smith** (Philadelphia) had prepared, titled "Bad Faith and Punitive Damages Arising from Third-Party Liability Claims." Tia's presentation was "Products Liability Claims Handling: A Primer from A to Z."

Mike Smith (Philadelphia) spoke in Chicago in June at the Second Annual ACI Advanced Forum on Welding Rod Litigation. He addressed "Insurance Coverage Issues" in connection with welding rod claims.

Francine Semaya (New York Downtown) was an invited lecturer this spring at the Brooklyn Law School for a class on "Reinsurance 101 and Insurance Insolvency." She also spoke at the ACI conference in New York on April 21 on "Reinsurance Claims and Collections," and on April 15 at the ABCNY/City Bar Joint New York Annual Regional Meeting on "Current Issues in Insurance Regulation," a program she co-chaired. She spoke on reinsurance and also was on the planning committee for training presented in San Francisco to the California Liquidation Office, in a session sponsored by IAIR.

Michael A. Hamilton (Philadelphia) was a co-chair and speaker at the Insurance Coverage and Claims Institute conference sponsored by the Defense Research Institute on April 7-8 in Chicago. Michael chaired the program track for Commercial Lines Insurance Coverage and spoke on "General Liability Coverage Considerations in Copyright, Trademark, and Trade Secret Litigation." Mike also spoke at a seminar, titled "Insurance Law 2005: Understanding the ABC's," sponsored by the Practicing Law Institute on April 4-5 in New York, on "Fundamentals of Property Insurance from the Insurers' Perspective."

Josh Kantrow (Chicago) was a speaker at a transportation seminar held in Chicago on February 10 sponsored by a transportation insurance brokerage firm. His topic was

"Attorney Perspectives on Liability Exposures and Trends in the Transportation Industry."

Chris Raleigh (New York Downtown) spoke on February 15 before the Recovery Forum, Inc. in New York on "Recent Developments Affecting Intermodal Claims," discussing how the interplay of the U.S. Carriage of Goods By Sea Act and the I.C.C. Termination Act can affect litigation strategy when multimodal shipments are damaged during inland transit.

William F. Knowles (Seattle) was a speaker presenting the insurer's perspective on "Confirming and Resolving Status of Insureds" at Mealey's Additional Insured Conference in May.

For further information on any of these topics, contact the attorneys directly at their respective offices at the numbers listed on the back page of this issue.

YOUR TURN

We would like to hear from you. Please take a minute to fill out the remainder of this page and fax it back to us. Your opinions and ideas will help us create a better *Insurance Coverage Observer* more attuned to your needs and interests. Thank you.

Your Infomation:

Name:_____

Title:_____

Company:_____

Address:_____

_____

Email:_____

Who is your principal contact at Cozen O'Connor?

_____

If there are others in your organization who would like to receive the *Observer* please let us know:

Name:_____

Title:_____

Company:_____

Address: _____

_____

Email:_____

What do you anticipate will be the most important insurance issues to confront your company over the next five years?

_____

_____

_____

_____

What topics would you like to see addressed in future issues of the *Observer*?

_____

_____

_____

_____

What topics would you like to see addressed in client seminars by Cozen O'Connor?

_____

_____

_____

_____

Please identify the insurance trade publications you read/review on a regular basis.

_____

_____

_____

_____

PLEASE FAX COMPLETED FORM TO: 215-568-3756
(NO COVER SHEET IS NECESSARY)

COZEN O'CONNOR®

DIRECTORY OF OFFICES

PRINCIPAL OFFICE: PHILADELPHIA
1900 Market Street
Philadelphia, PA 19103-3508
Tel: 215.665.2000 or 800.523.2900
Fax: 215.665.2013
For general information please contact:
Joseph A. Gerber, Esq.

ATLANTA
Suite 2200, SunTrust Plaza
303 Peachtree Street, NE
Atlanta, GA 30308-3264
Tel: 404.572.2000 or 800.890.1393
Fax: 404.572.2199
Contact: Samuel S. Woodhouse, III, Esq.

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

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

CHICAGO
Suite 1500, 222 South Riverside Plaza
Chicago, IL 60606-6000
Tel: 312.382.3100 or 877.992.6036
Fax: 312.382.8910
Contact: James I. Tarman, Esq.

DALLAS
2300 Bank One Center, 1717 Main Street
Dallas, TX 75201-7335
Tel: 214.462.3000 or 800.448.1207
Fax: 214.462.3299
Contact: Lawrence T. Bowman, Esq.

DENVER
707 17th Street, Suite 3100
Denver, CO 80202-3400
Tel: 720.479.3900 or 877.467.0305
Fax: 720.479.3890
Contact: Brad W. Breslau, Esq.

HOUSTON
One Houston Center
1221 McKinney, Suite 2900
Houston, TX 77010-2009
Tel.: 832.214.3900 or 800.448.8502
Fax: 832.214.3905
Contact: Joseph A. Ziemianski, Esq.

LAS VEGAS*
601 South Rancho, Suite 20
Las Vegas, NV 89106-4825
Tel: 800.782.3366
Contact: Joseph Goldberg, Esq.
*Affiliated with the law offices of J. Goldberg, and D. Grossman.

LOS ANGELES
Suite 2850
777 South Figueroa Street
Los Angeles, CA 90017-5800
Tel: 213.892.7900 or 800.563.1027
Fax: 213.892.7999
Contact: Mark S. Roth, Esq.

LONDON
9th Floor, Fountain House
130 Fenchurch Street
London, UK
EC3M 5DJ
Tel: 011.44.20.7864.2000
Fax: 011.44.20.7864.2013
Contact: Richard F. Allen, Esq.

NEW YORK
45 Broadway Atrium, Suite 1600
New York, NY 10006-3792
Tel: 212.509.9400 or 800.437.7040
Fax: 212.509.9492
Contact: Michael J. Sommi, Esq.

909 Third Avenue
New York, NY 10022
Tel: 212.509.9400 or 800.437.7040
Fax: 212.207-4938
Contact: Michael J. Sommi, Esq.

NEWARK
Suite 1900
One Newark Center
1085 Raymond Boulevard
Newark, NJ 07102-5211
Tel: 973.286.1200 or 888.200.9521
Fax: 973.242.2121
Contact: Kevin M. Haas, Esq.

SAN DIEGO
Suite 1610, 501 West Broadway
San Diego, CA 92101-3536
Tel: 619.234.1700 or 800.782.3366
Fax: 619.234.7831
Contact: Joann Selleck, Esq.

SAN FRANCISCO
Suite 2400, 425 California Street
San Francisco, CA 94104-2215
Tel: 415.617.6100 or 800.818.0165
Fax: 415.617.6101
Contact: Forrest Booth, Esq.

SANTA FE
125 Lincoln Avenue, Suite 400
Santa Fe, NM 87501-2055
Tel: 505.820.3346 or 866.231.0144
Fax: 505.820.3347
Contact: Harvey Fruman, Esq.

SEATTLE
Suite 5200, Washington Mutual Tower
1201 Third Avenue
Seattle, WA 98101-3071
Tel: 206.340.1000 or 800.423.1950
Fax: 206.621.8783
Contact: Daniel C. Theveny, Esq.

TRENTON
144-B West State Street
Trenton, NJ 08608
Tel: 609.989.8620
Contact: Jeffrey L. Nash, Esq.

TORONTO
One Queen Street East, Suite 2000
Toronto, Ontario M5C 2W5
Tel: 416.361.3200 or 888.727.9948
Fax: 416.361.1405
Contact: Sheila McKinlay, Esq.

WASHINGTON, DC
Suite 500, 1667 K Street, NW
Washington, DC 20006-1605
Tel: 202.912.4800 or 800.540.1355
Fax: 202.912.4830
Contact: Barry Boss, Esq.

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

WICHITA
New England Financial Building
8415 E. 21st Street North, Suite 220
Wichita, KS 67206-2909
Tel: 316.609.3380 or 866.698.0073
Fax: 316.634.3837
Contact: Kenneth R. Lang, Esq.

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

PLEASE CONTACT ANY OF OUR OFFICES FOR ADDITIONAL INFORMATION OR VISIT US ONLINE AT WWW.COZEN.COM