MESSAGE FROM THE CHAIR
TO THE FRIENDS OF COZEN O’CONNOR:

We hope that most of you have already received the announcement of our name change from the National Insurance Department to the Global Insurance Group. This change, in part, simply reflects current operations, which include work in Central and South America, Europe and Asia. But the name change also represents our continuing transformation to a truly global insurance operation to meet the continuing globalization of the insurance industry we proudly serve. There will be more to follow on this in the coming months. For now, welcome to the “GIG.”

We take pride at Cozen O’Connor in addressing new developments that will affect our clients. In this issue, we include a special report on two new decisions from New Jersey on bad faith in the UM/UIM context.

We are proud to announce that the Honorable James Gardner Colins, former President Judge of the Commonwealth Court of Pennsylvania, has joined Cozen O’Connor. Judge Colins specializes in public utility and insurance regulation and will practice out of the Philadelphia office. Judge Colins served on the Commonwealth Court of Pennsylvania from 1984 to January 2008, is the longest-serving judge on the Commonwealth Court and the only one to have served two five-year terms as President Judge. An active participant in the judicial and legal communities, Colins served as a member and chairman of the Pennsylvania Judicial Conduct Board, handling and investigating complaints of judicial misconduct, and currently serves on the Supreme Court of Pennsylvania’s Special Committee on Judicial Education.

Finally, we are proud to announce that Peter Lynch (San Diego) was awarded the Bronze Star Medal for meritorious service for his service in Al Anbar Province as Deputy Rule of Law Officer, II Marine Expeditionary Force, during Operation Iraqi Freedom. Lieutenant General Helland, Commander of the Marine Corps Forces Central Command, Marine Expeditionary Force presented the medal to Peter upon completion of his 14-month presidential recall to active duty. We are extremely proud of Peter and most of all, we are grateful that he is home with us again. Peter practices in the firm’s Subrogation and Recovery Group.

Best regards,

William P. Shelley
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SPECIAL REPORT:
NEW JERSEY APPELLATE DIVISION’S
DECISIONS INVITE CHALLENGES TO
PICKETT’S RULE ON FIRST-PARTY
BAD FAITH CLAIMS

Thomas McKay, III, Esq. and Ruth Greenlee, Esq.
(Cherry Hill)

Two recent decisions by the New Jersey Superior Court, Appellate Division, slammed the door on two first-party plaintiffs who sought to expand an insurer’s bad faith exposure. At the same time, however, the decisions leave the door open for creative plaintiffs’ counsel to continue the fight to expand first-party bad faith in New Jersey.

On July 14, 2008, in two uninsured and underinsured motorist (UM/UIM) cases, Taddei v. State Farm Indemnity Co., No. A-3806-06T2 and Accisano v. Allstate Ins. Co., No. A-0156-06T2, two different panels of the New Jersey Superior Court, Appellate Division, declined to expand the doctrine of Rova Farms Resort, Inc. v. Investors Ins. Co. of America, 65 N.J. 474 (1974), which applies where a third-party general liability insurer’s bad faith failure to settle within policy limits exposes its insured to personal liability from a verdict in excess of policy limits. In Taddei and Accisano, the Appellate Division refused to recognize a novel recovery modeled on Rova Farms for UM/UIM insurers’ delay in resolving and refusal to pay first-party policy limits.

The Appellate Division panel that decided Taddei (Judges Lisa, Simonelli, and King) went beyond what was necessary to decide the case, expressing doubts in the UM/UIM context about the sufficiency of the bad faith “fairly debatable standard” under Pickett v. Lloyd’s, 131 N.J. 457, 621 A.2d 445 (1993) in which the New Jersey Supreme Court authorized a first-party bad faith claim for undisputed property damage. Bad faith was never pled in either Taddei or Accisano. The pleadings never requested consequential damages from any alleged bad faith. The plaintiffs never moved to amend his or her pleadings to include such a claim. Plaintiff, Leona C. Taddei, however, filed a second bad faith case in the New Jersey Superior Court, Law Division, now pending a decision on State Farm’s motion to dismiss under New Jersey’s entire controversy doctrine. Not surprisingly, the Appellate Division found no error in the trial courts’ refusal to address the plaintiffs’ belated claims of bad faith. The issue was never before the trial courts nor the Appellate Division.

Despite the procedural posture of the cases on the belated bad faith claims, the Appellate Division in Taddei went on to discuss the principles it deems relevant and necessary to explain why the trial judge did not err in declining to rule on plaintiff’s late-assertion of bad faith. The Appellate Division’s expansive discussion promises to have an impact on future bad faith litigation in the UM/UIM context.

In New Jersey, Rova Farms provides a remedy to a third-party general liability insured for its carrier’s bad faith failure to settle within policy limits, allowing the insured to recover from the insurer the verdict amount in excess of policy limits. The Rova Farms rationale, based on the unique fiduciary relationship between an insured and its general liability carrier who controls the defense, does not permit an insurer that chooses not to settle within policy limits to gamble with its insured’s money. Rova Farms, 65 N.J. at 492-96, 501-02, 323 A.2d at 495. In Taddei and Accisano, the Appellate Division ruled that Rova Farms simply does not apply in the first-party coverage context because the insured’s assets are not placed at risk for failure to settle within policy limits.

Although Taddei presented no evidence of nefarious strategies by the UM/UIM industry, Rova Farms had recognized over thirty years ago that insurers’ settlement decisions may be “polluted by institutional considerations which ignore the interests of the specific insured involved.” Id. at 499, 323 A.2d at 495. Such institutional interests include “a purpose to keep future settlement costs down, to numb the public’s claim-consciousness, to create a conservative image for the discouragement of future claimants or to establish favorable precedents, none of which purposes has anything to do with the protection of the particular insured at hand.” Ibid. Rova Farms also recognized that carriers might pursue institutional interests whether or not they were liable for the entire amount of a specific adverse verdict. Ibid.

Although rejecting a remedy modeled on Rova Farms, Taddei unequivocally announced that a plaintiff has the right to assert a claim against its UM/UIM insurer for breaching the covenant of good faith and fair dealing implied in the insurance contract under Pickett v. Lloyd’s, supra. The plaintiff insured who believes his carrier has acted in bad faith thus is not restricted solely to the offer-of-judgment remedy set forth in the New Jersey Rules of Court, Rule 4:58-1, et seq. But the measure of damages, if plaintiff can prove bad faith, is not unlimited. It remains to be any foreseeable consequential damages in accordance with New Jersey’s long adherence to the rule in Hadley v. Baxendale, 9 Ex. 341, 156 Eng.Rep. 145 (1854), “that the defendant is not chargeable for loss that he did not have reason to foresee as a probable result of the breach when the contract was made.” Donovan v. Bachstadt, 91 N.J. 434, 444, 453 A.2d 160 (1982). This would include costs of litigation, expenses for experts and counsel fees, and prejudgment interest. Such damages, however, are not measured by the amount of damages the jury finds for the UM/UIM insured’s injuries:

We can conceive of no reason to limit a UM claimant’s remedy, if he or she believes the insurer has acted in bad faith, to the offer of judgment rule. The existence of the rule should not bar an aggrieved insured from pursuing a meritorious claim against the insurer for breach of the covenant of good faith and fair dealing, and the ability to recover all consequential damages, and, in an exceptional and particularly egregious case, even be permitted to pursue punitive damages.


Taddei suggests that the fairly stringent Pickett standard for undisputed property damage claims should undergo a more liberal modification in the context of UM/UIM cases because the evaluation of an insurer’s good faith in failing to settle in that context differs significantly from Pickett-type property damage claims. Although UM/UIM claims and Pickett-type property damage claims are both first-party claims, UM/UIM claims involve subjectively determinable, unliquidated bodily injury claims whereas Pickett claims involve objectively determinable, property damage claims. In Pickett, the
property damages were undisputed. On the other hand, potential recoveries for unliquidated bodily injury claims typically cover very broad ranges that are difficult to predict with any certainty.

The Appellate Division's rulings in Taddei and Accisano suggest that the present Pickett standard does not provide a sufficient basis on which to impose bad faith liability for an UM/UIM carrier's trifling with its good faith obligations to its insured. A broadened rule stands to place a heavier burden for failure to settle on the UM/UIM insurer who sacrifices the interests of its insured for its own interests.

Thomas McKay, III is the Office Managing Partner of the Cherry Hill office. His practice focuses primarily on insurance coverage, arson and insurance fraud investigations and defense, and first party bad faith defense. Ruth Greenlee concentrates her practice in appellate advocacy, complex insurance coverage litigation with a focus on commercial property claims, and bad faith.

RECENT VICTORIES: APPEALS

FORMER DALLAS COWBOY’S PETITION FOR REHEARING DENIED

Donald Mitchell v. ACE American Ins. Co., No. 07-10962 (5th Cir. March 31, 2008)

The United States Court of Appeals for the Fifth Circuit agreed with the arguments of Alicia Curran (Dallas) and Kendall Hayden (Dallas) and denied Petitioner /Appellant (and former Dallas Cowboy) Donald Mitchell's Petition for Rehearing. The Court’s decision affirmed the trial court’s decision granting the insurer’s motion for summary judgment and dismissed Mitchell’s claim for $1 million of benefits allegedly due under a professional disability policy.

The Fifth Circuit rejected Mitchell’s two arguments. First, the Court refused to consider an ambiguity argument regarding the definition of the word “participate” because Mitchell failed to make the argument to the District Court. (The court noted that even if the ambiguity argument had not been waived, Mitchell would have lost the point.) Second, the Court rejected Mitchell’s argument that he should be covered despite failing to meet the policy requirements of the Elimination Period and the rehabilitation clause. Considering the Policy as a whole, the Court ruled that the rehabilitation clause functioned to limit coverage, not enlarge the insurer’s exposure by doing away with the Elimination Period.

NO COVERAGE FOR COMPLETED OPERATIONS CLAIM


Bill Knowles (Seattle) and Katina Thornock (Seattle) successfully convinced the Washington State Court of Appeals to affirm summary judgment in favor of our client against another insurer. This construction defect coverage decision was a matter of first impression in Washington.

In the lower court, the Cozen team successfully moved for summary judgment to dismiss the other insurer’s contribution action. The other insurer appealed. The Court of Appeals delivered the first published decision in Washington holding that endorsement language that limits additional insurance to liability arising from the named insured’s ongoing operations does not extend to completed operations claims such as those presented in construction defect litigation.

PETITION FOR REVIEW GRANTED IN WASHINGTON


Despite the Washington State Supreme Court’s denial rate of over ninety percent, J.C. Ditzler, Melissa O’Loughlin White and Molly Siebert Eckman (all Seattle) convinced the Court to grant a Petition for Review on behalf of an insurer. The issue at the heart of the case is whether the policy’s exclusion for bodily injury that “arises out of” assault excludes coverage for alleged “exacerbation” of assault-derived injuries.

This case involves a shooting at the insured nightclub that caused injury to a patron. After the shooting but before medical help arrived, the nightclub’s staff moved the injured patron. There was no evidence of separate injury caused by the staff’s actions. The patron sued the nightclub for negligence.

Relying upon the policy language and Washington precedent, the insurer denied coverage. The nightclub made a request for reconsideration that relied upon distinguishable out-of-
state authorities, and the insurer denied coverage again. The nightclub sued the insurer.

The trial court concluded that the injuries necessarily arose out of the assault, and dismissed the case on summary judgment. Then the Washington State Court of Appeals reversed, ignoring on point Washington law and relying on out of state authority to hold that the policy did not necessarily exclude coverage for claims of post-assault negligence. The Court of Appeals also stated that the insurer’s mere awareness of out-of-state authorities could be evidence of bad faith. And now the Cozen squad has successfully brought the issue to the State Supreme Court’s doorstep.

**ANOTHER PETITION FOR REVIEW GRANTED**


Once again proving that the Washington State Supreme Court rejection rate of over ninety percent does not apply to cases argued by Cozen O’Connor, Melissa O’Loughlin White and Kevin Michael (Seattle) persuaded the Washington State Supreme Court to grant review in two cases involving the applicability of Washington’s Consumer Protection Act to subrogation demand letters.

Both cases involve allegations that a collection agency violated Washington’s Consumer Protection Act when it sent subrogation recovery demand letters to uninsured drivers who were believed to be at fault for causing motor vehicle accidents and resulting damages. Those damages were paid by the not-at-fault driver’s insurer and subrogation recovery efforts followed.

In the underlying opinion, the Washington State Court of Appeals concluded that a collection agency’s practice of sending subrogation recovery demand letters to an uninsured motorist violated Washington’s Consumer Protection Act. The Court of Appeals took issue with the collection agency’s use of the term “amount due” when no fault determination had been made. Petitions for review were filed in the Washington State Supreme Court on behalf of the collection agency, Credit Control Services, Inc., that urged the Court to address the issue of whether adversarial parties have standing to sue under Washington’s Consumer Protection Act. Due to the efforts of White and Michael, the Washington State Supreme Court granted review on April 1, 2008, and heard oral argument on June 24, 2008.

**DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF INSURER IN ERISA MATTER**

*Bruce Lichtcsien (Chicago)* recently convinced the United States District Court for the Northern District of Illinois to enter summary judgment in favor of an insurer in an ERISA matter involving accidental death benefits. *Nunnery v. Sun Life Assurance Company of Canada (U.S.)*, No. 06 C 5908 (N.D.Ill. 2008). The claimant’s wife suffered from a variety of illnesses including Crohn’s disease and epilepsy. At the time of her death, she was taking over 20 prescription medications. The claimant sought accidental death benefits on the theory that his wife’s death was the result of an accidental overdose because many of her medications were missing when she was discovered. The insurer argued that the claimant’s wife died from natural causes which was consistent with the autopsy report and other official reports of death and that the toxicology screen did not show lethal levels of any of the wife’s medications. The District Court agreed.

**RECENT VICTORIES: PRO BONO**

*MANN SAVED FROM EVICTION AFTER NEW YORK CITY BAR REFERRAL FOR POA DRAFTING*

*William Broudy (New York Downtown)* and *Laurence Shapiro (New York Downtown)* saved a man from being evicted after the New York City Bar referred the man to Bill to assist in the preparation of a Power of Attorney for the man’s ailing wife. The referral was only the start to an extensive and successful pro bono representation.

After the man’s wife passed away, Bill obtained full survivor benefits for him from his wife’s pension fund. An appeal was necessary to obtain these benefits.
The client’s income was too low to pay his rent and he fell into arrears and was served with a Notice of Eviction. With procedural guidance from Cozen O’Connor Commercial Litigation Group members Menachem Kastner and Todd Lamb (New York Midtown), Bill Broudy reopened the proceedings and moved the case into the Housing Court for four months while filing a Supreme Court action against the NYC Human Resources Administration and the landlord by an Order to Show Cause, staying the eviction and seeking a rent arrears allotment. The case survived a procedural assault in the Appellate Division and inspired the rent arrears grant by the Human Resources Administration. Because of the Cozen team’s efforts, all past due rent was paid and the eviction was averted.

PERMANENT RESIDENT STATUS GRANTED
J.C. Ditzler (Seattle) successfully obtained permanent resident status for a former Columbian national who was persecuted in her home country. Previously, J.C. had obtained asylum for her. He completed the job by successfully obtaining a green card for her.

NOTEWORTHY HONORS, APPOINTMENTS AND PUBLICATIONS

HONORS
Stephen A. Cozen, William P. Shelley, Joshua Wall, Michael F. Henry and Gaele McLaughlin Barthold (all Philadelphia), Patrick J. O’Connor (West Conshohocken), Joann Selleck (San Diego), and Thomas M. Jones, William Knowles, J.C. Ditzler, and Robert A. Meyers (all Seattle) have been named “Super Lawyers” for 2008-09.

Thomas M. Jones (Seattle) has been re-elected to the Cozen O’Connor Board of Directors. Tom is Vice Chair of the Global Insurance Group and Chair of the Electronic Discovery and Records Management Practice Area. Other Global Insurance Group members on the Board of Directors include William P. Shelley (Philadelphia), Thomas McKay III (Cherry Hill), and Joseph A. Ziemianski (Houston).

Kendall Hayden (formerly Kelly) (Dallas) was recognized as a Rising Star in the 2008 Super Lawyers edition of the Texas Monthly.

Richard Wegryn (West Conshohocken) was named Chair of the Board of Directors of the Boys & Girls Clubs of Philadelphia for a two-year term. As Chair of the Board, Rick was asked to throw out the first pitch at the Phillies v. The Marlins game. Boys & Girls Clubs is a national organization that has been serving the Philadelphia community since 1887, and offers developmental, social and recreational services for children from preschool age through age 18.

PUBLICATIONS
William P. Shelley, Jacob C. Cohn and Joseph A. Arnold (Philadelphia) co-authored an article entitled “The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts,” which was published in the Norton Journal of Bankruptcy Law and Practice, Vol. 17, No. 2 (April 2008).

Thomas M. Jones and Matthew D. Taylor (Seattle) are two of the co-authors of “Considerations Governing Establishment of Document Retention Periods for International Organizations,” which appeared in the May/June 2008 issue of the Information Management Journal, published by ARMA International.

Thomas M. Jones (Seattle) and Joann Selleck (San Diego) collaborated on a November 2007 Cozen O’Connor white paper entitled “The Santa Ana Wind-Driven 2007 Southern California Wildfires: A Preliminary First-Party Factual and Legal Analysis of the Santa Ana Wind-Driven Wildfires.”


Joseph Ziemianski and Tyler Henkel (Houston) co-authored an article entitled “Using Careful Policy Drafting to Protect Contribution and Subrogation Rights Post-Mid-Continent,” which was published in the June 2008 Edition of the ACE Group Claims Bulletin.

Denise Brinker Bense (West Conshohocken) and Michael J. Smith (West Conshohocken) co-authored an article entitled “Multiple Claimants And Insufficient Policy Limits - Slicing Up The Pizza Pie Without Getting Burned!,” which was published in Mealey’s Litigation Report: Insurance Bad Faith, Vol. 22, No.1 (May 6, 2008).
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 collaborated with the Oklahoma City University School of Law to present a first annual seminar on The Risks and Opportunities of Climate Change. The half-day seminar, held at The National Constitution Center in Philadelphia, Pennsylvania on June 17, 2008, was moderated by Thomas M. Jones (Seattle) and featured Cozen attorneys Peter J. Fontaine (Cherry Hill), William F. Stewart (West Conshohocken), and other leading experts in the field. The keynote speaker was Fred Krupp, President of the Environmental Defense Fund and New York Times best-selling author of *Earth: The Sequel—The Race to Reinvent Energy and Stop Global Warming.*

Thomas M. Jones (Seattle) spoke on the topic “E-Discovery in Insurance” at the DRI Electronic Discovery Annual E-Discovery Program in New York City on April 17-18, 2008.


Thomas M. Jones (Seattle) spoke on “Coverage for Food Contamination Claims” at the PLRB/LIRB Claim Conference in Boston, Massachusetts in April 2008.

Francine L. Semaya (New York Downtown) served as the Arrangements Chair for the 2008 ABA/TIPS Annual Meeting held August 8 - August 12, 2008, for a historic evening at Ellis Island and the TIPS 75th Anniversary celebration at the United Nations, in New York City. She also co-chaired the August 2008 TIPS program at the Waldorf-Astoria on “The Terrorism Risk Insurance Act – TRIA’s Nuts and Bolts and Lessons.” Fran also presented the 4th annual Kirsten Christophe Memorial Award during the UN event. The Kirsten Christophe Memorial Award is presented annually to a TIPS member who demonstrates expertise in insurance law or trial practice, and most importantly, who personifies the exemplary attributes of Kirsten, who perished in the terrorist attack on the World Trade Center – balancing career, family and philanthropic activities. Fran was the first recipient of the award in 2004.

Christopher Kende (New York Downtown) recently spoke at a two-day symposium held by the University of Oran in Oran Algeria on Risk Assessment and Management. His topic was part of a roundtable discussion on international legal issues in large catastrophic losses and he presented a paper on the use of expert evidence under the United States legal system. The symposium was also sponsored by Groupe Sonatrach, the government-owned oil and gas company and was presided over by the Minister of Education and Scientific Research of the Algerian Republic.

Christopher Kende (New York Downtown) also spoke in Paris at the annual maritime conference sponsored by the French Maritime Law Association on June 30, 2008. The conference, called “Ripert Day” after a famous French maritime law professor, was devoted to the *Erika* oil spill which was recently the subject of a major court decision in France. Chris discussed recent developments under the U.S. Oil Pollution Act of 1990, passed in the wake of the Exxon Valdez disaster.

Additionally, Christopher Kende (New York Downtown) spoke in February 2008 at the Winter Seminar of the UIA in Vail, Colorado, on Liability and Damages under United States Tort Law.

Deborah Minkoff (Philadelphia) moderated and spoke at PBI seminars in Pittsburgh and Philadelphia in August 2008. The seminars were entitled Claims Made and Professional Liability Coverage. Deborah’s topic was “Practical Issues in Enforcement of Claims Made Policies.” Lawrence Jackson (Philadelphia) was also on the faculty of the August 2008 PBI seminars, presenting on the topic “Whose Line is It?,“ which focused on the differences between professional liability risks and general liability risks.

Helen A. Boyer (Seattle) was an organizer of and spoke in the Mealey’s Teleconference: Top 5 Issues Facing the Insurance Industry in July of 2008. Helen’s presentation was on the topic “Environmental Coverage Update and the Transition to Pollution Insurance Products.”
Michael J. Smith (West Conshohocken) co-presented a speech with Federal Magistrate Judge (and former Cozen O’Connor Member) David Strawbridge on “Federal Magistrate Judge Practice” at the June 11, 2008 Annual Meeting of the Philadelphia Association of Defense Counsel (PADC). Mike is also the Treasurer of the PADC.

Beth A. Stroup (Chicago) spoke at the Chicago Bar Associations’ YLS Insurance Law Committee Meeting on April 17, 2008 in Chicago, Illinois. Her presentation was entitled “Emerging Issues in Insurance Coverage: Examining Coverage Issues Involving E-Commerce and the Internet.”

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) will speak at the American Conference Institute’s Insurance Enterprise Content Management Seminar December 3-4, 2008 in New York City. Tom will speak on “Beyond the Smoke and Mirrors: Choosing the Best Vendor to Achieve Your Records Management Goals.” Credits are available. Register at www.americanconference.com or call 212.352.3220.

Thomas M. Jones (Seattle) is Program Chair of the DRI Electronic Discovery Seminar that will take place May 7-8, 2009 in New York City. Tom will moderate a Judicial Roundtable on the topic “Emerging E-Discovery Issues.” Credit are available and registration information is at www.dri.org or 312.795.1101.

Francine L. Semaya (New York Downtown) will be chairing Practising Law Institute’s September 17, 2008 Reinsurance Law 2008 program and moderating a session on, “The Board Room - Emergency Meeting: Interactive Crisis Management Hypothetical.” CLE credit is available and more information can be found at www.pli.edu or 800.260.4PLI. It will be held in NYC.

Francine L. Semaya (New York Downtown) will be conducting Business Insurance magazine’s October 23, 2008 Webinar on, “State vs. Federal Insurance Regulatory Issues”. This is a free event and registration information is available at www.businessinsurance.com.

Bill Knowles (Seattle) will be leading a panel presentation titled “Global Warming: What Does It Mean For The Insurance Industry?” during the Pacific Northwest CPCU Industry Day in Seattle on October 27, 2008. Registration information is available at http://pacificnorthwest.cpcusociety.org.

MARK YOUR CALENDARS FOR THESE UPCOMING SEMINAR DATES presented by Cozen OConnor’s Global Insurance Group

SEPTEMBER 25 - Seattle, WA
OCTOBER 29 - New York, NY
OCTOBER 30 - Dallas, TX

For more information regarding any of these events, please contact Trisha Ross at 215.665.2187 or pross@cozen.com.

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08/2008