

MESSAGE FROM THE CHAIR

Dear Clients and Colleagues:

In this issue, we consider a number of emerging issues and also identify key developments in coverage in 2007. We summarize new court decisions dealing with toxic torts, environmental coverage, insolvency and regulatory issues, and construction defect. We feature a key construction defect coverage case in Illinois with important implications. We address global warming in the context of directors and officers liability coverage. Finally, we discuss the emerging areas of fax blast and food contamination, and the impact of the reauthorization of TRIA.

We take pride at Cozen O'Connor in monitoring and being prepared to address cutting-edge coverage issues. We have organized our coverage group into flexible practice areas for this purpose, and to this end have recently added several important new practice areas.

Thomas M. Jones (Seattle), the Vice Chair of the National Insurance Department, leads the *Electronic Discovery Practice Area*. Tom has published and spoken widely on this topic, including a number of recent articles that are listed herein in the Publications section. Tom will be making several presentations in the near future on electronic discovery issues at seminars that are listed in the "Coverage Attorneys in the Spotlight" section. For information and resources on this area and/or these upcoming seminars, please contact Tom at (206) 224-1242 or tjones@cozen.com.

Joseph Bermudez (Denver) leads the *Food Contamination Coverage Practice Area*, comprised of a national team of attorneys experienced in handling food contamination coverage matters related to first-party, third-party and specialty policies. This issue contains a special report by Joe on this issue, and lists several presentations Joe will be making in the near future on food contamination coverage. Joe can be reached at (720) 479-3926 or jbermudez@cozen.com for information and resources on this topic.

William Stewart (West Conshohocken) leads our *Climate Change/Global Warming Practice Area*. Bill has lectured on climate change at numerous national symposia, and his work has been featured by NBC News, *The Wall Street Journal* and several insurance industry publications. He has written a comprehensive white paper on Global Warming and we encourage you to contact him at (610) 832-8356 or wstewart@cozen.com for a copy and/or for other information and resources.

A complete list of our practice areas and contact persons for each is available from a link at the home page of our website, www.cozen.com. You can also download from there a copy of our practice areas handbook.

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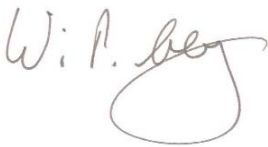
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Finally, we are proud to announce that **Francine L. Semaya** (New York Downtown) has been elected president of the International Association of Insurance Receivers (IAIR). The IAIR was formed in 1991 to promote the highest standards for the administration of insurance receiverships, including enacting a code of professional and ethical standards, to develop educational programs and provide a forum for discussion for industry professionals, and to inform the public about the quality of IAIR-affiliated insurance receivers. We are extremely proud of Francine on her election as President of the IAIR. Her knowledge will be an excellent resource for members of that organization. Francine is the chair of the firm's Insurance Corporate and Regulatory Practice Group and concentrates her practice in reinsurance, insolvency and national and global insurance regulatory matters, in the areas of property, casualty, life, annuity, surety and financial guaranty.

As always, we look forward to continuing to meet your needs in these areas and others. Be sure to check out the last couple of pages of this issue, listing upcoming events involving attorneys from Cozen O'Connor's National Insurance Department.

Best regards,



William P. Shelley

Chair, National Insurance Department

MARK YOUR CALENDARS FOR:

Cozen O'Connor Professional Liability Coverage Seminar, **New York City, Marriott Financial Center, April 24, 2008**

KEY DEVELOPMENTS IN COVERAGE LITIGATION 2007

PROPERTY

By: Michael A. Hamilton (Philadelphia)

Fifth Circuit Upholds Flood Exclusion in Katrina Decision....

In re Katrina Canal Breaches Litigation, 495 F.3d 191 (5th Cir. 2007)

The Fifth Circuit held that first-party property insurance policies' exclusions for the peril of flood unambiguously bar coverage for the inundation of New Orleans, even if it can be shown that the breaches in the city's levees that resulted in the flooding were themselves the result of negligence in design, construction, or maintenance. Reversing the district court, the court rejected the notion that the insurers' flood exclusions were ambiguous. Neither the fact that the term "flood" was undefined in the policies nor the fact that the exclusion at issue could arguably have been worded more explicitly necessarily render the term ambiguous. The Fifth Circuit also squarely rejected the trial court's purported distinction between "natural" and "man-made" floods. The court noted that courts in other jurisdictions had "uniformly" declared that an inundation of water resulting from the failure of a man-made structure such as a dam or a dike fell within the flood exclusion's ambit. Lastly, the court rejected the contention that the reasonable expectations of New Orleans policyholders weighed in favor of coverage and that the efficient proximate cause of the flooding in New Orleans was human negligence.

Insurance Coverage Observer and Alert! Editors:
Helen Boyer (Seattle), Michael Hamilton (Philadelphia),
Marianne May (Newark). The editors thank Alicia Curran (Dallas)
for her assistance.

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.

Comments in the Cozen O'Connor *Insurance Coverage Observer* are not intended to provide legal advice. Readers should not act or rely on information in the *Observer* without seeking specific legal advice from Cozen O'Connor on matters which concern them.

... While Louisiana's Fourth Circuit Court of Appeals Finds the Flood Exclusion Ambiguous

Sher v. Lafayette Ins. Co., --- So.2d ----, 2007 WL 4247708 (La.App. 4 Cir. 2007), writ granted, --- So.2d ----, 2008 WL 364613 (La. Jan. 11, 2008)

The Fourth Circuit Court of Appeals, in a 3-2 decision, ruled that the flood exclusion in Joseph Sher's homeowners policy was ambiguous; therefore, the policy covered man-made events such as a levee break. "The meaning of 'flood' is not defined within the policy," wrote Judge Terri F. Love. "Lafayette failed to specifically exclude all floods because of the ambiguity contained within the water exclusion." Judge Leon A. Cannizzaro, in his dissent, found no merit in the majority's conclusion that the word "flood" has different meanings: "Based upon my review, the term 'flood', as well as the entirety of the (water) exclusion, is clear and unambiguous," he wrote.

Louisiana's Value Policy Law Does not Apply When Total Loss Does not Result From a Covered Peril

Chauvin v. State Farm Fire & Cas. Co., 495 F.3d 232 (5th Cir. 2007)

In *Chauvin*, homeowners brought suit against their insurers, arguing that Louisiana's Value Policy Law (VPL) applied when their homes were totally destroyed in hurricanes Katrina and/or Rita because their homes sustained some damage from wind, a covered peril, even though the total loss resulted from flooding, a non-covered peril. The Fifth Circuit concluded that the focus of the VPL is on establishing the value of the property in the event of a total loss, and is not intended to expand coverage to excluded perils. Thus, the VPL does not apply when a total loss does not result from a covered peril.

Ensuing Loss Clause Do not Provide Coverage for Losses Due to Faulty Construction

Wal-Mart Stores, Inc. v. Gulf Ins. Co., 250 Fed.Appx. 221, 2007 WL 2915603 (9th Cir. 2007)

In *Wal-Mart*, the insured argued that Gulf Insurance should pay to remedy a defectively designed concrete floor in the retailer's distribution center, despite an exclusion for the cost of making good defective design

or faulty workmanship. The Ninth Circuit cited with approval from the "great weight of authority" over the last five years, limiting ensuing loss exceptions to covered losses that ensue from an excluded condition or event. The court noted that to hold otherwise would effectively void the entire exclusion, rather than simply preserving coverage for otherwise insured losses that ensue.

Application of Faulty Workmanship Exclusion Does not Require Showing of Proximate Cause

Schwaber v. Hartford Acc. & Indem. Co., No. Civ. JFM 06-0956, 2007 WL 4532126 (D.Md. Dec. 17, 2007)

In *Schwaber*, Hartford issued a property insurance policy which excluded coverage for losses that arose out of poor workmanship or improper maintenance. After the insured's roof collapsed, the insured sued Hartford for coverage under the policy. The insured argued that the faulty workmanship exclusions did not apply because Hartford was unable to prove that faulty workmanship and wear and tear proximately caused the roof to collapse. The court, however, ruled that the policy terms "arising out of" should be interpreted broadly. The insurer was not required to prove that the excluded cause was the proximate cause, but only that some or all of the loss was caused by, resulted from, or arose out of faulty workmanship/maintenance.

Payment Under Law or Ordinance Coverage Required Showing of Actual Loss Incurred

Citizens Property Ins. Corp. v. Ceballo, --- So.2d ----, 2007 WL 2727092 (Fla. 2007)

The Florida Supreme Court addressed whether a total loss entitled the insured to policy limits of supplemental ordinance and law coverage provided by a homeowner's policy. The insureds lost their entire home to fire, and the insurer paid the face value of the policy. The policy also provided supplemental coverage up to 25% of the policy limit for increased costs due to the enforcement of any ordinance or law relating to the loss. The insurer contended that the insureds must first show proof of an actual loss in order to recover under that provision. The insureds contended that because they met the burden of demonstrating a total loss, under Florida's valued policy laws, they should receive the

supplemental coverage without establishing that they actually incurred any additional loss or expense. The Supreme Court held that because the supplemental coverage provision did not directly state a dollar amount, but instead only stated maximum percentage of limit of liability, the VPL does not apply to that coverage. Furthermore, the insured was still obligated to show that it incurred a loss in order to recover under the policy's supplemental coverage.

No Civil Authority Coverage Where Location at Issue not Specified in Clause

Penton Media, Inc. v. Affiliated FM Ins. Co., 245 Fed.Appx. 495, 2007 WL 2332323 (6th Cir. 2007)

In *Penton*, the insured sued its insurer under a business interruption policy, asserting claims for breach of contract and bad faith regarding the insurer's denial of coverage for losses resulting from the postponement of a trade show due to disaster relief efforts after September 11. The Sixth Circuit held that the business interruption policy did not provide coverage where the insured was denied access, by order of a civil authority, to the leased space. The court held that it was not reasonable to conclude that the phrase "described locations" within the meaning of a civil authority clause included locations described not in the clause, but elsewhere in the policy.

Inherent Vice Exclusion Applied to Y2K Losses

State v. Allendale Mut. Ins. Co., 337 Mont. 49, 154 P.3d 1233 (2007)

The Montana Supreme Court was faced with an issue that has mostly faded from the realm of insurance coverage disputes: coverage for expenses to correct year 2000 (Y2K) date recognition problems in computer software. Nevertheless, this opinion is important in its analysis of the inherent vice and faulty design exclusions and their application to computer deficiencies. The court noted that the analysis required by the "inherent vice" exclusion focuses on whether the insured's problem or loss was caused by an internal or external factor or defect -- if caused by an internal defect, the problem is excluded from coverage as an inherent vice. The court concluded that the two-digit date field code in computer software was an "inherent vice" and thus excluded, even though subsequent policies expressly excluded damages related to Y2K.

Fifth Circuit Upholds Exclusions Barring Coverage for Concurrent Water and Wind Damage Due to Hurricane Katrina

Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346 (5th Cir. 2007)

The Fifth Circuit Court of Appeals, applying Mississippi law, held that State Farm's policy barred coverage for concurrent water and wind damage caused by Hurricane Katrina. In *Tuepker*, the policy excluded coverage for damage caused by "flood, waves, tidal water, and overflow of a body of water, . . . all whether driven by wind or not." The insureds argued that the water damage exclusion did not apply to damage caused by Katrina's "storm surge." In affirming the district court, the Fifth Circuit relied upon its holding in *Leonard v. Nationwide Mutual Insurance Company*, 499 F.3d 419 (5th Cir. 2007). The court in *Tuepker* noted that, in *Leonard*, it had concluded that a "storm surge" is a synonym for a "tidal wave" or "wind-driven flood." In addition, the policy contained an anti-concurrent-causation clause, excluding coverage for any loss that would not have occurred in the absence of certain excluded events, including water damage. The district court found the clause ambiguous because where damage caused by both wind and rain (covered losses) and water (excluded from coverage) the amount payable turns on which is the proximate cause of the loss. The Fifth Circuit rejected this reasoning, holding that anti-concurrent-causation clauses are enforceable and that they trump the efficient proximate cause doctrine. In this case, the policy excluded damage caused by wind acting concurrently or sequentially with water.

TOXIC TORT

By: Stephen R. Bishop (Philadelphia)

Exposures to Asbestos Insulation in Turbines Are Multiple Occurrences

Appalachian Ins. Co. v. General Elec. Co., 863 N.E.2d 994 (N.Y. 2007)

In *General Electric*, the New York Court of Appeals held that asbestos exposure claims constituted multiple occurrences. The policies defined occurrence as "an accident, event, happening or continuous or repeated exposure to conditions which unintentionally results in injury or damage during the policy period." The court stated that the

parties could have defined “occurrence” in a manner that grouped incidents, but chose not to do so. Then, applying the “unfortunate event” test, the court found that each individual’s repeated or continuous exposure to asbestos was a separate occurrence. The court explained that there were few commonalities among the various exposures as there were differences in terms of when, where and for how long the exposures occurred.

Exposures to Popcorn Flavoring Chemicals Constitute Multiple Occurrences

International Flavors & Fragrances, Inc. v. Royal Ins. Co. of America, 844 N.Y.S.2d 257 (N.Y. App. Div. 2007)

The Appellate Division of the New York Supreme Court affirmed a trial court decision finding that injuries to thirty workers resulting from exposure to chemicals found in popcorn flavoring at the same plant resulted from separate “occurrences” for purposes of applying a deductible under liability policies. Applying the unfortunate event test, the court found that the workers were exposed at different times and for unequal durations. Furthermore, the definition of occurrence did not demonstrate any intention to aggregate claims. Therefore, a separate deductible applied to each employee’s claim.

Single Occurrence Theory For Asbestos Claims Rejected

London Market Insurers v. Superior Court, 146 Cal. App.4th 648 (Cal. App. 2007)

A California appeals court ruled that the relevant “occurrence” with respect to asbestos claims against the insured was not the manufacture and distribution of asbestos-containing products, but rather the injurious exposure to asbestos and that all exposures could not be treated as a single occurrence under various aggregation provisions, including a “lot or batch” clause. While the court held that the “lot or batch” clause applied to both manufacturing defect claims and design defect claims, the court concluded that the claims arose from more than one “lot” of goods.

Pollution Exclusion Precludes Coverage for Bodily Injuries from Restaurant Waste

Mountain States Mut. Cas. Co. v. Kirkpatrick, No. 06-221, 2007 U.S. Dist. LEXIS 67420 (D. Colo., August 30, 2007).

In *Mountain States*, the District of Colorado held that the pollution exclusion precluded coverage for bodily injuries incurred by workers cleaning a sewer. The workers were overcome by hydrogen sulfide gas emitted from kitchen waste “discharged” into the sewer by the restaurant insured. The court found the kitchen waste constituted a contaminant and therefore was a “pollutant” under the policy. The court rejected the argument that toxicity was required for a substance to be considered a “pollutant.”

Pollution Exclusion Bars Coverage for Hydrogen Sulfide Gas Exposure

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

The Fifth Circuit ruled in *Hydro Tank* that the pollution exclusion bars coverage for exposure to hydrogen sulfide gas. Workers were injured when they were exposed to hydrogen sulfide gas when removing petroleum-byproduct sludge from a tank. The court rejected the insured’s argument that the underlying injuries were the result of contact with the sludge rather than inhalation of a gas and that the sludge should not be considered a pollutant because petroleum products are not pollutants when they are stored where they belong. The court concluded that because the workers alleged they were injured, in whole or in part, by the release of hydrogen sulfide, a pollutant, the pollution exclusion was invoked.

Pollution Exclusion Applies to Bar Coverage for Workplace Exposure to Noxious Fumes

Apana v. TIG Ins. Co., 504 F. Supp.2d 998 (D. Hawaii 2007)

The District of Hawaii held in *Apana* that the total pollution exclusion precluded an insurer’s duty to indemnify a plumber in connection with an individual’s inhalation of noxious fumes from chemicals used to unclog a drain. The plaintiff was exposed to chemicals

while working at Wal-Mart when a plumber working nearby poured extremely strong cleaner down a drain. Because of the legal ambiguity regarding the exclusion, the court held the insurer had a duty to defend; however, the court predicted that the Hawaii Supreme Court would find the exclusion unambiguous and that it was not limited to traditional environmental pollution. Thus, the exclusion ultimately applied to bar coverage and the insurer had no duty to indemnify its insured.

Carbon Monoxide Is a Pollutant Under the Pollution Exclusion

Auto-Owners Ins. Co. v. Reed, 649 S.E.2d 843 (Ga. Ct. App. 2007)

In *Reed*, the Georgia Court of Appeals, following state precedent that such an exclusion was not limited to traditional environmental pollution, held that carbon monoxide was a “pollutant” within the meaning of the pollution exclusion. The court concluded that application of the exclusion prevented a landlord from receiving coverage for a tenant’s carbon monoxide poisoning.

Pollution Exclusion Not Applicable to Carbon Monoxide Poisoning

Langone v. American Family Mut. Ins. Co., 731 N.W.2d 334 (Wisc. Ct. App. 2007), rev. den. 2007 Wisc. LEXIS 855 (Wisc. Sept. 14, 2007)

In *Langone*, the Wisconsin Court of Appeals reached a different result regarding carbon monoxide. According to the Langone court, the exposure occurred when a fireplace was used at the same time a fire was burning in the boiler burner when the heat was turned on. The combination led to a flue reversal, allowing carbon monoxide to be emitted into an apartment. The court concluded that the pollution exclusion was not applicable to carbon monoxide poisoning because the unusual concentration of carbon monoxide due to a ventilation defect at a rental property could not be considered a “pollutant.”

Pollution Exclusion Bars Coverage for Injuries Caused by Gasoline Exposure

Federated Mut. Ins. Co. v. Abston Petroleum, Inc., 967 So.2d 705 (Ala. 2007)

In *Abston Petroleum*, the Alabama Supreme Court ruled that the absolute pollution exclusion excluded coverage for bodily injury and property damage claims related to gasoline contamination. The court concluded that even though gasoline is not a pollutant when it is put to its intended use, it is clearly a pollutant when it leaks into soil from underground lines or tanks and that contamination causes bodily injuries and property damage. The court also rejected the insured’s argument that any claims involving the gasoline business would be covered pursuant to the reasonable expectations doctrine. The court stated that any such expectations were limited by the unambiguous terms of the policy and thus, could not be “objectively reasonable.”

Asbestos Claims Fall Under Operations Coverage

Continental Cas. Co. v. Employers Ins. Co. of Wausau, 839 N.Y.S.2d 403 (N.Y. Sup. Ct. 2007)

In *Continental Casualty*, the court held that asbestos-related injuries involved in an underlying class action against Robert A. Keasbey Co. (“Keasbey”) all related to installation activities and fell under operations coverage, which was not subject to aggregate limits. Keasbey installed asbestos-containing materials in powerhouses and other facilities in and around New York. The policies contained aggregate limits for claims that came within the “products hazard,” but no aggregate limits for claims that did not. The court held that the underlying claims were not barred by exhaustion of the aggregate limits in the policies because claims that arise out of exposure to asbestos during the installation process are considered “operations” claims, and are therefore not subject to aggregate limits.

Liability Not Limited Due to Shortened Policy Period

OneBeacon Ins. Co. v. Georgia-Pacific Corp., 474 F.3d 6 (1st Cir. 2007)

In *Georgia-Pacific*, the First Circuit held that an insurer cannot cap its liability based on a partial year policy period because the insurance contract did not contemplate proration of an annual aggregate limit. Although the policy was only in effect for three months, the policy explicitly pro-

vided \$10,000,000 per occurrence and aggregate limits of liability. Furthermore, the court observed that the cancellation endorsement said nothing about modifying the limits. Finally, according to the court's analysis, the general rule is that where a policy is cancelled before the end of the stated period, there is no proration of the limits.

ENVIRONMENTAL

By: Peter J. Mintzer and Megan K. Kirk (Seattle)

Ninth Circuit Denies Coverage for Diminution in Value of Properties Due to Pollution

Goodstein v. Continental Cas. Co., et al., 509 F.3d 1042 (9th Cir. Dec. 3, 2007)

In *Goodstein*, the former owner of two properties identified as "contaminated" by the Washington Department of Ecology sued its liability insurer seeking to recover the difference between the appraised value of the properties if uncontaminated and the sale price of the sites in their contaminated state. The Ninth Circuit, applying Washington law, held that the claim for diminution in value of the land due to pollution was not a functional approximation of the cost to remediate the properties, and therefore Washington case law recognizing a duty to indemnify an insured for environmental cleanup costs it incurred did not apply. As such, there was no coverage for the diminution in value.

Primary Carrier Has Duty to Defend Where Complaint is Silent as to How Discharge Occurred

Barrett Paving Materials, Inc. v. Continental Ins. Co., 488 F.3d 59 (1st Cir. May 30, 2007)

Applying Maine law, the First Circuit concluded that a primary insurer was required to defend its insured where the complaint against the insured alleged that pollutants from the insured's facility were released into the soil or sewers. Although the complaint did not specify how the pollutants were allegedly released, its allegations were not inconsistent with a sudden and accidental discharge. The court rejected the insurer's argument that no duty to defend was owed because the "true facts" admitted by the insured indicated that there was no sudden and accidental discharge, because such "true facts" were relevant only to the duty to indemnify, not to the duty to defend.

The court also concluded that an excess insurer had no duty to defend the insured where the insured was unable to establish that the complaint allegations were not covered by an (insolvent) underlying insurer's policy.

Contrast *Barrett with Emerson Enterprises, LLC v. Crosby, et al.*, No. 03-CV-6530 CJS, 2007 U.S. Dist. LEXIS 13091 (W.D.N.Y. Feb. 26, 2007) (underlying complaint did not support finding a duty to defend because it did not "affirmatively suggest a sudden and accidental occurrence;" to the extent the insured contended that it had newly discovered extrinsic evidence that the discharge was, in fact, sudden and accidental, the court found the proffered evidence insufficient but permitted the insured to conduct further discovery before the court would rule on whether the insurer had a duty to indemnify).

The Cost of Preventing Future Contamination is Not a Covered Indemnity Cost

Precision Castparts Corp. v. Hartford Acc. & Indem. Co., et al., 2007 U.S. Dist. LEXIS 64412 (D. Or. Aug. 27, 2007)

In *Precision Castparts*, the U.S. District Court in Oregon, applying Oregon law, ruled that an insured was precluded from recovering as indemnity costs \$6.8 million in claimed costs for installation of an effluent pretreatment system that would prevent future contamination of a municipal sewer system. The court noted that thorium oxide was found both in the insured aircraft engine component manufacturer's plants and in the city sewer system, but that only the thorium contamination in the city sewer constitutes "property damage" under the insurance policies. Because the only thorium contamination mitigated by the pretreatment system was at the insured's premises, the court concluded such contamination did not constitute third party property damage and therefore the insurers had no duty to indemnify the insured for the costs of the pretreatment system.

Cozen O'Connor attorneys Doug Tuffley and Thomas M. Jones of the Seattle office represented one of the prevailing insurers, The Insurance Company of the State of Pennsylvania, in this case.

Costs to Defend Government Suit Seeking Installation of Equipment to Reduce Future Emissions Were Not Part of “Ultimate Net Loss” Caused by an Occurrence

Cinergy Corp. v. Associated Elec. & Gas Ins. Servs., Ltd., et al., 865 N.E.2d 571 (Ind. May 1, 2007)

Cinergy Corp. v. St. Paul Surplus Lines Ins. Co., et al., 873 N.E.2d 105 (Ind. App. Sept. 5, 2007)

In *Cinergy Corp.*, several insurers filed a declaratory judgment action against their power company insureds arguing that there was no coverage for costs the power companies incurred in defending a federal environmental lawsuit. The Indiana Supreme Court held that the primary thrust of the federal suit was to require the power companies to incur the cost of installing equipment intended to reduce future air emissions and prevent future environmental harm. Thus, the Indiana Supreme Court held the policies at issue before it did not provide coverage because they conditioned the insurer’s responsibility for the “ultimate net loss” on the requirement that the loss be for damages “caused by an occurrence.” Because the installation costs for preventive equipment was not caused by an occurrence, but rather, resulted from the prevention of an occurrence, such damages were not within the scope of coverage provided by the policy. A few months later, in considering other policies at issue in the case, the Indiana Court of Appeals similarly held that, pursuant to the Indiana Supreme Court’s earlier decision, there was no “occurrence” triggering coverage for the insureds’ defense costs to the extent the federal suit sought to recover the costs of installing equipment to reduce future emissions and to prevent resulting future environmental harm.

Remediation Costs Incurred Pursuant to a Settlement Agreement Are Not “Damages” For Which Indemnification is Due

Aerojet-General Corp. v. Commercial Union Ins. Co., 155 Cal. App. 4th 132 (Cal. Ct. App. Sept. 13, 2007)

In *Aerojet-General*, the California Court of Appeals held that settlement costs negotiated within a court suit, without entry of a judgment or a court order to pay, are not “damages” and thus do not trigger an excess insurer’s duty to indemnify. The court indicated it was extending the rule established in prior case law (e.g. *Powerine*) that

settlement costs an insured agrees to outside the context of a court suit are not “damages” for purposes of an insurer’s duty to indemnify.

Michigan Court Applies Time-on-the-Risk Damages Allocation for Landfill Cleanup and Applies “Horizontal” Exhaustion Methodology

Wolverine World Wide, Inc. v. Liberty Mut. Ins. Co., [No. 260330] (Mich. App. March 8, 2007)

In *Wolverine World Wide*, the Michigan Court of Appeals affirmed summary judgment dismissals of claims for coverage from two umbrella insurers for remediation costs allocated to a footwear manufacturer for tannery sludge disposal at two landfills over several years. In an unpublished decision, the court held that a “time-on-the-risk” allocation of damages applied, and the relevant time period was when the contaminants were disposed of until the time of cleanup. Because the insured’s liability for investigation and remediation costs spread out over the time periods applicable at the two sites were less than the primary policy limits of \$50,000 per year, the umbrella policies were not triggered.

Injuries Caused by Epoxy Fumes Discharged During Floor Sealant Application Are Excluded from Coverage Under the CGL Total Pollution Exclusion

Firemen’s Ins. Co. of Washington D.C. v. Kline & Son Cement Repair, Inc. et al., 474 F.Supp.2d 779 (E.D. Va. Feb. 13, 2007)

In *Kline & Son*, the U.S. District Court for the Eastern District of Virginia held that the absolute pollution exclusion in a floor sealant installer’s CGL policy barred coverage for injuries resulting from inhaling fumes from an epoxy sealant. The court applied Virginia law and held that the exclusion must be applied as written: the term “pollutant” included the toxic fumes released from the epoxy sealant when it was applied to the floor, and the broad language of the pollution exclusion was not limited to industrial environmental pollution events but rather included the discharge of fumes in the course of a standard sealant application.

Coverage for Cleanup Expenses and Lost Rents Caused by a Heating Oil Leak Barred by Absolute Pollution Exclusion

McGregor v. Allamerica Ins. Co., 868 N.E.2d 1225 (Mass. July 10, 2007)

In *McGregor*, the Supreme Judicial Court of Massachusetts held an absolute pollution exclusion in a general liability insurance policy issued to a furnace installer barred coverage for the installer's liability for a heating oil leak that developed several years after a residential furnace installation. The court rejected the argument that pollution exclusions are limited to claims arising from improper handling of hazardous waste or other pollution occurring in an "industrial" setting, and held that spilled oil was a "classic example" of pollution and that the location of an oil spill at a residence, rather than at an industrial site, did not alter the classification of the spilled oil as a "pollutant." The court also rejected the insured's contention that interpreting the exclusion to foreclose coverage for a heating oil leak would "effectively eviscerate" the policy because the insured regularly worked with oil as part of his ordinary business activities, reasoning that as long as the policy provides coverage for some acts, it was not illusory simply because it contains a broad pollution exclusion.

Iowa Opts for a Plain Reading of the Pollution Exclusion and Concludes it Bars Coverage for Injuries from Carbon Monoxide Poisoning

Bituminous Cas. Co. v. Sand Livestock Systems, Inc., [No. 135 / 05-1063] (Iowa, February 23, 2007)

In answering a certified question of law from the U.S. District Court for the Northern District of Iowa, the Iowa Supreme Court held that absolute pollution exclusions in CGL and umbrella liability policies barred coverage for carbon monoxide poisoning where the carbon monoxide had accumulated in a washroom at a hog confinement facility. The court concluded that the exclusions were not ambiguous and must be applied as written. The court declined to consider whether the "reasonable expectations" of the parties of the insurance contract would lead to a different result because such a factual inquiry had no place in answering the

legal question certified to the state court, but the court indicated the parties could raise that issue in the federal district court.

Even a "Green" Business Can Be Subject to the Absolute Pollution Exclusion

Cold Creek Compost, Inc. v. State Farm Fire & Cas. Co., 2007 Cal. App. LEXIS 1894 (Cal. Ct. App. Nov. 30, 2007)

In *Cold Creek Compost*, the California Court of Appeals held that the widespread dissemination of offensive and injurious odors from a commercial compost facility is "environmental pollution" under California law and thus is excluded from coverage by the absolute pollution exclusions in a business policy and a commercial liability umbrella policy. The court specifically rejected the Composting Facility's argument that the odors did not qualify as a "pollutant" because they do not pose a significant health threat, citing prior California case law indicating that a substance need not be "toxic or particularly harmful" to be considered a "pollutant" for purposes of a pollution exclusion.

All Applicable Coverage Must Be Exhausted Before CIGA Will Pay

Stonelight Tile, Inc. v. California Ins. Guar. Ass'n, 150 Cal. App. 4th 19 (Cal. Ct. App. March 29, 2007)

In *Stonelight Tile*, the California Court of Appeals held that the California Insurance Guarantee Association ("CIGA") was not required to pay any portion of a judgment obtained against an insured recycling company by a neighboring tile-manufacturing business and its owner where those claimants suffered a continuously triggered injury during the insolvent and solvent insurers' policy periods and settlement agreements with the solvent insurers did not fully exhaust their policies. "Since each of the Solvent Insurers was potentially liable for the full amount of its policy limits and that potential coverage was not exhausted in the settlements, we conclude there was other insurance available to Plaintiffs. Since there was other insurance available to cover the loss, it was not a "covered claim" within

the meaning of the [California] Guarantee Act.” In so holding, the court emphasized that CIGA’s payments were intended to protect the public, not to benefit insurance companies.

INSOLVENCY, REINSURANCE, AND CORPORATE REGULATORY

By: William K. Broudy and Laurance D. Shapiro (New York Downtown)

New York Liquidation Bureau Is Not A State Agency and Not Subject To Audit By State Comptroller

Dinallo v. DiNapoli, 2007 NY Slip Op. 7497, 9 N.Y.3d 94, 2007 N.Y. LEXIS 2711

The New York Court of Appeals, New York’s highest court, unanimously held that the New York Liquidation Bureau (the “Bureau”), the entity through which the Superintendent of Insurance deals with the property of insurers in receivership, is not a state agency under the State Finance Law, and that the New York State Comptroller does not have the constitutional or statutory authority to conduct a pre-audit of Bureau expenditures, a post-audit of the financial management and operating practices of the Bureau, or an audit of the property of insolvent insurers. In addition to holding that the Bureau is not a “state agency” within the ambit of the State Finance Law because it does not perform a governmental or proprietary function for the state, is not financed by the Insurance Department’s budget, operates without the benefit of state funds, maintains its own errors and omissions coverage, and is represented by its own private counsel rather than the Attorney General, the Court also held that assets of an insurer in receivership constitute neither “money[s] of the state” nor “money[s] under [state] control,” slip op. at 6, and that “the Superintendent as liquidator is not a state officer but rather one who acts on behalf of a private entity.” *Id.*

Court Dismisses, With Prejudice, Racketeering Claims Against Brokers in Bid-Rigging Class Action

In Re Insurance Brokerage Antitrust Litigation; In Re Employee-Benefit Insurance Brokerage Antitrust Litigation, 2007 U.S. Dist. LEXIS 73220 (D.N.J. 2007)

In this consolidated class action based on allegations similar to those raised in 2004 by then-New York State Attorney General Elliot Spitzer against major insurance brokers, the

U.S. District Court for the District of New Jersey dismissed Plaintiffs’ claims alleging that Defendants violated the Racketeer Influenced and Corrupt Organizations Act (“RICO”) 18 U.S.C. § 1961, et seq. These allegations, which included, *inter alia*, that Defendant insurers and brokers engaged in bid-rigging and conspired to suppress and eliminate competition in violation of RICO, were previously found by the Court to insufficiently assert cognizable RICO claims, and now, following numerous opportunities to amend the complaints, the Court granted the Defendants’ motion to dismiss the RICO claims, and dismissed the claims with prejudice.

New York Liquidator Raises Triable Issues of Fact Against Insolvent Insurer’s Parent Regarding Underlying Intent to Defraud

Superintendent of Ins. v. Chase Manhattan Bank, 43 A.D.3d 514, 840 N.Y.S.2d 479 (3d Dept. 2007).

The New York Superintendent of Insurance as liquidator of a subsidiary insurance company that was part of a holding company system raised genuine issues of material fact sufficient to withstand summary judgment in an action against the defendant financial entities which entered into credit and lending agreements with the subsidiary’s holding company. The liquidator alleged that the defendants knew or should have known that the subsidiary was or would be rendered insolvent as a result of the agreements. Timing and circumstances surrounding repayment negotiations and defendants’ knowledge of the subsidiary’s precarious financial state raised a triable issue of fact regarding the adequacy of the consideration for the transaction and whether the transaction was undertaken with intent to defraud.

New York Appellate Court Grants Full Faith and Credit To Texas Order Granting Exclusive Jurisdiction to Receiver of Texas Insurer, Grants Stay in Declaratory Judgment Action

A.J. Pegno Constr. Corp./Tully Constr. Co., Inc. v. Highlands Ins. Co., 39 A.D.3d 273, 834 N.Y.S.2d 109 (1st Dept. 2007).

A New York appellate court held that a declaratory judgment action commenced by plaintiff construction company for a coverage determination under a contractor’s umbrella liability insurance policy could not be adjudicated in New

York because the insurer that issued the policy was in receivership in Texas. The insurer, Highlands Insurance Company, filed a Texas court order in a New York court. The Texas order was filed in New York pursuant to the Uniform Enforcement of Foreign Judgments Act (N.Y. CPLR Art. 54). The order restrained and permanently enjoined all litigation against Highlands and specified that all claims against Highlands were to be submitted exclusively to the Texas receiver. Accordingly, the New York appellate court held that the Plaintiff improperly commenced this declaratory judgment action in New York, and ruled that the trial court should have granted the motion by the defendant insurer for a stay.

Bankrupt Service Contract Provider is Not an Insurer, Department of Insurance Must Turn Over Estate to Chapter 11 Trustee

In re Automotive Prof'ls, Inc., 2007 U.S. Dist. LEXIS 78339 (N.D. Ill. 2007)

The Illinois Department of Insurance (the “DOI”) obtained an order of conservation against Automotive Professionals, Inc. (“API”), a financially impaired service contract provider, and later sought rehabilitation and liquidation of API. API subsequently petitioned for Chapter 11 bankruptcy, and the court granted API’s the motion to appoint a Chapter 11 trustee. On appeal, the DOI argued that the service contract provider was an insurer, or was the substantial equivalent of an insurer, and was thus not entitled to relief under the Bankruptcy Code. The U.S. District Court for the Northern District of Illinois, however, found that a service contract provider that complies with the Illinois Service Contract Act is not subject to the Illinois Insurance Code, and that a service contract provider is not considered an insurer under state law. Accordingly, the Court denied the DOI’s motion to dismiss the debtor’s petition for bankruptcy, and granted the debtor’s motion to compel the DOI to turn over the property in the service contract provider’s estate to the Chapter 11 Trustee.

Missouri Federal Court Retains Jurisdiction Over Claim Involving the Legion Insurance Company Estate

Midwest Employers Cas. Co. v. Legion Ins. Co., No.4:07CV870 CDP, 2007 U.S. Dist LEXIS 82857 (E.D. Mo. Eastern Division, 2007)

The primary issue in this case was whether an action in federal court brought under the federal Declaratory Judgment Act and the Federal Arbitration Act was subject to the McCarran-Ferguson Act, which preempts the application of federal statutes when they “invalidate, impair or supersede state statutes that regulate insurance.” In holding that McCarran-Ferguson does not apply, the Court found that it had authority to determine whether certain reinsurance contracts contained arbitration provisions. Legion Insurance Company in Liquidation (Legion) had sought to compel arbitration under the reinsurance contracts. Rather than litigating in Pennsylvania, where Legion is in liquidation, the plaintiff Midwest Employers Casualty Company sought a declaratory judgment in a Missouri federal court that many of the reinsurance contracts did not have arbitration provisions. In turning aside Legion’s effort to oust the case from federal court, the Court also found that the interpretation of the rights of the parties under the reinsurance contracts is an *in personam* matter that does not interfere with Pennsylvania’s *in rem* jurisdiction over the Legion Estate. In rejecting abstention, the Court further found that its review of the reinsurance contracts would not “be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern”, the test that is the foundation of the *Burford* abstention doctrine.

Supreme Court of Oregon Pierces the Corporate Veil and Requires A Member Company of a Group to Pay the Insurance Obligations of Another Member of the Group

Oregon Ins. Guar. Ass’n v. Superior Nat’l Ins. Co., No. S54315, Or. Sup. 2007 Or. LEXIS 1109

Citing a violation of Oregon Insurance Law, the Supreme Court of Oregon has directed Superior National Insurance Group (“SNIG”), a holding company, to reimburse the Oregon Insurance Guaranty Association (“OIGA”), using a statutory deposit of one

member company of the group to pay the insurance obligations of another group member company. Four insurance companies owned by SNIG formed a reinsurance pool for the purpose of reinsuring certain Workers' Compensation business in Oregon, but failed to report the pooling arrangement to the Oregon Department of Consumer and Business Services (DCBS), as required by law. The SNIG companies were placed into liquidation in California in 2000 and, at that time, the OIGA assumed responsibility for administering and paying the Workers' Compensation claims against one of the SNIG companies, Commercial Compensation Casualty Company ("CCCC"). After analyzing the complex reinsurance arrangements among the SNIG member companies, the Court concluded that group member Superior National Insurance Company ("SNIC") and CCCC "were operationally a single company for all practical purposes." As a result, the Court held SNIG responsible for failing to make the required deposit for CCCC and directed that funds deposited by SNIC be used to reimburse OIGA for losses and expenses.

CONSTRUCTION DEFECT

By: William F. Knowles and Tylor C. Laney (Seattle)

Washington: Insurer Commits Bad Faith Via Subpoena and Ex Parte Contact with Arbitrator

Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 169 P.3d 1 (Wash. 2007).

In *Dan Paulson Constr.*, the Supreme Court of Washington held that an insurance company acted in bad faith by issuing a subpoena to an arbitrator and by sending a letter to the arbitrator seeking information relevant to the "your work" exclusion in the policy. The insurer filed a declaratory action before the subpoena and letter were sent, but did not serve its insured with the declaratory complaint. The insurer was providing a defense under a reservation of rights. The Court also held that the insurer did not rebut the resulting presumption of harm to the insured and did not raise a genuine issue of material fact regarding whether the settlement amount was reasonable.

Texas: Construction Defects, Occurrences and Property Damage

Lamar Homes, Inc. v. Mid-Continent Cas. Co., No. 05-0832, 2007 WL 4898326 (Tex. Aug. 31, 2007)

In *Lamar Homes*, the Supreme Court of Texas defined the terms "occurrence" and "property damage" as they related to coverage for construction defects under a CGL policy. The Court concluded that the term "occurrence" includes damage that is the "unexpected, unforeseen or undesigned happening or consequence" of an insured's negligent behavior, including "claims for damage caused by an insured's defective performance or faulty workmanship." As such, the Complaint alleged an "occurrence" because it asserted that the builder's defective construction was a product of its negligence. In addition, the court held that selling property (the contractor's work) with a latent defect that subsequently causes physical injury to tangible property involves "property damage" within the meaning of the contractor's commercial general liability (CGL) policy, even though the damage only affected the contractor's work and the homeowners were seeking recovery for their economic loss. The Court supported its holding by noting that the definition of "property damage" did not eliminate the general contractor's work, and the policy made no distinction between tort and contract damages. Finally, the Court ruled that an insured's claim against a liability insurer for defense costs was a "first party claim" under Texas' "prompt payment" statute, making the insurer liable for interest and attorney fees if it does not promptly respond to or pay a first party claim or defend a third party claim, abrogating prior decisional law.

Colorado: Additional Insured Endorsement Addressing "Ongoing Operations" Does Not Grant Completed Operations Coverage

Weitz Co., LLC v. Mid-Century Ins. Co., 2007 WL 2264634 (Colo. App. 2007)

In *Weitz*, the Colorado Court of Appeals held that the term "ongoing operations" in an insurance endorsement was unambiguous, and could not be interpreted to apply to completed operations. As such, the insurer did not commit bad faith by denying the general contractor's tender of defense in a homeowner's suit for construction defects discovered after the named insured subcontractor completed its work. The subcontractor procured the CG 20 10 (10/93)

endorsement listing the general contractor as an additional insured, "but only with respect to liability arising out of your [the subcontractor's] ongoing operations performed for that insured."

Washington: Faulty Workmanship Exclusion in All Risks Policy Bars Coverage For Property Damage Caused by Contractor's Negligence

City of Oak Harbor v. St. Paul Mercury Ins. Co., 139 Wash.App. 68, 159 P.3d 422 (2007)

In *City of Oak Harbor*, the City filed suit against its insurer under an "all risks" policy to recover for tears that a dredging contractor made in the liner of a wastewater treatment lagoon. The court noted that all-risks insurance policies allow recovery for all fortuitous losses unless a specific exclusion applies. However, the court held that the faulty workmanship exclusion applied because the liner damage was covered by the plain meaning of "faulty workmanship."

Tennessee: CGL Insurer Has Duty to Defend and Indemnify Contractor For Damage Caused by Faulty Installation of Windows by Subcontractor

Travelers Indem. Co. v. Moore & Associates, 216 S.W.3d 302 (Tenn. 2007)

In *Travelers v Moore*, the Supreme Court of Tennessee held, as a matter of first impression, that water penetration resulting from a subcontractor's faulty window installation was an "occurrence," and the ensuing damage was "property damage." In addition, the exclusion of coverage for property damage to the named insured's work did not apply because the faulty work was performed by a subcontractor. Therefore, the CGL insurer had to defend and indemnify the insured from the property owner's demand for arbitration.

Washington: County Liable for "All Risks" by Failing to Procure Contractually Specified Insurance

Frank Coluccio Construction Company, Inc. v. King County, 136 Wash.App. 751, 150 P.3d 1147 (2007)

In *Frank Coluccio*, the County hired a contractor to construct a tunnel. The contract required the County to

purchase an insurance policy to "insure against physical loss or damage by perils included under an 'All Risk' Builder's Risk policy form." The County denied the contractor's builder's risk claims because the County failed to obtain the specified insurance. The Court of Appeals of Washington held that the county was liable for full amount of losses that would have been covered by the all risk policy it was obligated to purchase, and that the contractor was entitled to reasonable attorney's fees and costs.

Fifth Circuit/Texas: Primary Insurer Can Subrogate to Rights of Insured Under Umbrella Policy

Scottsdale Ins. Co. v. Knox Park Const., Inc., 488 F.3d 680 (5th Cir. 2007)

In *Scottsdale v. Knox Park*, a subcontractor's primary insurer filed a declaratory action against a general contractor, its insured/subcontractor, and the insured's umbrella insurer seeking a determination of the primary insurer's duty to defend and indemnify the subcontractor in the underlying suit by the general contractor against the subcontractor for breach of warranty. The Fifth Circuit Court of Appeals held that the primary insurer could equitably subrogate to the rights of its insured to enforce the umbrella policy, and that the "coverage(s) afforded," as used in umbrella policy, referred to insurance coverage provided and not excluded by the underlying policy for particular categories of liability. Finally, the Court found that the umbrella insurer waived its right to deny coverage on the basis of a policy clause requiring that "ultimate net loss" be determined by trial or written agreement.

Tenth Circuit: Poor Workmanship is not a Covered Event under Colorado Law

Adair Group, Inc. v. St. Paul Fire and Marine Ins. Co., 2007 WL 575983 (10th Cir. 2007)

In *Adair Group*, the Tenth Circuit Court of Appeals held that "poor workmanship constituting a breach of contract" in Colorado is not a covered occurrence under a CGL policy because construction deficiencies resulting from faulty work are "business risks" rather than "fortuitous events." Further, the Court ruled that the general contractor/insured's breach of contract is

not a covered event simply because of the subcontractor's negligence. These issues came before the court when the insured sought indemnity from the insurer following an arbitration award of \$2.5 million for construction deficiencies in work performed by the insured's subcontractors.

Seventh Circuit: Six Year Statute of Limitations Applies to Claims Under Builder's Risk Policy

Hunt Constr. Group, Inc. v. Allianz Global Risk U.S. Ins. Co., 503 F.3d 632 (7th Cir. 2007)

In *Hunt Construction*, the Seventh Circuit Court of Appeals held that under Michigan law a construction company's claim for liquidated damages under a builder's risk policy was subject to the six year statute of limitations for contract actions, rather than the one year statute of limitations applicable to "fire insurance policies," even though the builder's risk policy covered fire damage. Here, the contractor sought to recover liquidated damages it had to pay the owner as a result of delay caused by excessive rain.

Colorado: Insured's Judgment Creditors Are Allowed to Garnish Insured's CGL Policy

Hoang v. Assurance Co. of America, 149 P.3d 798 (Colo. 2007)

In *Hoang*, the Supreme Court of Colorado held that a home builder's judgment creditors (the homeowner's) could maintain a garnishment action against the builder's commercial general liability (CGL) insurer to recover the judgment in an underlying construction defect lawsuit. In addition, the Court held that the sale of the house to the judgment creditor after the expiration of the policy did not terminate coverage for the builder's liability, because there was property damage during the policy period.

SPECIAL REPORT:

CONSTRUCTION DEFECT

Illinois Appellate Court Holds That Subcontractor's Insurer Wrongfully Rejected General Contractor's Tender Of Defense For Suit Filed By Subcontractor's Employee

State Automobile Mut. Ins. Co. v. Habitat Constr. Co., ___ Ill.App.3d ___, 875 N.E.2d 1159 (1st Dist. 2007)

By: *Bruce Lichtcsien (Chicago)*

I. INTRODUCTION

Construction accidents have historically provided fertile ground for civil litigation. An inherently hazardous and sometimes dangerous work environment makes injuries at construction sites all too common. Illinois law has generally provided injured construction workers with numerous remedies to seek compensation for their injuries. Because Illinois prohibits employees from filing suits directly against their employers, injured workers, as a first avenue of recovery, often exercise their rights under the Illinois Workers' Compensation Act. The Structural Work Act, repealed in 1995, formerly provided injured workers with another statutory basis of recovery in the construction setting.

Injured workers have not been left without a civil remedy since the repeal of the Structural Work Act, however. Illinois courts still permit suits against third parties under general principles of negligence. The Restatement (Second) of Torts ("Restatement") codifies many of these principles of negligence which Illinois courts have recognized as valid authority in many cases. *See, e.g., Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.App.3d 835, 719 N.E.2d 174 (1st Dist. 1999)(applying Section § 414 of the Restatement). Under the Restatement, injured construction workers can seek to hold third parties civilly liable if a third party's conduct caused or contributed to the injury.

Construction litigation lends itself to a predictable pattern. In a large commercial project, typically a property owner will hire a general contractor to perform the construction work. The contract between the owner and a single general contractor simplifies the process for the owner who, in theory, only has to deal with the general contractor. The general contractor, however, does not usually perform all

of the construction. The general contractor will, in turn, enter into subcontracts with various subcontractors to perform specialized work such as electrical, glazing, plumbing and general labor.

The usual scenario involving a personal injury lawsuit in the construction context arises when an employee of one of the subcontractors suffers an injury on the job. Because Illinois law does not permit him to sue his employer, an injured worker will seek to hold the general contractor liable for causing the worker's injuries. Theories against general contractors usually allege that the general contractor controlled the site but failed to provide a safe place for the injured worker to perform his job.

When an injured worker files suit against the general contractor, the general contractor usually has a couple of options regarding who will pay for its defense of the lawsuit. A general contractor can first turn to its own commercial general liability ("CGL") insurer. A second option is the possibility of a tender of the defense to the CGL insurer for the subcontractor whose employee was injured. As consideration to win the bid for the subcontract, the subcontractor will often agree to obtain insurance for the general contractor that names the general contractor as an additional insured on the subcontractor's CGL policy. In that case, the general contractor can request the subcontractor's insurer to defend the lawsuit and "deselect" or avoid triggering the general contractor's own insurance. This scenario is referred to as a "targeted tender". See *John Burns Constr. Co. v. Indiana Ins. Co.*, 189 Ill.2d 570, 727 N.E.2d 211 (2000).

II. HABITAT – FACTS

In *State Automobile Mutual Insurance Co. v. Habitat Construction Co.*, ___ Ill.App.3d ___, 875 N.E.2d 1159 (1st Dist. 2007), the First District Appellate Court clarified the propriety of tendering the defense of a personal injury lawsuit in construction cases. Habitat arose in the typical fashion. Habitat Construction Company ("Habitat"), the general contractor for a construction project, hired Central Building & Preservation ("Central") as a subcontractor for the job. The written subcontract between Habitat and Central required Central to add Habitat as an additional insured to Central's CGL policy (the "State Auto Policy") with

State Automobile Mutual Insurance Company ("State Auto"). Habitat also had its own CGL policy with Pennsylvania General Insurance Company ("Pennsylvania General").

The State Auto Policy contained a blanket additional insured endorsement which defined an Insured as "any person or organization whom you are required to name as an additional insured on this policy under a written contract or agreement." The State Auto Policy limited the insurance for all additional insureds to "liability arising out of: (b) 'Your work' for that additional insured for or by you." The State Auto Policy further defined "Your work" as "Work or operations performed by you or on your behalf; and . . . [m]aterials, parts or equipment furnished in connection with such work or operations."

Larry Medolan, an employee of Central, allegedly sustained an injury while working at the construction site. Medolan filed a complaint against Habitat alleging that Habitat was in charge of the construction project and that he suffered his injury in furtherance of the work. Medolan also alleged that Habitat was present during construction, coordinated the work, designed work methods and had the authority to stop the work if it was dangerous. Medolan's complaint claimed that his injury occurred when Habitat erected a concrete wall which fell on a scaffold on which Medolan was working. Medolan accused Habitat of negligence in failing to inspect the site, failing to supervise the site, failing to warn him of the dangerous condition and

directing workers to cut excessive amounts of concrete. Habitat filed a third-party complaint against Central in which it alleged that Central's negligence proximately caused Medolan's injuries.

Pursuant to the terms of its subcontract with Central, Habitat tendered Medolan's complaint to Central for defense and indemnification. Central forwarded the matter to State Auto which rejected Habitat's tender and filed a declaratory judgment action seeking a declaration that the State Auto Policy did not provide any defense or indemnity coverage to Habitat for the Medolan complaint.

III. ANALYSIS

The trial court entered summary judgment on behalf of State Auto. In reversing the trial court, the First District Appellate Court conducted a two-part analysis. First, the First District examined whether the State Auto Policy contained any exclusions specifically for the additional insured's own negligence. Next, the Court considered whether the allegations in the complaint triggered coverage under the "additional insured" coverage based on liability "arising out of" Central's work.

A. The State Auto Policy Did Not Contain an Exclusion for Habitat's Own Negligence

The First District did not find any exclusions in the State Auto Policy for the additional insured's own negligence. Relying on several other Illinois decisions, the Court concluded that if the insurance policy contains an express exclusion directly applicable to the facts alleged in the complaint against the additional insured, the insurer has no duty to defend or indemnify. For example, in *National Union Fire Insurance Co. v. R. Olson Construction Contractors, Inc.*, 329 Ill.App.3d 228, 769 N.E.2d 977 (2d Dist. 2002), the Second District Appellate Court held that an exclusion for "LIABILITY RESULTING FROM [THE ADDITIONAL INSURED'S] OWN NEGLIGENCE OR THE NEGLIGENCE OF ITS SERVANTS, AGENTS OR EMPLOYEES" operated to bar coverage to the general contractor on the subcontractor's insurance policy. *See also Am. Country Ins. Co. v. James McHugh Constr. Co.*, 344 Ill.App.3d 960, 801 N.E.2d 1031 (1st Dist. 2003) (barring coverage where policy excluded coverage for liability "arising out of any act or omission of the additional insured or any of their employees").

In contrast to policies that contain an express exclusion, the Court concluded that a policy containing a provision that simply limits the insurer's coverage to liability "arising from your [subcontractor's] work" is insufficient to remove the complaint from the terms of coverage. Here again, the First District relied on what it considered controlling precedent in *State Automobile Mutual Insurance Co. v. Kingsport Development, LLC*, 364 Ill.App.3d 946, 846 N.E.2d 974 (2d Dist. 2006). Importantly, the policy at issue in *Kingsport* was identical to the policy at issue in *Habitat*. The First District adopted the reasoning of *Kingsport* in wholesale fashion. Construing the same policy terms, *Kingsport* distinguished those cases involving an express exclusion on the grounds that the State Auto

Policy required "only that the liability arise out of [subcontractor's] work and [did] not require a more detailed examination of whose acts and omissions are alleged to have caused the injury." *Id.* at 1166.

B. "But For" Central's Work, Medolan Would Not Have Been Injured

After concluding that the State Auto Policy did not bar coverage based on an exclusion for the additional insured's own negligence, the Court next addressed whether a "but for" analysis should be the test employed to determine coverage under the "arising out of" language. Once again, the Court found *Kingsport* authoritative. *Kingsport* determined the "but for" analysis to be the appropriate standard and "held that the allegations in the injured employee's complaint established that but for his work for [subcontractor] and [subcontractor's] presence on the construction site, he would not have been injured." *Id.* at 1167. Likewise, the First District determined that because the policy in *Kingsport* contained the identical "arising out of" language as found in the State Auto Policy, it was compelled to reach the same result. The Court reasoned:

When the allegations of Medolan's complaint, which establish Medolan was injured in furtherance of his work for Central Building, are liberally construed, and are compared to the relevant provisions of the State Auto policy, it is clear that Medolan's alleged injuries at least potentially arose out of Central Building's work.

Id. at 1167-68.

Thus, State Auto owed a duty to defend Habitat under the State Auto Policy.

C. A Final, Critical Wrinkle

In theory, Habitat seemingly emerged with a complete victory from the litigation based on the Court's holding that State Auto owed a duty, as a matter of law, to defend Habitat against the Medolan complaint. As a practical matter, however, the decision did not leave Habitat without a few remaining problems. In fact, based on the final section of the Court's decision, Habitat may have notched only a pyrrhic victory.

Among the terms of the State Auto Policy was an "other insurance" clause which provided:

Any coverage provided hereunder shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent, or on any other basis unless a contract specifically requires that this insurance be non-contributory and or primary or you [Central Building] request that it apply on a non-contributory and or primary basis.

Id. at 1168-69.

State Auto contended that because the “other insurance” clause made the State Auto Policy excess, State Auto did not owe a duty to defend or indemnify Habitat until Habitat exhausted all of its primary insurance. Recognizing Habitat’s right under *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill.2d 570, 727 N.E.2d 211 (2000) and its progeny to make a “targeted tender” to State Auto, the First District tempered Habitat’s apparent victory with a reference to the Court’s decision in *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 368 Ill.App.3d 665, 856 N.E.2d 453 (1st Dist. 2006), in which the First District held that an insured cannot make a targeted tender to an excess insurer until the insured’s primary coverage is exhausted.¹ In other words, under *Kajima*, horizontal exhaustion trumps a targeted tender.

Habitat carried a CGL policy with Pennsylvania General. However, the Court did not have any information about the terms of the Pennsylvania General policy to determine whether the primary limits of the policy were exhausted such that the Medolan complaint would trigger the State Auto Policy. Consequently, the Court remanded the case to the trial court to decide whether Habitat had any other primary insurance and, if so, whether Habitat’s primary policy(ies) would be exhausted to the extent that State Auto would be obligated to provide a defense or indemnity under the State Auto Policy.

IV. CONCLUSION

Habitat teaches an important and cautionary lesson. In the current landscape of targeted tenders in construction cases, insurers for subcontractors often provide “additional insured” coverage to general contractors pursuant to the subcontractor’s contractual obligation to furnish insurance naming the general contractor as

an additional insured on the subcontractor’s CGL policy. Under *Habitat* and *Kingsport*, in the absence of a specific exclusion barring coverage for liability resulting from the additional insured’s own negligence, the general contractor may make a valid tender of defense to the subcontractor’s insurer. Terms in the subcontractor’s policy which merely limit the coverage to liability “arising out of” the subcontractor’s work are not enough to avoid coverage. The policy must contain a specific exclusion.

Whether the expansion of the targeted tender rule in *Habitat* and *Kingsport* amounts to an increase in insurance coverage remains in doubt. In light of *Kajima*, many targeted tenders may be short-circuited if the subcontractor’s policy contains an “other insurance” clause and the general contractor has other primary insurance which it has yet to exhaust.

1.The Supreme Court of Illinois recently affirmed the First District’s decision in *Kajima*, reinforcing the principle that Habitat must exhaust its primary limits of insurance before the State Auto Policy is triggered. See *Kajima Constr. Servs., Inc. v. St. Paul Fire and Marine Ins. Co.*, No. 103588, 2007 WL 4200949 (Ill. Nov. 29, 2007).

DIRECTORS & OFFICERS LIABILITY INSURANCE

Climate in the Boardroom: Global Warming Exposures Put the Heat on Directors and Officers

By: Richard J. Bortnick (West Conshohocken) and Kevin M. LaCroix

Since the advent of the Age of Mega Securities Fraud Settlements--indeed, even before--class-action counsel have searched strenuously for--and corporate executives have slept fretfully worrying about--the next trend in investor claims and activism.

In the recent past, directors and officers have been challenged by and in some cases faced down, allegations of improper stock backdating. We also have become familiar with the problems of subprime mortgages. But these issues relate primarily to considerations of personal wealth and economic interest.

The latest topic of concern has been promoted not by class-action lawyers or even capitalist entrepreneurs and reaches far beyond mere issues of individual economic interests. Rather, the critical issues of global warming and environmental protection have been placed on the front pages and received the heightened

attention of both investors and noninvestors alike because of the efforts of social activists, politicians and others.

The import and potential impact of global warming and its implications for our environment extend well beyond the capital markets and insurance. Indeed, the issue may have potentially important repercussions for directors and officers of publicly traded companies as well as for their D&O liability insurers.

Most recently, global warming has received the attention of the U.S. government, including the executive branch.

At the same time, the U.S. Supreme Court has spoken on the subject, having held in the seminal case of *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), that the U.S. Environmental Protection Agency violated the Clean Air Act by improperly declining to regulate new vehicle emissions standards to control carbon dioxide emissions that contribute to global warming.

In and of itself, the court's ruling is somewhat narrow. However, two components of the decision are relevant to corporate governance and D&O insurance.

First, the court held that the injury of which Massachusetts complained in bringing the suit was sufficiently particularized for the Commonwealth to have "standing" to bring its claim against the federal government. And second, the Court held that greenhouse gas emissions are "pollutants" under the Clean Air Act.

Responses of the EPA, state regulators, lower courts and even the newly constituted Congress to the Supreme Court's ruling and environmental issues in general could potentially have a dramatic impact on a broad range of industries--some of which will have to modify their business practices to comply with the anticipated heightened regulation and judicial scrutiny of environmental matters.

In addition, these changes could dramatically impact public companies' disclosure obligations and the way they do business--particularly in the face of Regulation S-K, Item 101 (requiring disclosure of environmental compliance) and the more generalized requirements of Item 303 (which requires disclosure of known trends or uncertainties that could affect a company's business).¹

In turn, public company disclosure creates a context within which it is prudent to assume that D&O claims will arise.

Beyond automotive and energy generation businesses (and supporting industries), the changing claims context could also have a significant effect on industries such as insurance, transportation, manufacturing, shipping and businesses whose operations have (or which could sustain) a substantial environmental impact, even if it is entirely localized.

In some cases, the battles already have begun, with activist shareholders asking questions, voicing concern, and demanding through corporate resolutions and other vehicles that public companies disclose:

The nature and extent of their pollution generating activities.

The financial risks attendant to global warming and the government's heightened scrutiny, including how they will recognize and account for the risks attendant to climate change.

The methodologies and plans they are implementing or intend to implement to reduce greenhouse emissions and meet the changing regulatory, political and social environments.

To the extent claims do arise, the wording of applicable D&O policies could have an enormous impact on the availability of D&O insurance to defend and indemnify companies and their directors and officers.

The typical D&O policy contains a pollution exclusion. Surprisingly, however, it is not obvious that the standard forms of pollution exclusion address greenhouse gas emissions or consequences arising from such emissions.²

There may be several arguments raised to try to support the idea that the typical pollution exclusion wording has no relation to greenhouse gas emissions or their environmental consequences.

Whether or not such contentions would be persuasive to a court is a matter of pure conjecture on which we do not opine.

Nevertheless, assuming the exclusion would otherwise preclude coverage for claims pertaining to greenhouse gas emissions, the pollution exclusion in most D&O policies these days carves back coverage for derivative suits and shareholder claims.

In light of the possible course of future litigation in this area, the wording of the pollution exclusion--and, in particular, the wording of the carve-back for shareholder claims and derivative lawsuits--will be absolutely critical.

The fact that policy language must anticipate cases and claims of a kind that may not have previously arisen underscores the importance of enlisting the assistance of skilled D&O insurance professionals in the D&O insurance transaction.

Some insurers are already requesting of proposed policyholders detailed information about their companies' efforts to reduce the risk of and manage environmental losses and claims. The reality is that global climate change is not some distant theoretical construct.

More to the point, the answer to the question of whether this will affect a company's risk profile is a reflection of the way the question is framed.

On the one hand, an underwriter can regard global climate change as a separate category of risk to be analyzed on its own merits.

Alternatively, the underwriter can simply view the discrete issue of climate change as imbedded within numerous other risk categories—such as commodities pricing risk, political risk and currency risk, as well as what insurers call parameter risk (the risk of events different than those that have occurred in the past).

Regardless, whether viewed separately or as a part of the overall panoply of corporate risk, global climate change will be an increasingly important part of the risk landscape that companies face.

The influence of activist investors suggests that companies and their insurers disregard these risks at their peril.

1 SEC Regulation S-K, codified at 17 C.F.R. Part 229.10 et seq. (2007), was enacted on March 16, 1982. The regulation:

Governs the content of forms filed under the Securities Exchange Act of 1933, the Securities Exchange Act of 1934, and the Energy Policy and Conservation Act of 1975.

Specifically sets forth requirements for the content of the nonfinancial statement portions of such forms.

Of particular note in the environmental context are Items 101 and 303.

Item 101, titled "DESCRIPTION OF BUSINESS," requires SEC registrants to disclose the material effects of complying (or failing to comply) with "federal, state and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment."

Under Item 101, registrants must disclose the effect of such compliance on capital expenditures, earnings and competitive position.

ITEM 303, titled "MANAGEMENT'S DISCUSSION AND ANALYSIS OF

FINANCIAL CONDITION AND RESULTS OF OPERATIONS," does not specifically address environmental disclosure. It does, however, require disclosure of known trends or uncertainties that could affect a company's business.

In particular, it requires description of trends or uncertainties that "have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."

Registrants must also "identify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way."

Further instruction in Item 303 says the "discussion and analysis shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition."

2 While there is no standard form wording among D&O insurers, the following is illustrative of pollution exclusion wordings typically available in the D&O market today without modification:

"The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured: alleging, arising out of, based upon or attributable to, directly or indirectly:

(i) the actual, alleged or threatened discharge, dispersal, release or escape of Pollutants; or

(ii) any direction or request to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize Pollutants (including but not limited to a Claim alleging damage to an organization or its securities holders); provided, however, that this exclusion shall not apply to Non-Indemnifiable Loss, other than Non-Indemnifiable Loss constituting Cleanup Costs;

'Cleanup Costs' means expenses (including but not limited to legal and professional fees) incurred in testing for, monitoring, cleaning up, removing, containing, treating, neutralizing, detoxifying or assessing the effects of pollutants.

'Pollutants' means, but is not limited to, any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and Waste.

'Waste' includes, but is not limited to, materials to be recycled, reconditioned or reclaimed."

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EMERGING ISSUES:

“FAX BLAST”

By: Chris Neal (Seattle)

Courts Around the Country Continue to Address Coverage for Claims under the Telephone Consumer Protection Act – “Fax Blast” Cases

The year 2007 was another busy one for courts addressing whether commercial general liability policies provide coverage for claims involving violations of the Federal Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”). Under the TCPA, it is unlawful to send unsolicited fax advertisements. A claimant may recover statutory damages of \$500.00 or more for each violation. As a result of the numerous class actions and individual lawsuits that have spread throughout the country, there has been an increasing number of coverage disputes regarding these claims.

In general, TCPA coverage disputes centered around the meaning of the word “privacy.” Insurers contend that written publication of material that violates a person’s “right of privacy” is applicable only when the *content* of the published material reveals private information about a person. Insureds, on the other hand, argue that “right of privacy” includes one’s interest in *seclusion*, or being left alone. In other words, not receiving unwanted faxes or auto-dialed telephone solicitations during dinner. Thus, in most TCPA coverage cases, the courts have to determine whether “right of privacy,” as used in the definition of “advertising injury,” means *secrecy* or *seclusion*. For additional background on the distinction between the two, please see the holding in *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 640 (4th Cir. 2005), where that court (quoting from the holding in *American States Ins. Co. v. Capital Assocs. of Jackson County*, 392 F.3d 939, 941-42 (7th Cir. 2004)) held the plain meaning of “invasion of

privacy” encompassed both the seclusional and secrecy variants of the right to privacy.

In *ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co.*, 147 Cal.App.4th 137 (2007), a California appellate court held that a commercial liability insurer owed no duty to defend to its insured for claims arising out of the insured’s alleged transmission of unsolicited telephone fax advertisements. Significantly, the Advertising Injury coverage narrowly defined an “advertising injury” as “[m]aking known to any person or organization written or spoken material that violates a person’s right of privacy.” The insured, ACS Systems, was named as a defendant in a class action lawsuit, in which it was alleged that, among other things, ACS violated the Telephone Consumer Protection Act (TCPA) when it sent thousands of unsolicited fax advertisements to various recipients. ACS’ commercial liability insurer denied coverage for the underlying complaint. ACS sued the insurer claiming that it owed a duty to defend under the “advertising injury” and “property damage” coverage parts of the CGL policy. The California appellate court disagreed and affirmed the lower court’s holding that neither coverage part afforded liability coverage to ACS for the TCPA violations or for the invasion of privacy claims alleged in the underlying complaint. Of some importance, with respect to the “right of privacy” offense and whether or not coverage was afforded for secrecy or seclusion claims, or both, the court concluded that the policy wording restricted application to injuries caused by the disclosure of private content to a third party – *i.e.*, to the invasion of “secrecy privacy” caused by “making [materials] known” to a third party. In other words, the *content* of the material must violate someone’s right of privacy, not the mere sending of material. *See also Penzer v. Transportation Ins. Co.*, 509 F.Supp.2d 1278 (S.D. Fla. 2007) [Under Florida law, and analyzing the same narrow Advertising Injury coverage grant as that in *ACS Systems, Inc.*, insured’s transmission of unsolicited commercial advertisements by facsimile, in violation of the Telephone Consumer Protection Act (TCPA), did not constitute oral or written publication of material that violated a person’s right to privacy within commercial liability policy’s coverage for advertising injury, since advertisements did not disclose private facts about anyone, and thus insurer had no duty to defend or indemnify insured for its violations of TCPA; advertising injury coverage under provision existed only when *content* of material published violated a person’s right to privacy.]

In contrast to the Advertising Injury coverage at issue in the *ACS Systems* and *Penzer* opinions, the policy at issue in *Terra Nova Ins. Co. v. Fray-Witzer*, 449 Mass. 406 (applying New Jersey law), provided coverage for “[o]ral or written publication of material that violates a person’s right of privacy.” As noted, the policies in *ACS Systems* and *Penzer* were different in that they defined an “advertising injury” as “[m]aking known to any person or organization written or spoken material that violates a person’s right of privacy.” With this broadened “invasion of privacy” definition in mind, the *Terra Nova* court held that under New Jersey law, the mere existence of oral or written material, regardless of content, can violate the right of privacy and result in advertising injury covered by a commercial general liability (CGL) policy.

However, in *American Home Assurance Co. v. McCleod USA, Inc.*, 475 F.Supp.2d 766 (N.D. Ill. 2007), where the policy at issue again broadly defined “advertising injury” to include “written ... publication ... of material that violates a person’s right of privacy”, the court held that under both Illinois and Iowa law, the plain meaning of “right of privacy” connotes both an interest in seclusion and an interest in secrecy of personal information. Based on this construction, the *McCleod* court held that the unsolicited fax advertisements at issue in the underlying TCPA suits fell within the definition of “advertising injury.”

In 2008, only one thing is certain in this developing area of the law – courts will continue to issue diverse and unpredictable results, irrespective of policy language. Insurers would be well-advised to stay aware of the trends arising from these new decisions.

FOOD CONTAMINATION

By: Joseph Bermudez (Denver)

The Explosion of Food Contamination Claims: Who Pays When Good Food Goes Bad?

2007 was the year of eating dangerously for Americans. The year started badly when the first recall was announced on January 2, 2007. U.S. Food and Drug Administration Recall – Firm Press Release, *Ho’s Trading Inc. Recalls Home Special Health Soup Recipe (Dry Mix)*, Jan. 2, 2007. Shortly thereafter, the largest

pet food contamination recall in history was announced. U.S. Food and Drug Administration Recall – Firm Press Release, *Menu Foods Issues Recall of Specific Can and Small Foil Pouch Wet Pet Foods*, Mar. 16, 2007. The year that devastated the U.S. food industry’s safety reputation continued with an All-American list of contaminated food products that involved international, national and super-regional recalls including, but not limited to: a spinach recall involving 48 states and Canadian provinces; a peanut butter recall involving 47 states; and a pot pie recall involving 31 states. Apple pie appears to have been the one American standard that was not recalled last year. Of course, any 2007 food contamination highlight film would not be complete without Topps’ recall of historic proportions, which involved 21.7 million pounds of hamburger, was the second largest ground beef recall and third largest food recall in U.S. history.

While the number of foodborne pathogens identified continues to increase, the number of foodborne illnesses reported is steadily decreasing. Even though the number of foodborne-illness cases is declining, large-scale outbreaks continue to occur. It is estimated that approximately one out of every four Americans suffers from some form of foodborne illness every year. The hepatitis A outbreak in 2003 from a single location (just outside of Pittsburgh, PA) of a national restaurant chain, Chi-Chi’s, led to more than 600 illnesses, including several deaths, from customers eating green onions. Given the increasing litigiousness of Americans, we can expect that even as the number of foodborne illnesses reported continues to decrease, the ultimate money paid out for both informal claims and litigated suits related to food contamination will continue to increase.

Historically, the growth and distribution of produce was the business of small, family-owned farming operations. With the advent of “big business” and the steady decline of “mom and pop operations”, the food production and distribution process has become increasingly and overwhelmingly centralized. Individual large-scale growers provide produce which may ultimately be distributed to dozens of states across the country. The ramifications of this are simple and frightening. A single outbreak of contaminated produce from one grower’s crop, manufactured in one state but shipped to multiple states, can potentially sicken

people in every state in which that product is distributed. This reality, coupled with consumers' eating patterns toward more unprocessed foods sold by fast food and national restaurant chains, is a recipe for potentially catastrophic losses stemming from foodborne illnesses.

The anticipated future loss scenarios from foodborne illnesses beg the obvious and glaring question – who is going to pay for these losses? Clearly, consumers who are sickened by a foodborne illness may be entitled to monetary damages to compensate them for their injuries which may range anywhere from stomach ache to death. Moreover, because the elderly and small children tend to be the most adversely affected by certain strains of bacterial and viral contaminations, these lawsuits will be emotionally charged thereby increasing the risk of substantial jury awards.

Bodily injuries aside, there are enormous financial losses which result from any significant food recall. Once a recall is issued, the recalled product must be removed from shelves, transported and destroyed. Notices may have to be issued and distributed informing the public of the recall. Consumer refunds may be issued. Costs may be incurred to rehabilitate the product's reputation. Various entities in the distribution chain may lose anticipated profits. Depending on the scope of the recall and the economic viability of the businesses that are impacted, a product recall can result in financial ruin to a business. For instance, according to the U.S. Centers for Disease Control ("CDC"), medical costs and lost wages due to foodborne salmonellosis, only one of many foodborne infections, have been estimated to be more than \$1 billion per year.

Given the reach of potential food contamination claims such as the recent spinach E.coli outbreak, potential targets for liability may include a broad range of businesses, beginning with growers and fertilizer manufacturers, continuing through packagers, distributors and shippers and ending through points of sale, such as food processors, retail markets and restaurants.

All hope is not lost for businesses involved in food production and distribution. Companies can purchase insurance to defray the costs and expenses associated with product recalls. Third-party policies may pay for defense costs and indemnity exposure with respect to the companies' liability to others. Companies may also purchase policies for the costs associated with losses to their own assets – first-party policies. Additionally, the availability of specialized policies is growing. Specialized policies, such as

product recall policies, may supplement the coverage provided by standard first-party and third-party policies.

TRIA REAUTHORIZED

By: Helen A. Boyer (Seattle)

On December 27, 2007, President Bush signed into law a seven-year extension of the Terrorism Risk Insurance Act (TRIA). TRIA was first enacted after 9/11, on November 26, 2002. The 2007 reauthorization adds domestic terrorist events to the program, and provides for two Government Accountability Office studies of the legislation. One study will examine risks posed by attacks from nuclear, biological, chemical and radiation sources. The other study will examine terrorism insurance capacity restraints for properties in certain urban areas regarded as high risk targets for terrorist attacks.

TRIA provides, subject to certain trigger levels and deductibles, a federally-funded backstop for insurers for "certified" terrorism losses. A purpose of TRIA as originally enacted was to allow time for the insurance industry to develop products to insure against acts of terrorism. The Act was set to expire December 31, 2005, which was subsequently extended to December 31, 2007.

The American Bar Association supported a long-term or permanent TRIA authorization.

For questions about TRIA, contact **Francine L. Semaya** at 212.908.1270 or fsemaya@cozen.com, or **Christopher B. Kende** at 212.908.1242 or ckende@cozen.com.

RECENT VICTORIES

APPEALS

Libya Liable for Terrorist Bombing to Aircraft's Insurer

La Reunion Aerienne v. The Socialist People's Libyan Arab Jamahiriya, reported below at 477 F. Supp.2d 131 (D.D.C. 2007), appeal pending.

Cozen O'Connor's team of **Christopher Kende** and **Ed Hayum** (New York Downtown) obtained a major victory against Libya on behalf of the insurer La Reunion Aerienne (LRA), in a claim under the state-sponsored exception to the Foreign Sovereign Immunities Act, arising from the bombing

of UTA flight 772 over Niger Africa on September 19, 1989 which resulted in the loss of 170 lives. In a lawsuit filed in the US District Court for the District of Columbia, against Libya, its external security organization LESO, and the individuals responsible for the attack, which was identical in its MO to the Pan Am 103 bombing, the court rejected Libya's arguments of (i) lack of personal jurisdiction, (ii) lack of subject matter jurisdiction under the FSIA, (iii) forum non conveniens, (iv) insufficient service, and, most importantly, (iv) lack of standing of LRA based on its standing as a foreign insurer and third party assignee of claims against the defendants. The court held that as an assignee of the victims, LRA "stepped into the shoes" of the survivors and the owner of the aircraft and, therefore, could properly assert its claims under the FSIA exception for terrorist acts, and that the exception applied even though Libya is now off the "terrorist state" list because the acts in question occurred when it was considered a terrorist state. Libya has appealed the sovereign immunity issue under the FSIA. It is likely the appeal will be mooted by the major revisions to the FSIA signed by President Bush on January 28, 2008 which expressly allow third party actions by insurers.

Application of Dismissal after Settlement Under FRCP 41.1 Upheld

Safeguard Lighting Systems, Inc. v. North American Specialty Ins. Co., 2007 U.S. App. LEXIS 1680 (3d Cir. 2007) and *Smith v. North American Specialty Ins. Co.*, C.A. Nos. 07-1475,1520 (E. D. Pa. June 28, 2007)

Michael Henry (Philadelphia) successfully convinced the United States Court of Appeals for the Third Circuit that the trial court's dismissal with prejudice of Cozen's insurance client should be affirmed in an appeal involving significant issues concerning a Rule 41.1 dismissal and appellate jurisdiction.

The carrier insured a theatrical wholesaler, which suffered freeze-up water damages to equipment and building claiming losses to sophisticated sound equipment, computer lighting, and its warehouse. After undisputed claim payments were made, an additional claim of \$2.5 million dollars was submitted for appraisal. In a highly political case involving insurance department complaints and inquiries from political leaders, a settlement was ultimately entered and a Rule 41.1 dismissal with prejudice

obtained. When the insured was then unsuccessful in reducing its IRS liability it filed a motion to vacate the dismissal and void the settlement, since all the settlement money was to go to the IRS. The trial court affirmed its dismissal, and on appeal, the Third Circuit affirmed the trial court's judgment. *Safeguard Lighting, supra*. Mike also secured a dismissal of the public adjuster's later attempt to sue the insurer for his fee from the insurance proceeds, and to remand the case as a state contract action. *Smith, supra*.

Exhaustion of Joint Tortfeasor's Solvent Insurance Not Required Before Guaranty Fund Must Pay

Carrozza v. Greenbaum, 916 A.2d 553 (Pa. 2007)

The Pennsylvania Supreme Court agreed with Cozen coverage lawyer **Sara Anderson Frey** and her team of **Gale Barthold** and **Deborah Minkoff** (Philadelphia) in this coverage action arising out of an underlying medical malpractice coverage action. In a case of first impression involving policy limits and exhaustion issues, the Supreme Court held that the Legislature did not intend for the Property and Casualty Guaranty Insurance Association to be treated any differently than the insurer it replaces with respect to joint and several liability. Thus, the Court held that the non-duplication of recovery provision in the Guaranty Act does not require a claimant to exhaust the solvent insurance of a joint tortfeasor prior to the Guaranty Association paying its statutorily mandated limits.

No Duty to Defend and No Occurrence In Construction Defect Cases

Jacob Cohn, **Mike Hamilton**, **Joshua Broudy**, and **Joe Arnold** (Philadelphia), prevailed in a bellwether case with nationwide impact involving the issue of whether liability policies provide coverage for defective construction claims. The builder sought coverage from its insurer for the cost of repairing the damage caused by the defective work of its subcontractors. Both parties filed cross-motions for partial summary judgment as to whether there was a duty to defend one underlying homeowner lawsuit, and a duty to indemnify another lawsuit that had resulted in a \$1.1 million arbitration award. The insurer prevailed on summary judgment, with the trial court agreeing that claims for

faulty workmanship do not constitute an “occurrence” where only the insured’s own work product is damaged and held there was no duty to defend.

In late December, the Pennsylvania Superior Court unanimously affirmed in a carefully-reasoned, 26-page precedential opinion. *Millers Capital Ins. Co. v. Gambone Brothers Development Co.*, 2007 WL 4555258, 2007 PA Super 403, __ A.2d __ (2007). The court reinforced the Pennsylvania Supreme Court’s ruling in *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888 (2006) (another Cozen recent victory), by clarifying that the limitation on coverage for faulty workmanship applies not only to the faulty work itself, but to the natural consequences of faulty workmanship, such as water intrusion, even where damage occurs to other, non-defective components of the insured’s overall work product.

Joseph Ziemianski and **April Zubizarreta** (Houston) similarly convinced the U.S. District Court for the Western District of Texas in a motion for summary judgment that no duty was owed by the insurer to defend the insured subcontractor in an underlying lawsuit involving construction defect and faulty workmanship claims. *Kerry Charlton d/b/a Kerry Charlton & Son v. Evanston Ins. Co.*, 502 F.Supp.2d 553, 560 (W.D. Tex. 2007); but *cf. Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, No. 05-0832, 2007 WL 4898326 (Tex. Aug. 31, 2007) (the court held, based on the particular facts presented, the plaintiffs’ allegations of faulty work constituted an “occurrence”).

Cozen O’Connor Lawyer Turns Back Radiologists’ Challenge to NY No-Fault Insurers’ Right to Deny Reimbursement for Medically Unnecessary MRI’s

Long Is. Radiology v. Allstate Ins. Co., New York Supreme Court, Appellate Division (2d Dept.)

Jacob C. Cohn (Philadelphia), defeated a class action suit on behalf of radiologists seeking reimbursement for MRIs that had been rejected by no-fault automobile insurers as medically unnecessary. Reversing a trial court ruling that would have cost New York automobile insurers substantially increased indemnity dollars, the appellate court affirmed that defense of “medical necessity” is a valid defense irrespective of whether the claim is submitted by the insured motorist or by a radiologist standing in the motorist’s shoes as an assignee. See

<http://www.courts.state.ny.us/courts/ad2/calendar/webcal/decisions/2007/D13506.pdf> for a copy of the opinion.

No Coverage Under Pollution Insurance Policy; Contaminants Pre-Existing

Denihan Ownership Co., LLC v. Commerce & Indus. Ins. Co., 37 A.D.3d 314 (N.Y. Sup. 2007)

Ed Zampino, Kevin Haas, and Marianne May (Newark) achieved a major victory in a pollution insurance products case of first impression, prevailing in an appeal before the NY Supreme Court, First Department. The policyholder sought coverage under a Pollution Liability policy, after obtaining coverage under a Cost Cap policy. The insured’s property was historically used for dry cleaning and auto repair businesses. To sell the property, a remedial investigation was undertaken, which revealed historical contamination that required remediation. The owner came to the carrier, which issued the Cost Cap to cover remediation cost overruns, and the Pollution Liability policy to cover new and different pollution conditions. The Pollution Liability policy was issued with an exclusion of coverage for pollution arising from or related to matters addressed by the consultants’ remedial investigation reports. When remediation commenced, Denihan discovered much more extensive contamination on the site, with contaminants that had not been discovered by the consultant. The Cozen team was able to convince the Court that the contaminants were the types of materials used in an auto repair business and dry cleaning operation, and therefore contemplated by the studies undertaken before coverage was issued.

“Track-Raising Claim” Held Not an Occurrence

Union Electric Co. d/b/a Ameren UE v. Certain Underwriters at Lloyd's London, et al., Gen No.: 5-06-0631 (Madison County No.: 2-MR-181), *affirmed* (Ill. Ct. App., Fifth Dist. Nov. 6, 2007)

Matthew Walsh and **Gregory Hopp** (Chicago) secured a victory in a coverage case on behalf of Certain Underwriters at Lloyd's before the Illinois Court of Appeal, Fifth Appellate District. The insured, Ameren, sought coverage for its \$7.7 million settlement with Burlington Northern and Santa Fe Railway Company relating to the cost of raising railway tracks after a 1993 flood near Fort Madison, Iowa. In affirming the trial court's grant of summary judgment, the appellate court found that Ameren's

“track-raising claim” was barred by the prior notice exclusion of the applicable policy and did not constitute an occurrence. The appellate court also rejected Ameren’s claim that Underwriters breached a fiduciary duty relating to the release of a prior year’s policy.

Directed Verdict in Mold Case Upheld on Appeal

Bruce Lichtsien, assisted by **Matthew Walsh**, **Martha Conlin** and **Dan Johnson** (Chicago), obtained a directed verdict in favor of the defendant in a hotly contested property damage case in Will County, Illinois. Plaintiffs claimed that when the defendant construction company started developing a piece of commercial property adjacent to plaintiffs’ home, it caused their home to flood, resulting in the basement becoming contaminated with toxic mold with an estimated cost of repairs alone at \$50,000. Through a series of pre-trial and trial motions, Bruce managed to exclude virtually all of plaintiffs’ damages and argued, at the close of plaintiffs’ case, that, as a matter of law, the client’s conduct did not cause plaintiffs’ flood. The trial court agreed and entered a directed verdict, which was upheld on plaintiff’s appeal to the Third District Appellate Court for the State of Illinois.

Loss Caused by Evacuation Not Covered Where No Physical Damage

Washington Mutual Bank v. Commonwealth Ins. Co., et al., Washington Court of Appeals, Div. I., No. 56396-3-I (June 26, 2006) (unpublished)

Seattle attorneys **Craig Bennion** and **Ramona Hunter** (Seattle) recently defeated an insured’s effort to collect, under a property insurance policy, loss caused by its evacuation of a commercial building where the building sustained no physical loss. The insured, Washington Mutual Bank, hired an engineering firm to examine its commercial building that housed bank operations. The firm reported that corrosion had compromised the post-tension cable support system and that the building was in danger of collapse. The firm recommended immediate evacuation of bank operations and tenants. The Bank evacuated, then hired a second engineering firm to assess the building. The second firm conducted a thorough inspection and concluded that nothing was wrong with the structure. The

Bank reoccupied the building after incurring approximately \$680,000 in evacuation expense. The Bank sought recovery under its property policies, relying on the policies’ “sue and labor” and “ingress/egress” provisions. The trial court granted the insurers’ summary judgment motion. The Bank appealed and the Washington Court of Appeals affirmed in an unpublished decision. Adopting in large part Craig and Ramona’s arguments, the Court held that the Bank’s reasonable but mistaken belief that the property would collapse did not trigger property coverage where the building sustained no direct physical loss or damage, and that the sue and labor provision was inoperable in the absence of a risk of covered loss that was imminent in fact. The Bank sought review, which the Washington Supreme Court denied.

TRIAL COURT DECISIONS

Business Interruption Coverage Does Not Cover Consequential Loss of Market Share

Joseph Bermudez, **Christopher S. Clemenson**, and **Jason D. Melichar** (Denver) obtained a summary judgment for their insurer client from the United States District Court for the District of Colorado, which held that the business interruption clause in a first-party policy provides coverage only until the insured resumes operations, and does not provide coverage for market consequences resulting from the insured’s temporary cessation of business. *Brand Management, Inc., et al. v. Maryland Cas. Co.*, 05-CV-02293-REB-MEH (D. Colo. June 18, 2007). In so holding, the Court rejected the insureds’ argument that they were entitled to coverage for their alleged loss of business income after the period in which their operations were suspended.

Professional Services Exclusion Applied on Summary Judgment

June Gilson, **Rick Wegryn**, and **Dave Walton** (West Conshohocken) were victorious with their cross-motions for summary judgment in the Eastern District of Virginia in a matter involving an assigned claim for indemnification with respect to a policy of insurance. In the underlying matter filed in Maricopa County, Arizona, plaintiffs alleged that the insured crematory

breached its contract to cremate their husband and father's remains, alleging that the insured mishandled the remains by losing and/or commingling the remains with those of an animal. The insurer denied liability coverage and the insured and plaintiffs entered into a stipulated judgment for \$4 Million. Underlying plaintiffs and the insured subsequently filed suit against the insurer in Virginia asserting claims for breach of contract, reformation and bad faith. The court found that the allegations of the underlying complaint fell squarely within the professional services exclusion. Therefore, the insurer had no duty to defend the insured in the underlying action. The court further found that even if the policy were reformed to include the "Funeral Director's Professional Liability Endorsement," an endorsement that had been included in the insured's prior policy, the endorsement would not provide coverage because the allegations contained in the underlying action did not arise out of the provision of a funeral or embalming service but rather arose directly out of the cremation.

Dismissal Obtained After Filing of Declaratory Action

One business day after filing a declaratory judgment complaint on behalf of the insurer by the Cozen team of **Lori S. Nugent**, **Josh M. Kantrow** and **Beth Stroup** (Chicago), with assistance from **Allan Levin**, **Jeff McConaughy** and **Rosa Rivera** (Atlanta), the policyholder in this Georgia federal court case withdrew its claim. The key specialty technology/cyber-perils wording at issue had never been tested in court, so the policyholder pushed its position aggressively. The policyholder sought reimbursement of defense expenses and indemnification of its settlement of the underlying dispute. The day after the policyholder received the complaint with its attached documents proving that no coverage was warranted, the policyholder withdrew its claim. The policyholder even permitted the insurer to keep the premium, despite the fact that the insurer's complaint sought rescission based on misrepresentations. *ACE Capital Ltd. v. Entuition, Inc., et al.*, No.: 06 CV 2541 (N.D.Ga., filed Oct. 20, 2006).

Court Finds No Retaliation By Employer

Retaliation lawsuits are among the most risky for an employer to place before a jury because of the possibility that members of the jury will identify with a complaining employee and award punitive damages. After a three-day trial in Minneapolis, Minnesota, **Jeff Pasek** (Philadelphia)

won a finding of no retaliation and a complete defense victory in favor of our client, a nationwide provider of education services and the insured of a major domestic insurer. An especially unusual aspect of the trial was that after Jeff cross-examined the plaintiff, the trial judge announced outside the presence of the jury that he was considering referring the matter for potential perjury charges against the plaintiff.

Asbestos/Silica Exclusion Upheld

Michael Smith and **Stephen Bishop** (Philadelphia) obtained summary judgment in a Waterbury, Connecticut state court for a major domestic insurer, applying asbestos exclusions that included silica dust injuries in excess liability policies issued to a silica products manufacturer, in a matter involving injuries caused by exposure to silica dust.

Successful "Beef Stew" Defense of Auto Liability Claim

Dan Johnson (Chicago) tried and won his first jury trial in Cook County, Illinois with the jury returning a verdict in favor of the defendant and against the plaintiffs. The case involved a rear-end car accident in Chicago approximately 5 years ago. The police report noted that only three people were involved in the accident, but when the lawsuit was filed seven people were alleging that they were injured. Receiving an assignment from the insurer's fraud unit, the matter was defended and ultimately tried. In his closing argument, Dan used the "beef stew" argument, i.e., "Members of the jury, if you're eating beef stew and realize that the meat is bad, do you pull out the meat and eat the rest of the stew? No, you throw the whole thing out." Dan recommended that the jury not pick and choose who was in the car but rather throw the entire case out and find in favor of his client. They did.

Transfer of Venue Obtained

Alicia Curran and **Kendall Hayden** (Dallas) prevailed in an unusual case in which the client wanted venue to reside in South Texas, successfully persuading a Collin County judge to grant a motion to transfer venue from Collin County to Hidalgo County, Texas. Alicia and Kendall represented a hotelier operating several establishments in South Texas who was sued by his management company for alleged breach of contract. Alicia and Kendall convinced the court that venue was improper in Collin

County due to the hotel owner's extensive business operations in and the management company's frequent travels to South Texas.

PRO BONO

Permanent Resident Status Obtained

Jennifer Brown (Seattle) obtained permanent resident status (*i.e.*, a green card) for her Gambian client. Jen previously handled the client's asylum application related to her severe mistreatment in The Gambia.

NOTEWORTHY HONORS, APPOINTMENTS AND PUBLICATIONS

HONORS

Stephen Cozen, William P. Shelley, and Michael Izzo (Philadelphia); **Mark Roth** (Los Angeles); **Kenan Loomis** (Atlanta); **Thomas McKay** (Cherry Hill); **Christopher Kende** and **James Campise** (New York Downtown); and **Thomas Jones, J.C. Ditzler, Jodi McDougall** and **William Knowles** (Seattle) have been named "Super Lawyers" for 2007-08.

Named as "Rising Stars" are **C. Tyler Havey** and **Ilan Rosenberg** (Philadelphia); and **Michael Ballnik** and **Michael Handler** (Seattle).

Catherine Hamilton (Philadelphia) will be honored in 2008 by the Pennsylvania Society for the Prevention of Cruelty to Animals for her pro bono efforts on the Society's behalf.

APPOINTMENTS

As noted in the Message from the Chair on the first page of this issue, **Francine L. Semaya** (New York Downtown) has been elected president of the International Association of Insurance Receivers (IAIR). Francine chairs the firm's Insurance Corporate and Regulatory Practice Group, is a frequent lecturer and has authored numerous articles in both legal and insurance trade publications on insurance regulatory, reinsurance and insolvency law.

Francine L. Semaya (New York Downtown) has also been appointed Chair of the ABA/TIPS (Tort & Insurance Practice Section) task force on Federal Involvement in Insurance Regulation Modernization (FIIRM) Task Force, and Arrangement Chair for the TIPS meetings during the ABA Annual Meeting in New York, scheduled for August 2008.

Richard Mason (Philadelphia) was elected as Vice Chair of the Excess and Reinsurance Committee of ABA's Tort & Insurance Practice Section.

Peter J. Mintzer (Seattle) recently expanded the scope of his practice with an admission to the Idaho State Bar. Peter is also admitted to practice in Washington and Oregon. Peter passed the bar exam in Hawaii this summer and is in the process of being admitted to the Hawaii State Bar.

Gene Creely, II (Houston) was recently re-elected to another two-year term to the Governing Council of the Insurance Section of the State Bar of Texas.

Michael D. Handler (Seattle) has been elected co-chair of the Northwest Insurance Coverage Association ("NICA"). NICA is a Seattle-based business league established in approximately 1990. Members of NICA include both Washington state attorneys who represent insurance companies on complex casualty or property insurance coverage claims and the individuals adjusting or evaluating such insurance coverage claims. NICA's purpose is to advance the technical education and professional competence of its members.

Kellyn J. W. Muller (Cherry Hill) has been appointed the Newsletter Vice-Chair of the Property Insurance Law Committee (TTIPS section of the ABA) for 2007-2008.

PUBLICATIONS

William P. Shelley (Philadelphia) and **Kellyn J. W. Muller** (Cherry Hill) co-authored an article entitled "e-Discovery Costs and General Liability Coverage: Who Pays When the Rules are Violated?", which was published in the December 2007 edition of the Insurance Coverage Law Bulletin (vol. 6, no. 11).

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 will appear soon in the *Information Management Journal*, published by ARMA International.

Thomas M. Jones and **Matthew D. Taylor** (Seattle) authored “Formulating a Records Retention Policy,” *For the Defense* at 42 (Jan. 2008).

Thomas M. Jones and **Helen A. Boyer** (Seattle) authored “Should an Insurer Institute a Litigation Hold to Preserve Electronic Data After Denying a Claim?,” 10 *TortSource* 3 (Winter 2008).

Thomas M. Jones (Seattle) authored “Food Contamination Claims,” *For the Defense* at 57 (May 2007).

Francine L. Semaya (New York Downtown) and **Laurance D. Shapiro** (New York Downtown) published *Risk-Based Reinsurance Collateral Requirements: A New Era?*, 18 FORC Q. J. INS. L. 11 (March 2007).

Francine L. Semaya (New York Downtown) authored a chapter on “Insurer Insolvencies: Looking Back and Forging Ahead” in the Practising Law Institute’s treatise on Reinsurance Law & Practice 2006.

Francine L. Semaya (New York Downtown) and **William K. Broudy** (New York Downtown) co-authored the article “Permanent TRIA Solution Depends on Partnership” in *Business Insurance* (April 23, 2007).

Francine L. Semaya, with the editorial assistance of **William K. Broudy** and **Laurance D. Shapiro** (New York Downtown), wrote the chapter on Insurance Guaranty Fund Principles for the New Appleman Insurance Law and Practice Guide, published in December 2007.

Francine L. Semaya (New York Downtown) was featured in the Winter 2007 issue of ABA’s *TortSource*, in an interview about her practice and professional experiences. Francine gave this advice to new lawyers: “Don’t be afraid to ask questions; never assume; keep up your writing skills; become involved in pro bono work and community service; and never lose sight of who you are.”

Josh M. Kantrow (Chicago) has been interviewed on two occasions recently by the Metropolitan Corporate Counsel magazine. In June 2007 he was interviewed on the topic of the legal environment for businesses in the Midwest. The interview appears at <http://www.iwpubs.com>

[/Subscriber/sd.asp?p=10&a=32836&l=5348762&_s=46EAC720](http://Subscriber/sd.asp?p=10&a=32836&l=5348762&_s=46EAC720). This interview was republished in the November 2007 issue of *USI Today – Risk Management Issues*. In September 2007, Josh and **Lawrence Bowman** (Dallas) were interviewed on the topic of secondments. Josh was seconded to the London insurance market in 2002. The interview was published with the title, “Are Secondments the Wave of the Future?” and can be viewed at <http://www.metrocorpocounsel.com/current.php?artType=view&EntryNo=7171>.

Gene Creely, II (Houston) is a contributing editor to the recently published LexisNexis’ *Texas Annotated Insurance Code*.

Gene Creely, II (Houston) published “Showdown in Texas: Dueling Positions on Construction Defect Claims,” in the January 2007 issue of *Claims* magazine.

Michael D. Handler (Seattle) authored “Washington State Passes New “Bad Faith” Law With Penalties, and 20-Day Notice Requirement,” ABA Tort Trial & Insurance Practice Section, Property Insurance Law Committee, *Committee News* (Summer 2007).

Michael D. Handler (Seattle) authored “Fair Conduct Laws Are Anything But,” *Best’s Review* (February 2008).

Kellyn J. W. Muller (Cherry Hill) co-authored an article entitled “Recent Developments in Property Law,” 43 *Tort Trial & Ins. Prac. L.J.* ___ (Winter 2008). Kellyn is the author of the section of the article entitled “Recent Developments in Hurricane Katrina Litigation.”

COVERAGE ATTORNEYS “IN THE SPOTLIGHT”

PAST EVENTS

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

William P. Shelley (Philadelphia) co-chaired the Mealey’s Bad Faith Litigation Conference in Philadelphia in September 2007. Speakers included **Lori S. Nugent** (Chicago) on “What To Do When the Wheels Come Off,” and **Alicia G. Curran** (Dallas) on “Ethical Witness Preparation and Conduct at Deposition.”

William P. Shelley (Philadelphia) spoke at the EECMA Spring 2007 Meeting and Conference in Captiva Island, Florida regarding "Public Nuisance Doctrine: Lead Paint and Other Mass Torts."

Thomas M. Jones (Seattle) and **Christopher Kende** (New York Downtown) presented several discussions concerning e-discovery and privileges this year at client seminars in the United States as well as Paris, Zurich and London.

Thomas M. Jones (Seattle) presented on "New Rules in Electronic Discovery" at the Oklahoma Bar Association's "Litigation and Trials in the Digital Age" seminar on December 2007 in both Tulsa and Oklahoma City.

Thomas M. Jones (Seattle) participated on April 11, 2007 at the DRI Insurance Coverage and Claims Institute Conference in Chicago, Illinois in which he presented on the topic of food contamination: "(Don't) Eat Your Spinach: Food Coverage Claims."

Thomas M. Jones (Seattle) was a panel member at the PLUS International Conference on November 7, 2007 on the topic "The Devil is in the E-Mails: E-Discovery, EGAD!"

Francine L. Semaya (New York Downtown) spoke on "Contract Provisions to Prepare for Insolvency of Reinsured" at ACI's 3rd National Forum on Reinsurance Agreements held in New York City. Francine also lectured at the ACI's Insurance Regulation Conference, Legal and Compliance Executives' Forum on Insurance Regulation, on the topic of "Insolvent Insurers: Complying with Government Mandates to Pick up the Slack." Additionally, Francine moderated and participated in the panel on "Guaranty Funds & Receivers: The Impact of a New Collateral System on Insolvency" at the ACI Reinsurance Collateral Forum.

Francine L. Semaya (New York Downtown) chaired the Practising Law Institute's "Hot Topics in Reinsurance", on November 27, 2007.

Francine L. Semaya (New York Downtown) chaired and moderated two programs during the "34th Annual TIPS Midwinter Symposium on Insurance, Employment and Benefits" held January 17-20, 2008. The two programs were "Roundtable of Insurance

Commissioners - Current Issues in Insurance Regulation" and its breakout session "Insurance Regulation Modernization - Alternatives to The Current State-Based System"; and the second program was "Basics of Life Reinsurance".

Francine L. Semaya (New York Downtown) was a moderator and speaker on "The Impact of the Subprime Mortgage Collapse," on February 1, 2008, at the 2008 IAIR Insolvency Workshop in Tucson, Arizona. More information about IAIR can be found at <http://www.iair.org> or you can e-mail Paula Keyes at IAIRhq@aol.com and ask to be put on the mailing list.

Francine L. Semaya (New York Downtown) conducted an IAIR Insolvency Training Workshop in Salt Lake City, Utah for the State Insurance Department.

Joseph Bermudez (Denver) has spoken extensively on food contamination coverage issues. His recent engagements include a number of in-house client presentations.

Joseph Bermudez (Denver) was a panel leader on Colorado Coverage and Economic Loss Issues at the McConsultants Seminar in Colorado Springs on October 19-20, 2007.

Joseph Bermudez (Denver) spoke at the Mealey's Product Recall Liability Conference: Made in China and Beyond, in Washington, D.C. in December 10-11, 2007, on "Insurance Coverage for Product Recalls."

Joann Selleck (San Diego) and **Joseph Bermudez** (Denver) were on the faculty of the National Forum for Property Loss Professionals in Chicago, and presented an interactive program on November 7, 2007 entitled "Understanding Business Interruption Claims." The National Forum is a nonprofit educational organization founded in 1984 and this was its 23rd Forum. **Joe Gerber** (Philadelphia) is Executive Secretary of the Advisory Committee and hosted the event.

Joann Selleck (San Diego) and **Alicia Curran** (Dallas) participated in June 2007 at the mid year meeting of the Loss Executives Association, held in Chicago. They presented workshops on "Avoiding the Bad Faith Set-Up with First Party Losses."

Joann Selleck (San Diego) provided the defense perspective in three bad faith seminars sponsored by poli-

cyholders' counsel in Los Angeles and Orange County, discussing "Reasonable Conduct – A Current look at First Party Principles."

Joann Selleck (San Diego) was on a panel of attorneys at the 46th Annual Seminar of the Association of Southern California Defense Counsel, presenting on "Trends in Construction Law: Litigating complex commercial, investment and luxury property cases."

Christopher Kende (New York Downtown) spoke on the use of experts in air disaster litigation at the annual conference organized by the French Air and Space Academy, at the headquarters of the Directorate for Civil Aviation in Paris on June 6, 2007. The organization's website is at www.anae.fr.

Richard Bortnick (West Conshohocken) and **Michael Metzger** (Philadelphia) presented "What You Need to Know About Litigation Management Guidelines," at Mealey's Litigation Management Guidelines Conference, held May 10-11, 2007 in New York. The presentation examined the history and common elements of insurers' guidelines, as well as current trends such as the impact of electronic invoicing and budgeting on litigation management.

Richard J. Bortnick (West Conshohocken) made two appearances on Fox 29's Good Day. During his first appearance, Bortnick discussed the immigration bill currently being debated in Congress, and how it could affect illegal immigrants currently living in the United States. During his second appearance, he spoke on the story of Atlanta attorney Andrew Speaker, who flew throughout Europe after being diagnosed with an extremely drug-resistant form of tuberculosis.

Jacob Cohn (Philadelphia) spoke at the June 7-8, 2007 Mealey's Asbestos Bankruptcy seminar in Chicago, Illinois. He was a featured speaker on the topic "The Bankruptcy Code & Section 524(g) – What is Currently Allowed?"

Josh M. Kantrow, Lori S. Nugent, and Beth A. Stroup (Chicago) made presentations at the September 27, 2007 ACI Advanced Forum on Cyber Risk Insurance in Philadelphia. Josh spoke on "Resolving Claims Made Under Cyber-Risk Policies." Lori presented "Working With Clients to Ensure an Effective Incident Response Plan: Mitigating Damages in the Event of a Breach," and joined with Beth on a panel to present a post-conference

workshop entitled "Negotiating and Drafting Cyber Risk Provisions and Policies." Lori is a co-author of *@ Risk: Internet and E-Commerce Insurance and Reinsurance Legal Issues*. Stroup was a co-author of the ACE/Cozen Cyber White Paper, "Information Management – New Threats, New Liabilities."

Josh M. Kantrow (Chicago) was a speaker at the American Society for Healthcare Risk Management (ASHRM) Conference in San Diego in October 2006 on the topic "Healthcare Privacy and Security Risk (It is not just about HIPAA anymore)." The ASHRM Annual Conference is the healthcare risk management professions' most comprehensive education and networking program. See www.ashrm.org.

Deborah Minkoff (Philadelphia) was a speaker at the ABA's Litigation Section, Insurance Coverage Committee seminar in Tucson, presenting "Duties Owed to the Excess Insurer, and Theories of Recovery."

Michael Hamilton (Philadelphia) recently presented "The Duty to Defend, Settle and Indemnify and Ethical Considerations," in a nationwide teleconference sponsored by the Defense Research Institute's Insurance Law Committee.

Peter J. Mintzer (Seattle) was a speaker at the recent Mealey's Scope of Coverage Conference, held October 15, 2007, in Washington, D.C. Peter spoke on a panel which addressed "*The Fundamentals: 'All Sums' Versus Pro Rata Allocation, Terminology and a Look Ahead.*"

Peter J. Mintzer (Seattle) participated on a panel addressing the recently adopted Washington State Insurance Fair Conduct Act, at the Northwest CPCU Society Annual Seminar, held in Seattle on October 22, 2007.

Peter J. Mintzer (Seattle) spoke on a Teleconference CLE sponsored by Strafford Publications on January 15, 2007, entitled "Bad Faith Litigation: Strategies for Effective Resolution."

Gene Creely, II (Houston) recently spoke on "Business Risk Assessment and Alternative Risk Transfer Mechanisms, including Self-Insured Retentions, Captive Insurers and Fronting Arrangements" at the University of Houston Insurance Law Seminar in March 2007 in both Dallas and Houston.

Tracy Eggleston (Charlotte) presented the topic “Collapse Losses: Coverage and Investigations” at the June 2007 Property Loss Research Bureau’s Eastern Regional Adjusters Conference in Richmond, Virginia. Tracy presented the same topic at the August 2007 PLRB Midwest Regional Adjusters Conference in Columbus, Ohio.

Tim Headley (Dallas) was a speaker at the Houston Advanced Insurance and Tort Claims speaking on the topic “Triggers—A Survey of Recent Texas Law on First-Party and Third-Party Property Damage Claims and the Apportionment of Coverage.”

Michael D. Handler (Seattle) spoke on a Teleconference CLE sponsored by Strafford Publications on July 31, 2007, entitled “Bad Faith Insurance Claims.”

Kendall Hayden, Wes Vines and **Craig Crafton** (Dallas) presented “Property Damage from High Winds” to the Texas Property Casualty Insurance Guaranty Association in Austin, TX.

Coverage group attorneys spoke at our client seminar in New York City on October 23, 2007, chaired by **William P. Shelley** (Philadelphia), on the following topics: **Deborah Minkoff** (Philadelphia) -- claims-made policies; **William Stewart** (West Conshohocken) -- global warming; **John Mullen** (Philadelphia) -- e-discovery; **Richard Bortnick** (West Conshohocken) -- D&O insurance; **Alicia Curran** (Dallas) -- extra-contractual exposures; **Joseph Bermudez** (Denver) -- food contamination; and **David Loh** and **Christopher Raleigh** (New York Downtown) -- maritime insurance.

Seattle insurance attorneys spoke at our client seminar in Seattle on September 18, 2007, chaired by **Jodi McDougall**, on the following topics: **Maggie Peterson** -- tavern liability; **Peter Mintzer** -- global warming; **Kevin Michael** -- bad faith; **William Knowles** -- Northwest jurisdictions coverage update; **Robert Slavik** -- fire spread theories in subrogation; **Katina Thornock** -- successor liability; and **Jack Soltys** -- tort law update.

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.

William P. Shelley and **Jacob Cohn** (Philadelphia) will present “Bankruptcy Transparency and a Tort Defendant’s Ability to Get Information, Credit, and Setoff for Recoveries from Bankruptcy Trusts” at the Emerging and Environmental Claim Manager Association (“EECMA”) Spring 2008 Conference, Captiva Island, Florida, April 30-May 2, 2008. For registration information, see www.eecma.org.

Thomas M. Jones (Seattle) will present at the ARMA International [formerly, the Association of Records Managers and Administrators] and E-Discovery Advisory Group’s *E-Discovery and Beyond* conference the week of March 31, 2008 in New York City. For registration information, see www.arma.org or call 913.341.3808 or 800.422.2762.

Thomas M. Jones (Seattle) will speak at the American Bar Association’s Section of Dispute Resolution Tenth Annual Spring Conference beginning April 3, 2008 in Seattle. For registration information, see www.abanet.org or call 312.988.5000.

Thomas M. Jones (Seattle) will present at DRI’s Electronic Discovery Conference April 17-18 in New York City. Tom will moderate the panel entitled, “eDiscovery in Insurance Defense (scenario).” For registration information, see www.dri.org or call 312.698.6264.

Thomas M. Jones (Seattle) will present “Coverage for Food Contamination Claims” at the PLRB/LIRB 2008 Claims Conference in Boston from April 13 -16, 2008. For registration information, see www.plrb.org or call 630.724.2200.

Thomas M. Jones (Seattle) will participate in a panel presentation at the American Conference Institute’s National Advanced Pollution Liability Insurance conference, April 15 & 16, 2007 in New York City. Tom will address Claims Management and Litigation: Strategies for Expediting Claims and Avoiding Disputes. For registration information, see www.americanconference.com or call 212.352.3220.



INSURANCE COVERAGE OBSERVER

NEWS ON CONTEMPORARY ISSUES

Francine L. Semaya (New York Downtown) is Co-Chair of the 19th Annual "Current Issues in Insurance Regulation" to be held April 4, 2008 at the Association of the Bar of the City of New York. This program is co-sponsored by the Association, the Insurance Regulation Committee of the ABA Tort Trial and Insurance Practice Section and the Insurance Federation of New York. In addition, Francine will moderate the Commissioners' Roundtable. For registration information, see <https://www.nycbar.org/CLE/>

Francine L. Semaya (New York Downtown) will speak April 28, 2008 at the ACI Conference on Reinsurance Agreements in New York City on "Protecting Your Interests in the Event of Insolvency." For registration information, see http://www.american-conference.com/insurance_reinsurance/reagree.htm

Joseph F. Bermudez (Denver) is scheduled to speak on February 27, 2008 in the Master Class on Insurance Coverage for Food-Borne Illness Outbreaks and Recalls at the Food-Borne Illness Litigation Conference sponsored by the American Conference Institute. The seminar will be held on February 27-29, 2008 in Scottsdale, Arizona. For registration information, please see www.AmericanConference.com/FoodLit

Joseph F. Bermudez (Denver) is scheduled to speak on April 15, 2008 on the topic of Insurance Coverage Issues - A Comprehensive Overview of Food Contamination and Product Recall Claims at the Food and Product Recall Business Strategies Seminar sponsored by Mealey's. The seminar will be held on April 13-15, 2008 in Las Vegas, Nevada. For registration information, please see <http://www.lexisnexis.com/conferences/>

Michael A. Hamilton (Philadelphia) will present at DRI's Insurance Coverage and Claims Institute April 9-11 in Chicago. Michael will speak on practical and ethical issues relating to "burning limits policies" -- liability policies that count defense costs against available policy limits. For registration information, see www.dri.org or call 312.698.6264.

Kellyn J. W. Muller (Cherry Hill) will present "Rescission of Property Insurance Policies" at the ABA/PILC Spring 2008 Meeting in Carlsbad, California from April 3-5, 2008. For registration information, see <http://www.abanet.org/tips/>

market/PILC08.htm or call 312.988.5597. Cozen O'Connor is a sponsor of this meeting.

Cozen O'Connor is a sponsor of the Region IX Conference of the National Association of Insurance Women, International, which will be hosted in Seattle by the local branches of the organization, Greater Seattle Insurance Professionals and Eastside Insurance Professionals, on February 29 – March 1, 2008. Region IX includes Alaska, Washington, Idaho, Montana, Oregon and Vancouver, B.C. For registration information, go to <http://www.gsipi.org/> and follow the links to the Washington State Council and then to Calendar.

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