COZEN O'CONNOR®

INSURANCE COVERAGE OBSERVER

NEWS ON CONTEMPORARY ISSUES

WINTER 2006-2007

Dear Clients and Colleagues:

We hope you had a safe and restful holiday, and we wish you continued success in the new year.

We continue our annual tradition of summarizing significant coverage decisions that were issued in the last calendar year. This year we have added the substantive areas of construction defect claims, insurance insolvency and reinsurance. As we have done in the past, we include sections on the most important cases of the year in property, general liability, environmental and toxic tort coverage.

Cozen O'Connor welcomes the **Honorable Sandra Schultz Newman** as head of the Appellate Practice Group, resident in our West Conshohocken office. With a distinguished career spanning over 20 years of private practice experience, Justice Newman was the first woman elected to the Pennsylvania Supreme Court. She was also elected to the Commonwealth Court of Pennsylvania and served as the first female assistant district attorney of Montgomery County, Pennsylvania. Justice Newman will oversee the firm's very active 50+ lawyer appellate practice, which boasts more than 75 wins and over half a billion dollars in savings and verdicts over the past two years.

Cozen O'Connor also welcomes the following attorneys to the Insurance Department:

Kenan G. Loomis joined the firm's Atlanta office in July 2006 as a Member. He has extensive experience in litigation, regulatory and contractual matters pertaining to the health, life, accident and disability insurance industry. Kenan has litigated numerous coverage issues, including bad faith, punitive damages and deceptive trade practices claims. He has also defended major insurance companies in various consumer related class actions and ERISA claims. Kenan has advised insurance companies on contractual issues such as agency agreements, pharmacy benefit management agreements, and reinsurance treaties. He also has experience in the implementation of new insurance products. Kenan has received Martindale-Hubbell's top ("AV") Peer Review Rating. Kenan is a graduate of Emory University School of Law.

April Zubizarreta joined Cozen O'Connor's Houston office in January 2006 as a Member. April concentrates her practice in insurance coverage matters. She is a member of the American Bar Association, the Houston Bar Association's continuing

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legal education committee and administration of justice committee, and the Texas State Bar's insurance section. April earned her law degree from South Texas College of Law.

Daniel D. Harshman joined Cozen O'Connor's San Francisco office in April 2006 as a Member. Dan has extensive experience litigating insurance coverage matters, as well as handling contract disputes, business litigation, business torts, trade secrets, negligence actions, products liability and accounting. As an insurance and business litigator, Dan's litigation experience includes numerous administrative trials, bench trials and jury trials in Pennsylvania, California, Arizona and Texas. Dan earned his law degree from Duquesne University School of Law, where he served as a recent decisions editor of the *Duquesne Law Review*.

Alycen A. Moss joined Cozen O'Connor's Atlanta office as a Member in July 2006. She concentrates her practice in civil litigation, with an emphasis on products liability, labor and employment and business matters. She has experience in litigating a wide variety of commercial matters, including matters pertaining to the health and life insurance industry. She has also represented defendant corporations in various consumer-related class actions. Alycen earned her law degree from Georgia State University, where she was a member of the *Georgia State University Law Review* and a finalist in the Moot Court Oral Argument Competition.

Benjamin J. Stone joined the Seattle office of Cozen O'Connor in April 2006 as a Member. Ben has represented employers against discrimination, wage and hour and retaliation claims; insurance agents and brokers in error and omission matters; and contractors in construction defect and personal injury cases. He has also counseled and defended insurers with respect to complex coverage and bad faith claims. Ben earned his law degree from Brooklyn Law School, where he was on the dean's list and was managing editor of the *Brooklyn Journal of International Law*.

Samantha Evans joined the Philadelphia office in September 2006 as an Associate. Samantha practices in the area of insurance coverage. Samantha earned her law degree, *magna cum laude*, from Villanova University School of Law.

Katina C. Thornock joined the firm's Seattle office in September 2006 as an Associate. Katina earned her law degree from the Seattle University School of Law.

Dylan T. Higgins joined Cozen O'Connor's Seattle office in October 2006 as an Associate. Dylan earned his law degree from the University of Washington School of Law.

Marvin P. Velastegui joined Cozen O'Connor's San Diego office in June 2006 as an Associate. He has experience in employment and labor law. Marvin is fluent in conversational Spanish. He earned his law degree from Boston University School of Law.

Joanna Nelson joined the firm's Houston office in August 2006 as an Associate. Joanna earned her law degree from the University of Virginia School of Law, where she was a member of the *Virginia Journal of Law and Technology*.

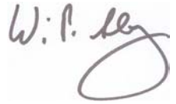
Joshua M. Rosen joined the firm's Seattle office in October 2006 as an Associate. Joshua earned his law degree from Tulane University Law School.

Aleksandr Pinkhas joined Cozen O'Connor's Newark office in September 2006 as an Associate. Aleksandr earned his law degree from New York Law School, where he was a recipient of the Harlan Scholarship, the Harry Wellington Scholarship Award for Academic Excellence, and the New York Law School Dean Scholarship.

Laurance D. Shapiro joined the firm's Insurance Corporate & Regulatory Practice Group in the New York Downtown office in September 2006 as an Associate. Larry earned his law degree *cum laude* from New York Law School.

Finally, in the rush of handling individual claims and litigation, the broader picture of the insurance services the firm offers sometimes gets lost in the shuffle. For example, many claims people express surprise that we handle insurance matters from our new office in Miami or that we boast an experienced insurance regulatory practice. While much of this information is on our new website, in the next month or so we will be forwarding detailed office and practice area information to assist you. In the meantime, if you have questions regarding our practice areas in various cities, please feel free to give me a call.

Best regards,



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

The editors thank **Alicia Curran (Dallas)** for her assistance.

SIGNIFICANT COVERAGE DECISIONS IN 2006

PROPERTY INSURANCE

By: Michael Hamilton, Esq., Cozen O'Connor, Philadelphia

SECOND CIRCUIT AFFIRMS WORLD TRADE CENTER VERDICTS

S.R. International Business Insurance Co., Ltd. v. World Trade Center Properties, LLC, 467 F.3d 107 (2d Cir. Oct. 18, 2006)

The Second Circuit affirmed both phases of the jury's deliberation in the Silverstein – World Trade Center trial. In its October 18, 2006 Opinion, the court affirmed the jury's ruling in the Phase I jury trial that all but three of Silverstein's property insureds followed the WilProp form that defined "occurrence" in a way whereby the terrorist attack on 9/11 should be treated as a single insured event. The court concluded that London, Swiss Re, Federal, and other property insurers clearly intended to follow the WilProp form. With respect to the Phase II verdict, the court held that Allianz, Gulf, IRI, TIG, Travelers Indemnity and Tokio Marine had issued binders (or, in the case of Allianz, a final policy) that contemplated a "two occurrence" treatment of 9/11. The Second Circuit held that the trial court did not abuse its discretion in allowing Silverstein's insurance expert to testify concerning the meaning of the term "events". The court also rejected Allianz's argument that it was entitled to judgment based on a policy definition of "occurrence" that allowed aggregation of various named perils that resulted in damage within a 72-hour period. Lastly, the court affirmed the trial court's decision to allow Silverstein to cross examine a Travelers witness with respect to a California insurance case in which Travelers treated arson fires in four different buildings as separate "occurrences".

Cozen O'Connor president **Stephen A. Cozen** (Philadelphia), and members **Thomas McKay** (Cherry Hill), **Jacob Cohn** and **Mike Hamilton** (Philadelphia) represented a leading domestic insurer in the matter. *See* **Recent Victories**, below, for more detail.

EIGHTH CIRCUIT RULES DIRECT PHYSICAL LOSS OCCURRED DURING BEEF EMBARGO

Source Food Technology, Inc. v. USF&G, 460 F.3d 995 (8th Cir. Aug. 22, 2006)

The Eighth Circuit ruled that a Minnesota food processing company suffered a "direct physical loss" after its supply of Canadian beef was cut off due to mad cow concerns. In upholding the insured's business interruption claim for loss profits during the period that it was shut down due to the beef embargo imposed by the U.S.D.A., the Eighth Circuit ruled that whether or not the beef was actually infected, it was deemed to be so by the government. The court also held that the insured did not suffer a business interruption within the meaning of its policy. The insured's loss was not caused by the inability to ship the single truckload of beef that the insured purchased at the time of the embargo, but rather the closure of the border to Canadian beef thereafter.

TEXAS SUPREME COURT DECLARES MOLD NOT COVERED UNDER HOMEOWNER POLICIES

Fiess v. State Farm Lloyds, 202 S.W.3d 744 (Tex. Aug. 31, 2006)

The Texas Supreme Court concluded that the Texas standard homeowner's insurance policy is unambiguous and precludes coverage for an insured's mold claim. In that case, the Fiesses' house suffered mold damage as a result of tropical storm Allison. The policy excluded loss caused by mold, but covered ensuing loss caused by water damage if the loss would otherwise be covered under the policy. The insureds argued that mold was an ensuing loss caused by water damage. However, the court interpreted ensuing loss to encompass a loss caused by water damage where the water damage itself is the result of a preceding cause that may be excluded, such as mold or rot. In addition, the court construed the phrase "caused by water damage" to exclude damage caused by water alone. Because mold does not grow without water, the court held that the exclusion for any mold, rot or rust then the policy would be meaningless if mold was considered "water damage". Lastly, the court held that the qualifying language of the ensuing loss clause "if the loss would be otherwise covered under the policy" mandated that any "ensuing loss" must ultimately be covered in some other area of the policy.

SECOND CIRCUIT RENDERS OPINION ON ASSIGNMENT OF BUSINESS INTERRUPTION CLAIMS

Globecon Group, LLC v. Hartford Fire Insurance Co., 434 F.3d 165 (2d Cir. Jan. 9, 2006)

The U.S. Court of Appeals for the Second Circuit ruled that a "no transfer" clause in a property insurance policy does not necessarily preclude the insured from assigning to a successor entity its 9/11 business interruption claims. The District Court noted that the general rule is that a policyholder may assign the rights to a claim after it had already occurred. However, this rule did not apply in the context of business interruption claims in view of the necessary involvement of the policyholder and the adjustment and calculation of the claim to loss. Second Circuit held that a distinction should be drawn between fixed losses, such as rental streams that were in place prior to date of the loss, and more speculative losses, such as claims for lost profits. The court therefore remanded the case back to the District Court to determine whether and to what extent the insured had presented a claim for 9-11 business interruption losses.

SEVENTH CIRCUIT HOLDS THAT FAILURE TO APPEAR AT EUO IS GROUNDS FOR DENIAL OF COVERAGE

Employers Mutual Casualty Company v. Skoutaris, 453 F.3d 915 (7th Cir. July 13, 2006)

In this case, the insured owned a restaurant and submitted a claim to its property insurer to recover for fire damage to its building. The insured denied coverage on the grounds that the restaurant's owner failed to comply with the insurance policy provisions concerning his duty to cooperate with the insurer's investigation and duty to submit to an examination under oath as requested by the insurer. The 7th Circuit held that the owner's decision not to attend the examination under oath was a willful and intentional breach of the policy's examination under oath clause, and therefore, the insurer was entitled to summary judgment for breach of the insured's duty to cooperate.

NEW YORK NARROWS SCOPE OF BUSINESS INTERRUPTION COVERAGE

Broad Street, LLC v. Gulf Ins. Co., ___ N.Y.S.2d ___, 2006 WL 3593049 (N.Y.A.D. 1 Dept.), 2006 N.Y. Slip Op. 09316 (Dec. 12, 2006)

In *Broad Street*, the New York Supreme Court Appellate Division (First Department) reversed a lower court decision involving the scope of business interruption coverage for the insured, an owner/operator of a 345-unit residential apartment building located three blocks from the former World Trade Center, following September 11. Consistent with older, but nevertheless still widely used, ISO forms, the policy covered the "actual loss of Business Income" sustained by the insured "due to the necessary suspension of [the insured's] 'operations' during the 'period of restoration.'" The Court interpreted the terms "necessary suspension" as meaning a "total cessation" of business and concluded that the insured was entitled to business interruption coverage only for the one week the building was closed after the terrorist attack. The Court reasoned that, irrespective of the number of tenants who chose to resume their tenancies on September 18, and despite the generally unfavorable climate and conditions that existed in the environs of post-9/11 lower Manhattan, the insured nevertheless opened its doors for business one week after the attack, thereby terminating the "total cessation" of business. The Court also held that the policy's "period of restoration" is "only as long as necessary for plaintiff to resume operations," which, in *Broad Street*, was one week.

Cozen O'Connor attorneys **Josh Wall** and **Tyler Havey** (Philadelphia) represented the prevailing insurer. *See* **Recent Victories**, below, for more detail.

MISSISSIPPI FEDERAL COURT HOLDS THAT KATRINA STORM SURGE DAMAGE IS EXCLUDED FROM HOMEOWNERS' POLICY COVERAGE

Leonard v. Nationwide Mutual Insurance Co., No. 1:05 CV 475 (S.D. Miss. Aug. 15, 2006)

A Mississippi federal court held that a water damage exclusion in a homeowners' policy barred coverage for storm surge which damaged the insured's home during Hurricane Katrina. The insureds sued Nationwide seeking a declaration that their homeowners' policy covered their loss, regardless of whether it was caused by wind, water or a combination. The homeowners also claimed that they were entitled to coverage because Nationwide's agent misled them into believing they did not need to purchase separate flood insurance. The policy provided coverage for direct loss caused by rain driven through roofs or wall openings made by wind. However, the policy excluded coverage for flood, surface water or overflow of any body of water whether or not driven by wind. After a bench trial, the court held that the insureds were entitled to additional funds for cleaning expenses, but dismissed the remainder of the insureds' claim against Nationwide. Although the court held that the policy language was ambiguous, the court ruled that the insureds could recover only that portion of their loss which they could prove was caused by a covered peril (the wind damage). The court found that almost all of the damage to the insureds' residence was attributable to the incursion of water. The court also held that the policyholders were not misled by the insurance company's agent, reasoning that an insureds' inference of what their insurance covers is not a sufficient bases to reject the wording in the contract, absent proof that the agent misrepresented coverage to the insureds.

CALIFORNIA SUPREME COURT RULES THAT "CONSTRUCTION" NOT LIMITED TO NEW CONSTRUCTION

TRB Invs., Inc. v. Fireman's Fund Insurance Co., 40 Cal.4th 19, 145 P.3d 472 (Cal. 2006)

Fireman's Fund issued a property insurance policy that excluded coverage for specified perils while the insured premises are vacant with the exception that buildings "under construction" are not considered vacant. In a coverage dispute arising from an insured loss, the California Supreme Court reversed a summary judgment in favor of the insurer. The Court held that, contrary to the California Court of Appeals' ruling, the word "construction" cannot reasonably be understood to be limited only to the erection of a new structure. In addition, the Court held that the term "construction" contemplates any type of building endeavor, whether new construction or renovations, requiring the continuing presence of workers.

GENERAL LIABILITY INSURANCE

By: Craig H. Bennion, Cozen O'Connor, Seattle

DEFENSE WITHOUT RESERVATION OF RIGHTS MAY NOT PRECLUDE SUBSEQUENT DISCLAIMER WHERE DEFENSE FURNISHED UNDER FALSE PRETENSES

Federated Department Stores, Inc. v. Twin City Fire Ins. Co., 28 A.D.3d 32, 807 N.Y.S.2d 62 (2006)

In *Federated*, the New York Appellate Division held that an insurer who defends an action without a reservation of rights is estopped from later disclaiming coverage only if the insurer provides the defense with knowledge of facts supporting a coverage defense. The policy afforded additional insured coverage to any organization with whom the named insured vendor had a written agreement to provide liability coverage. The insurer accepted defense based upon the purported insured retailer's false representation that it had such a written agreement with the vendor. After the retailer repeatedly failed to provide copies of the agreement, the insurer withdrew its defense and disclaimed coverage. The Court held that the retailer violated its duty of good faith and fair dealing and the policy's cooperation clause by providing incorrect information.

INSURED'S VIOLATION OF CONSENT-TO-SETTLE AND COOPERATION CLAUSES RELIEVES INSURER OF INDEMNITY OBLIGATIONS

Motiva Enterprises v. St. Paul Fire & Marine Ins. Company, 445 F.3d 381 (5th Cir. (Tex.) 2006)

In *Motiva*, the insured operator of a refinery sued to recover $16.5 million paid in settlement of an employee's personal injury action. The Fifth Circuit Court of Appeals, reinterpreting earlier Texas law, held that the umbrella insurer was prejudiced as a matter of law where the insured failed to obtain the insurer's consent prior to agreeing to settlement. The Court reasoned that despite defending under a reservation of rights, the insurer was not precluded from enforcing the policy's consent-to-settle and cooperation clauses. The insurer was relieved from its obligations and owed nothing under the policy. Inconsistent state law cases that the Fifth Circuit Court of Appeals considered not "helpful" include *PAJ, Inc. v. Hanover*, 170 S.W.3d 258 (Tex.App.-Dallas 2005, petition granted), *Coastal Ref. & Mkt. Inc. v. U.S. Fidelity & Guar. Co*., --- S.W.3d ----, 2006 WL 1459869 (Tex. App.-Houston [14th Dist.] May 30,2006), *Prodigy Comms. Corp. v. Agric. Excess & Surplus Ins. Co.*, 195 S.W.3d 764 (Tex.App.-Dallas, May 30, 2006, petition for review filed).

NEGLIGENCE DURING THE POLICY PERIOD, UNACCOMPANIED BY INJURY, MAY IMPLICATE DUTY TO DEFEND

State Farm Fire & Cas. Co. v. James McGowan, et. al., 421 F.3d 433 (6th Cir. 2005)

In *McGowan*, a tenant alleged that the insured former owner of her apartment building was negligent in failing to remove a dangerous condition caused by a rotting tree, and that this negligence caused the death of the tenant's child after the insured sold the apartment. The Sixth Circuit Court of Appeals, applying Tennessee law, ruled that alleged negligence, unaccompanied by injury or damage during the policy period, can implicate a duty to defend, noting that the policy only required that the occurrence take place during the policy period, not the resulting injury.

DEFECTIVE COMPUTER CHIPS WHICH CAUSED FAILURE OF COMPUTER DRIVES NOT PROPERTY DAMAGE

Atmel Corp. v. St. Paul Fire & Marine Ins. Co., 430 F. Supp.2d 989 (N.D. Cal. 2006)

In *Atmel*, the federal court in California found no "loss of use" coverage under a CGL policy where the only expenses at issue were the cost of replacing defective computer chips built into computer drives. The plaintiff did not allege lost profits, lost sales, or other loss of use damages. The installation of defective chips into computer drives did not amount to "property damage."

PREJUDICE NOT REQUIRED WHERE INSURED PROVIDED UNTIMELY NOTICE OF LAWSUIT

Country Mut. Ins. Co., v. Livorsi Marine, Inc. 222 Ill. 2d 303, 856 N.E.2d 338 (2006)

In *Country Mutual*, the Illinois Supreme Court rejected the notice-prejudice rule adopted in a majority of states requiring a liability insurer to demonstrate prejudice before it will be relieved of its obligations. The Court held that an insured's inexcusable and unreasonable 20-month delay in notifying the insurer of a lawsuit terminated the insurer's defense obligation even in the absence of evidence that the insurer was prejudiced by the late notice.

INSURER NOT ENTITLED TO RECOUP COSTS INCURRED IN DEFENDING NON-COVERED CLAIMS; INSURED REQUIRED TO APPORTION SETTLEMENT BETWEEN COVERED AND NON-COVERED CLAIMS

Perdue Farms, Inc. v. Travelers Cas. and Sur. Co., 448 F.3d 252 (4th Cir. 2006)

In *Perdue*, the Fourth Circuit Court of Appeals, applying Maryland law, held that an insurer that defends a mixed action may not recover from the insured those defense costs attributable to non-covered claims. The Court also held that an insured that settles a mixed action may not recover the settlement from its insurer without demonstrating what portion of the settlement is covered.

ANTI-ASSIGNMENT PROVISIONS IN INSURANCE CONTRACTS TREATED DIFFERENTLY IN TWO JURISDICTIONS

Holloway v. Republic Indemnity Co. of America, 341 Or. 642, 147 P.3d 329 (2006)

In *Holloway*, the Oregon Supreme Court held that a broadly-worded anti-assignment clause contained no exceptions or qualifications, and prohibited the assignment of rights to the plaintiff if the insured had not obtained the insurer's written consent. The Court ruled that the assignment to the underlying plaintiff was not valid absent written consent, and the underlying plaintiff "obtained no rights against" the insurer.

Elliott Company v. Liberty Mutual Insurance Co., 434 F. Supp.2d 483 (N.D. Ohio 2006)

In *Elliott*, a federal court in Ohio rejected an insurer's argument that an anti-assignment clause precluded coverage from transferring to plaintiff under an assignment provision in Separation and Purchase Agreements between the plaintiff and its former parent company. The Court adopted the majority rule that no-assignment clauses do not prevent the voluntary assignment of coverage rights under occurrence-based policies for claims related to pre-assignment occurrences. The Court noted that the no-assignment clause in the

policy only prevented assignment of the "policy" as opposed to claims.

ENVIRONMENTAL COVERAGE

By: Thomas J. Braun, Esq., Cozen O'Connor, Seattle

OREGON SUPREME COURT REJECTS POLICYHOLDER ARGUMENT THAT SOIL AND GROUNDWATER CONTAMINATION WERE LINKED; NO COVERAGE FOR PREVENTIVE MEASURES

Schnitzer Investment Corp. v. Certain Underwriters at Lloyd's of London, 137 P.3d 1282 (Or. 2006)

In *Schnitzer*, the Oregon Supreme Court upheld a Court of Appeals' decision that the defendant insurers had no duty to indemnify policyholder Schnitzer for pollution cleanup costs where the Oregon Department of Environmental Quality required Schnitzer to clean up soil only. The Court reasoned that the policyholder had not been "legally obligated" to clean up groundwater that was below actionable levels of contamination and, therefore, the cleanup costs were not within the policies' insuring agreements. The Court also rejected Schnitzer's argument that the insurers should indemnify certain preventive measures that Schnitzer claimed had benefited the condition of the groundwater.

Cozen O'Connor's **Thomas M. Jones** and **Helen A. Boyer**, assisted on the briefs by **Melissa O'Loughlin White** and **Thomas Braun** (Seattle), represented a prevailing insurer respondent.

NON-SETTLING EXCESS INSURER OBLIGATED TO PAY POLICYHOLDER "FULL RECOVERY FOR THE LOSS"

Cascade Corp. v. American Home Assurance Company, 135 P.3d 450 (Or.App. 2006)

In *Cascade Corp.*, the Oregon Court of Appeals ruled that a final non-settling excess insurer was required "to make the insured whole up to the limits of" the triggered policies. The non-settling insurer was obligated to pay its policyholder a "full recovery for the loss" as measured by the jury's verdict, despite having issued just 3% of the insured's policy limits as compared to the total policy limits issued during the adjudicated trigger period. The Court does note that the excess insurer "was not obligated" for defense costs or remediation expenses until the policyholder "exhausted its coverage under the primary policy." However, the excess insurer was unable to reduce its payment to the insured based on inter-insurer allocations for "time on the risk," for "policy limits," or any other judicially recognized allocation methods.

NON-SETTLING INSURER'S RIGHTS IN ENVIRONMENTAL CLAIMS FURTHER LIMITED IN OREGON

Fireman's Fund Ins. Co., et al. v. Ed Niemi Oil Co., Inc. et al., 436 F.Supp.2d 1174 (D. Or. June 6, 2006)

In *Ed Niemi Oil Co.*, the Court held that a complete and "reasonable" settlement between the insured and its insurers extinguished a non-settling insurer's right of contribution against the settling insurers under the Oregon Environmental Cleanup Assistance Act ("ECAA"), Or. Rev. Stat. 465.480(4). The court reasoned that because the settling insurers "reasonably" settled with Ed Niemi Oil Company for their total liability, they were no longer "liable or potentially liable" to the insured under the ECAA, eliminating any potential contribution claim by another insurer.

NON-SETTLING INSURER LIABLE FOR CLEANUP COSTS; NO OFFSET FROM INSURED'S SETTLEMENT WITH OTHER INSURERS

Puget Sound Energy, Inc. v. Certain Underwriters of Lloyd's, 138 P.3d 1068 (Wash. App. 2006)

In *Puget Sound Energy*, the court ruled that the non-settling insurer was liable to the insured for environmental cleanup costs and was not entitled to an offset from settlement funds the insured had received from other insurers where the non-settling insurer failed to satisfy its burden to prove that the insured was "made whole" by its prior settlements with the other insurers. The court also upheld the trial court's issuance of a "contribution bar order" in favor of the settling insurers. Finally, the court ruled that Washington law requires an insured to prove that contamination exceeded the cleanup or remediation levels set forth in Washington's Model Toxic Control Act statute during the insurance policy period(s) at issue, or else there can be no compensable property damage to groundwater and therefore no covered loss.

NON-SETTLING INSURER'S CONTRIBUTION CLAIMS BARRED

Cadet Manufacturing Co. v. American Insurance Co., et. al., 2006 WL 910000 (W.D. Wash. 2006)

In *Cadet*, the court approved a settlement between a manufacturer and two insurers and barred the non-settling insurer from asserting future claims for contribution relating to coverage for environmental contamination at two Washington sites. The insured, a manufacturer of electric heating equipment, sought coverage for environmental claims brought against it by the Port of Vancouver and the Washington Department of Ecology.

ABSOLUTE POLLUTION EXCLUSION OF GENERAL LIABILITY POLICY BARS COVERAGE FOR RELEASE OF DRY CLEANING CHEMICALS

Lewis v. Hartford Casualty Insurance Company, 2006 WL 249516 (N.D. Cal. Jan. 31, 2006)

In *Lewis*, the Court ruled that an absolute pollution exclusion of a commercial general liability policy applied to bar coverage for a governmental cleanup claim. The operator of a dry cleaning business sued her insurer for defense and indemnity in connection with an administrative claim by a county government requiring her to determine the extent of pollution and then implement remedial action. The Court granted the insurer's motion to dismiss based on the pollution exclusion. The Court reasoned that the discharge or potential discharge of a dry cleaning chemical resulting in soil and groundwater pollution constitutes pollution that is commonly thought of as environmental pollution and is excluded pursuant to the policy's pollution exclusion.

NEBRASKA HIGH COURT AFFIRMS POLLUTION EXCLUSION APPLIES; 'SUDDEN' MEANS ABRUPT

Dutton-Lainson v. Continental Ins. Co., 716 N.W.2d 87 (Neb. 2006)

In *Dutton-Lainson*, the Nebraska Supreme Court upheld a lower court's dismissal of an environmental coverage action on grounds that a pollution exclusion with a "sudden and accidental" exception barred coverage. Dutton-Lainson sought coverage for costs and expenses incurred in relation to EPA-mandated cleanup of environmental damage. On appeal, the Court held that under the terms of the policy at issue, an event occurring over a period of time was not sudden. The Court reasoned that the language of an insurance policy should be considered in accordance with what a reasonable person in the position of the insured would have understood it to mean, and the term "sudden," as found in the context of the pollution exclusion, referred to the objectively temporally abrupt release of pollutants into the environment.

NO RIGHT OF CONTRIBUTION UNDER § 107(A) OF CERCLA OR FEDERAL COMMON LAW

Aviall Services Inc., v. Cooper Industries, 2006 WL 2263305 (N.D.Tex. 2006)

In *Aviall*, the U.S. District Court for the Northern District of Texas held on remand that Aviall could not bring a claim for contribution under § 107(a) of CERCLA or federal common law, reasoning that the Supreme Court has rejected implied rights of contribution when an express right exists. The Court did note that other courts have reached the opposite conclusion. The decision follows *Cooper Industries, Inc. v. Aviall Services, Inc.,* 125 S.Ct. 577 (2004), in which the U.S. Supreme Court ruled that Section 113(f)(1) of CERCLA does not authorize a contribution action by a responsible party that cleaned up a contaminated site without first having been

sued under § 106 or § 107(a). The Supreme Court in the 2004 CERCLA case reserved judgment and remanded on the question whether a responsible party that has not been sued or served with an administrative order has an implied right of contribution under § 107(a).

NO COVERAGE UNDER LIABILITY POLICIES TO SUCCESSOR ENTITY FOR ENVIRONMENTAL CLEANUP

BHP Copper Inc., f/k/a Magma Copper Co. v. Travelers Casualty & Surety Co., et al., (Arizona Court of Appeals, Division 1, No. 1 CA-CV 03-0825, December 27, 2005), *appeal denied* (September 26, 2006).

In *BHP Copper*, the Arizona Court of Appeals, Division 1 affirmed that a successor owner of a Superfund site is not entitled to coverage under liability policies issued to a predecessor because the successor was not sufficiently connected to the site during the policy periods. The Court agreed with the trial court's conclusion that although damage occurred during the relevant policy periods, BHP Copper did not control or own the polluted site during the policy periods and had no connection with the site when contamination occurred.

TOXIC TORT COVERAGE

By: Stephen R. Bishop, Esq., Cozen O'Connor, Philadelphia

EACH MERCURY SPILL SEPARATE OCCURRENCE; INSURED RESPONSIBLE TO SATISFY DEDUCTIBLE ON PER CLAIM BASIS

Nicor, Inc. v. Associated Electric & Gas Ins. Services Ltd., ___ N.E.2d ___, 2006 WL 3491670 (Ill. November 30, *2006)*

The Illinois Supreme Court recently added to the burgeoning body of case law addressing the often critical issue of number of occurrences in the "continuing injury" long-tail claim context. In affirming the appellate court, the Illinois Supreme Court held that the release of mercury at each of a number of homes had no temporal, geographical or other pattern amounting to a common cause. Thus, the court held each spill was a separate occurrence. Further, the court stated that this result did not deny the insured the benefit of its bargain because it elected through the deductible amounts to voluntarily assume the risk of absolving individual claims.

DELAWARE SUPREME COURT PREDICTS ALABAMA WOULD APPLY EXPOSURE TRIGGER FOR ASBESTOS CLAIMS

Shook & Fletcher Asbestos Settlement Trust v. Safety National Cas. Corp., 909 A.2d 125 (Del. 2006)

The settlement trust brought an action for declaratory judgment to determine insurance coverage for asbestos claims under policies issued by the insurer. The claims had been made against the settlement trust's predecessor. The Delaware Supreme Court was faced with the question of whether Alabama would apply the continuous trigger rule or the exposure trigger in the context of asbestos coverage. The court noted that the "continuous trigger" rule allowed recovery from a policy that was in effect any time from first exposure to asbestos until death. While the "exposure trigger" rule allows recovery only from a policy that was in effect during some exposure to asbestos. The Delaware Supreme Court surveyed those jurisdictions which addressed the issue of trigger in the context of asbestos coverage and concluded that the exposure trigger was the majority rule. The court also reasoned that both the Alabama trial court and a federal appellate court that heard appeals from the Alabama federal trial courts had concluded that Alabama should apply the "exposure trigger" rule.

ASBESTOS ATTIC INSULATION DOES NOT CONSTITUTE UNREASONABLE RISK OF HARM

In re W.R. Grace & Co., 2006 Bankr. LEXIS 3452 (Bankr. D. Del. Dec. 14, 2006)

On summary judgment, a federal bankruptcy court ruled that although there was no dispute that Zonolite Attic Insulation manufactured by W.R. Grace and installed in millions of homes and businesses contained asbestos and that the asbestos fibers in the insulation could be released when disturbed, the insulation did not pose an "unreasonable risk of harm." According to the court, the claimants did not offer any scientifically reliable evidence that the insulation posed an unreasonable risk of harm and further held that the evidence established that the risk of exposure to the insulation in the home was less than that of dying from a bicycle accident or drowning. The court cautioned that the ruling may prove fatal to the numerous property damage claims asserted against W.R. Grace.

OHIO REJECTS OPERATION OF LAW THEORY WITH REGARD TO SUCCESSOR RIGHTS TO COVERAGE

The Glidden Co. v. Lumbermans Mut. Ins. Co., ___ *N.E.2d* ___, 2006 WL 3743025 (Ohio Dec. 20, 2006)

Pilkington North America, Inc. v. Travelers Cas. & Sur. Co., ___ N.E.2d ___, 2006 WL 3746135 (Ohio Dec. 20, 2006)

The issue of coverage under a prior owner's insurance policies has wide significance in long-tail toxic tort claims because of the volume of corporate transactions over the last forty years. The Ohio Supreme Court recently issued two key decisions analyzing this issue. In *Glidden*, the court concluded that the present-day owner of a paint manufacturing operation was not entitled to coverage for lead-based paint exposure claims under policies issued to a predecessor company, by operation of law or by contract. In *Pilkington*, the court also rejected the theory that insurance rights automatically follow a corporate transfer of liability. The court did, however, state that in Ohio rights to indemnity could be contractually given by the policyholder to a successor entity after a loss had taken place. Finally, the *Pilkington* court questioned whether defense rights could ever be transferred because to do so would impermissibly and materially alter the risk accepted under the policies.

ABSOLUTE POLLUTION EXCLUSION DOES NOT APPLY TO BAR COVERAGE; MARYLAND HIGH COURT DISAGREES WITH PRIOR FOURTH CIRCUIT DECISION INTERPRETING MARYLAND LAW

Clendenin Bros. v. United States Fire Ins. Co., 390 Md. 449, 889 A.2d 387 (Maryland Court of Appeals, certified from U.S. District Court, District of Maryland, No. 1:03-CV-3308, January 6, 2006)

In *Clendenin Bros.*, the Maryland Court of Appeals ruled that an absolute pollution exclusion did not apply to bar coverage for exposure to welding fumes. The Court recognized that the substance at issue, manganese, had a useful purpose and only allegedly was harmful where a person was exposed to excessive levels. The Court concluded that the absolute pollution exclusion was not intended to bar coverage where the insured's alleged liability may be caused by non-environmental, localized workplace fumes.

ABSOLUTE POLLUTION EXCLUSION UNAMBIGUOUSLY APPLIES TO POLLUTANTS OCCURRING IN NORMAL BUSINESS ACTIVITIES

Continental Casualty Company v. Advance Terrazzo & Tile Company, Inc., 462 F.3d 1002 (8th Cir. 2006)

In *Advance Terrazzo & Tile Company*, the U.S. Court of Appeals for the Eighth Circuit ruled that an absolute pollution exclusion precluded a duty to defend a case alleging injury by a workman who fell after breathing in carbon monoxide fumes from a floor grinder. Although the Minnesota Supreme Court has not yet interpreted the absolute pollution exclusion, the Court rejected the insured's request for certification and abstention, concluding that three intermediate Minnesota court decisions made it clear that the absolute pollution exclusion is unambiguous and applies to pollution occurring in the normal course of business activities, including indoor pollution.

ABSOLUTE POLLUTION EXCLUSION BARS COVERAGE FOR INJURY FROM ACID; EXCLUSION LIMITED TO TRADITIONAL ENVIRONMENTAL POLLUTION

Sulphuric Acid Trading Co. Inc. v. Greenwich Ins. Co., 2006 WL 2135465, 2006 Tenn. App. LEXIS 514 (Tenn. Ct. App. July 31, 2006)

In a case of first impression, the Tennessee Court of Appeals held that the absolute pollution exclusion barred coverage for a personal injury claim arising from the discharge of sulphuric acid during a cargo transfer. However, the court reasoned that the exclusion applied to traditional environmental pollution and because the discharge involved a large amount of acid requiring significant cleanup costs, the claim constituted the type of classic environmental pollution that would trigger the exclusion. The court offered that the insured's reasonable expectation argument would be more credible if the injury occurred after the discharge of a small amount of acid on the claimant's body.

COVERAGE FOR BODILY INJURIES RESULTING FROM CHEMICAL SPILL NOT BARRED BY ABSOLUTE POLLUTION EXCLUSION

Urethane International Products v. Mid-Continent Cas. Co., 187 S.W.2d 172 (Texas Ct. App. 2006)

Claimants suffered injuries as a result of exposure to a chemical spilled from a transport truck. The insured's liability policy included a standard absolute pollution exclusion. The court held the pollution exclusion was ambiguous because it was not clear whether the exclusion applied to the escape of chemical irritants or the escape of chemical irritants transported as waste. The court noted that one of the sub-paragraphs of the exclusion excluded coverage for [chemicals] which were "transported . . . as waste by or for any insured." Interpreting the policy language in favor of the insured, the court held the exclusion did not apply because the chemical at issue was a raw material and not a "waste."

POLLUTION EXCLUSION BARS COVERAGE FOR INJURY CAUSED BY EXPOSURE TO PETROLEUM WASTE

United National Ins. Co. v. Motiva Enterprises, L.L.C., 2006 WL 83482, 2006 U.S. Dist. LEXIS 2561 (S.D. Texas Jan. 12, 2006)

Claimants were injured while removing petroleum sludge from a fuel-mixing tank. The court held there was not duty to defend or indemnify on the part of the insurer because the petition specifically alleged the injuries sustained would not have occurred but for the exposure to toxic levels of hydrogen sulfide and other chemicals and vapors that were components of and emanated from the sludge. Thus, the pollution exclusion applied to bar coverage for the injuries. In reaching its decision, the court disagreed with the insured's argument that the exclusion did not apply because the sludge was intentionally placed in the tank and thus, was not a pollutant and further the sludge was not "released" from the tank.

CONSTRUCTION DEFECT COVERAGE

By: William F. Knowles, Esq., Craig H. Bennion, Esq., and Dylan T. Higgins, Esq., Cozen O'Connor, Seattle

PENNSYLVANIA FOLLOWS MAJORITY RULE: FAULTY WORKMANSHIP NOT AN "OCCURRENCE"

Kvaerner Metals Div. of Kvaerner United States, Inc. v. Commercial Union Ins. Co., 908 A.2d 888 (Pa. 2006)

In *Kvaerner*, the court held that a claim for faulty workmanship does not satisfy the "occurrence" requirement and therefore the defendant insurer owed no duty to defend or indemnify the policyholder Kvaerner.

Cozen O'Connor attorneys **Deborah Minkoff**, **Michael Hamilton**, and **Gaele McLaughlin Barthold** (Philadelphia) represented the prevailing insurer. *See* **Recent Victories**, below, for more detail.

DEFECTIVE FIREWALLS IN CONDOMINIUM BUILDING WERE NOT PROPERTY DAMAGE; COST OF REPLACEMENT NOT COVERED BY CONTRACTOR'S CGL POLICY

Firemen's Ins. Co. of Newark v. National Union Fire Ins. Co., 904 A.2d 754 (N.J. Super.A.D. 2006)

The insured/contractor of a large condominium project installed defectively-constructed firewalls in the buildings. Several years later the homeowners association sued the contractor for the cost to remedy the defects. The New Jersey intermediate appellate court upheld summary judgment in favor of the contractor's CGL insurer, holding that the presence of defective firewalls did not constitute "property damage." The court noted that a CGL policy protected against tort liability for physical damage to others, "not contractual liability of the insured for economic losses resulting from breaches of its duty to perform as bargained."

BREACH OF CONTRACT, WARRANTY NOT AN ACCIDENT OR OCCURRENCE

Mid-Continent Casualty Co. v. Williamsburg Condominium Association, et al., 2006 WL 292766 (W.D. Wash. 2006)

In *Williamsburg*, the court concluded that the claims for breach of contract and breach of warranties do not constitute an "occurrence" or an "accident" because they are based on allegations that a party failed to adequately perform its work pursuant to its contract with another party. The court reasoned that if a party breached its contractual duty by constructing a substandard home, then facing a lawsuit was foreseeable. In arriving at her conclusion, the judge also reiterated Washington's view that CGL policies should not be interpreted as performance bonds.

DAMAGES FROM WINDOW DEFECTS ARE AN "OCCURRENCE"

Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 137 P.3d 486 (Kan. 2006)

In *Lee Builders*, the Kansas Supreme Court confronted an issue of first impression and ruled that water leakage damage that resulted from faulty workmanship was an "occurrence." The court reasoned that the damages arising from faulty or negligent work would constitute an "occurrence" as long as the damage was unintentional.

DAMAGES TO INTERIOR FROM DEFECTIVE ROOF COVERED, BUT NOT REPAIR COSTS

ACUITY v. Burd & Smith Constr., Inc., 721 N.W.2d 33 (N.D. 2006)

In *Acuity,* the Supreme Court ruled that damage to the inside of an apartment building caused while a roof was being replaced is an occurrence and thus covered by the CGL policy. However, the court held that the policy barred coverage for the cost of repairing and replacing the defective roof.

CONTRACTOR'S DESIGN FLAWS AND MISREPRESENTATIONS COVERED

Stuart v. Weisflog's Showroom Gallery, Inc., 722 N.W.2d 766 (Wis. Ct. App. 2006)

In *Stuart,* the court found coverage under a CGL policy for damages flowing from faulty construction plans and misrepresentations. The court concluded that the state Legislature intended code misrepresentation claims to be a cause of action distinct from other forms of misrepresentation, which would have been a basis for exclusion under the "your work" exclusion in the CGL policy. Further, the court concluded that the code misrepresentation was an "occurrence" because the violation is neutral with respect to a defendant's intent to deceive.

4TH CIRCUIT: NO COVERAGE FOR DEFECTIVE WORK BY SUBCONTRACTOR IN MARYLAND

French v. Assurance Co. of Am., 448 F.3d 693 (4th Cir. 2006)

In *French*, the court recognized that under a 1986 ISO CGL policy, liability coverage is not provided to a general

contractor for defective workmanship performed by a subcontractor. However, the court concluded that the damage to the non-defective structures was an "accident" and thus, an "occurrence." The court arrived at this conclusion by focusing on the subcontractor exception to the "your work" exclusion that was adopted in 1986.

SUBCONTRACTOR EXCEPTION RESTORES COVERAGE FOR FAULTY WORK

Supreme Servs. & Specialty Co. v. Sonny Greer, Inc., 930 So. 2d 1077 (La. Ct. App. 2006)

In *Sonny Greer*, the insurer relied on the "your work" exclusion to argue that coverage was barred in connection with faulty work performed by a subcontractor. The appeals court reversed the trial court and held that the subcontractor exception applied to provide coverage. The court wrote, "to the extent that other language conflicts with the exception, the ambiguity created by the conflict also leads to a finding that the work product of each subcontractor of Greer is covered by the policy."

CONTINUOUS TRIGGER APPLIES TO CONSTRUCTION DEFECTS IN OHIO

Plum v. West Am. Ins. Co., 2006 WL 256881 (Ohio Ct. App. 2006)

In *Plum*, a construction defect was discovered after the insurer had issued the policies. Relying on a manifestation trigger theory, the insurer argued that the "occurrence" did not happen when its polices were in effect. The court rejected this argument and adopted the continuous trigger theory. The court concluded that relying on the manifestation trigger would require business people to maintain insurance on entities that no longer exist.

MINNESOTA SUPREME COURT APPLIES PRO-RATA ALLOCATION IN CONSTRUCTION DEFECT CASE

Wooddale Builders, Inc. v. Maryland Cas. Co., 722 N.W.2d 283 (Minn. 2006)

In *Wooddale*, an insurer sought contribution from other insurers for damages arising out of a defective construction and faulty workmanship claim. In determining allocation between these insurers, the court adopted a pro-rata by time-on-the-risk scheme. The insurers on the risk were those insurers that insured builder between the closing date of the home involved and the date on which builder received notice of the claim with respect to that home. All insurers on the risk were deemed to be on the risk for the entire period of the triggered policy.

NO ADDITIONAL INSURANCE COVERAGE WITHOUT A WRITTEN CONTRACT ON THE DATE OF THE LOSS

National Abatement Corp. et al v. National Union Fire Insurance Company of Pittsburgh, PA, 824 N.Y.S.2d 230 (A.D. Oct. 31, 2006)

In *National Abatement,* the New York First Department Appellate Division concluded that a contractor is not entitled to additional insured coverage under a subcontractor's CGL policy when a written contract between the parties requiring the procurement of additional insured coverage did not exist on the date of the loss. The subcontractor's policy unequivocally stated that entities were additional insured only "where required by written contract." The court interpreted the insurance contract under the same principles as any ordinary business contract and concluded that the provision was unambiguous and susceptible to only one meaning.

Cozen O'Connor's **Melissa Brill** and **Lisa Shreiber** (New York) represented the prevailing insurer. *See* **Recent Victories,** below, for more detail.

HOMEBUILDER ENTITLED TO DEFENSE IN NEGLIGENT CONSTRUCTION ACTION BROUGHT BY HOMEOWNER WHO PURCHASED HOME AFTER POLICY EXPIRED

Bainbridge, Inc. v. Travelers Casualty Company of Connecticut, 2006 WL 3094099 (Colo. App. Nov. 2, 2006)

In *Bainbridge*, the Colorado Court of Appeals found that a third-party property owner may assert equitable subrogation of a claim or right of a predecessor in title who owned the property in question before the homebuilder's liability insurance expired. The complaint averred that the property damage was ongoing and, therefore, the previous owner had a right to pursue a remedy against the builder. The Court found that the plaintiff's negligent construction action raised the possibility of recovery against the builder under equitable subrogation principles and the builder's liability policy would apply.

INSURANCE INSOLVENCY AND REINSURANCE

By: William K. Broudy, Esq. and Laurance D. Shapiro, Esq., Cozen O'Connor, New York

INSOLVENCY CASES:

CREDITOR BARRED FROM ENFORCING JUDGMENT AGAINST CORPORATE PARENT OF INSURER IN LIQUIDATION

Employers Reinsurance Corporation v. Guaranteed Financial Corporation, et al., United States District Court for the District of Arizona, 2006 U.S. Dist. LEXIS 69428 (Sept. 26, 2006)

The United States District Court for the District of Arizona held that a default judgment obtained in a United States federal court against an insurance company after it had been placed into liquidation in Bermuda could not be enforced against its parent company. The Court found that at the time the default judgment was entered, Guaranteed Financial Corporation, the parent company, did not have control of the company in liquidation, American Investors Insurance, Ltd. ("AII") or the ability to defend against the default judgment. Rather the Liquidator and the Supreme Court of Bermuda were in control of AII at the time of the litigation that led to the default judgment. The Court stated that in order to find the defendant parent company liable on the default judgment, plaintiff would have to establish both an alter ego theory and control and demonstrate the ability of the defendant to defend litigation. Those factors were found not to be present.

INTEGRITY INSURANCE COMPANY'S FINAL DIVIDEND PLAN REJECTED BY NEW JERSEY COURT

In the Matter of the Liquidation of Integrity Insurance Company, Superior Court of New Jersey, Appellate Division, No. A-6972-03T56972-03T5 (Oct. 2, 2006)

The Court rejected the Fourth Amended Final Dividend Plan ("FDP") proposed by the Liquidator of Integrity Insurance Company. The FDP allowed incurred but not reported ("IBNR") claims. In response to an objection by the Reinsurance Association of America, the Court ruled that an IBNR claim is not an "absolute" claim as required by the statute governing claims against a company in liquidation. The Court noted that "IBNR claims are actuarial estimates and are, therefore, not absolute. They are derived from standards of measurement that vary according to the judgment of the valuator … Accordingly, IBNR claims are not absolute and are prohibited by the statute from sharing in the estate."

PENNSYLVANIA SUPREME COURT PROHIBITS WITHDRAWAL OF PROOF OF CLAIM IN RELIANCE INSURANCE COMPANY LIQUIDATION

Koken v. Reliance Insurance Company, Supreme Court of Pennsylvania, 586 Pa. 269 (Mar. 20, 2006)

The Supreme Court of Pennsylvania reversed a Commonwealth Court decision that permitted a third party to withdraw a Proof of Claim ("POC"), and its attendant release. Reliance was the insured's primary insurance company. The Commonwealth Court permitted withdrawal of the POC, noting that not permitting withdrawal leads to a "harsh result" and is a "draconian interpretation" that unduly burdens an insured and an injured party. The Supreme Court determined that the filing of a POC by a claimant, after having an ample opportunity to weigh other recovery options, is a voluntary election to pursue relief via the liquidation

proceeding and causes a release of the insured from liability in the amount of the applicable policy limit. The Supreme Court determined that such an election is irrevocable, thus minimizing uncertainty and reducing litigation connected with the liquidation.

NEW HAMPSHIRE SUPREME COURT UPHOLDS UNUSUAL CLASSIFICATION OF REINSURANCE CLAIMS

In the Matter of the Liquidation of the Home Insurance Company, Supreme Court of New Hampshire, No. 2005-740, 2006 N.H. LEXIS 188 (Dec. 5, 2006)

The Liquidator of the Home Insurance Company sought court approval of an agreement that permits claimants against Home U.K. to receive a direct payment of $50 million. The claimants were classified as Class V creditors and had no incentive to file claims because they would most likely not recover from the estate. In an unprecedented move, the Liquidator encouraged the claimants to file clams in the liquidation proceeding and agreed to pay those claimants 50% of reinsurance proceeds collected from the ACE Companies, a reinsurer of Home U.K. The Liquidator classified the payments to the claimants as "administrative costs." The ACE Companies, the Reinsurance Association of America and other claimants in the Home Liquidation objected on the ground that the Liquidator lacked authority to enter into such an agreement, that the Liquidator had improperly classified the claims to be resolved by the settlement agreement as Class I administrative costs rather than the Class V residual classification for "all other claims" and that in so doing, had created a prohibited subclass within Class V. The New Hampshire Supreme Court rejected all these arguments, finding the proposed agreement to be fair and reasonable. The key finding was that the overall effect of the settlement agreement was to make more funds of the estate available to pay other claimants, primarily because the Home Estate would be spared the expense of litigating the multiple claims against Home U.K. that were to be resolved by the settlement.

REINSURANCE CASES:

REINSURER REQUIRED TO FOLLOW THE FORTUNES OF ITS REINSURED

National Union Fire Insurance Co. v. American Re-Insurance Co., U.S. District Court for the Southern District of New York, 441 F. Supp. 2d 646 (July 28, 2006)

After the insurer, National Union, reached a settlement for pollution claims, its reinsurer, American Re, refused to pay its share of the loss, arguing that the claims were not covered by the National Union policy. In finding for National Union, the Court determined that the applicable standard in determining whether a reinsurer must follow the fortunes of its reinsured is whether the payment by the reinsured to its insured is "at least arguably within the scope of the insurance coverage that was reinsured." The Court observed that "[j]udicial review of either the settlement decision or the allocation decision has a likelihood of undermining settlement and fostering litigation." A key to the decision was a finding that a ceding company is not required to choose a method of allocation that minimizes the amounts to be collected from its reinsurers.

REINSURER NOT REQUIRED TO FOLLOW THE FORTUNES OF ITS REINSURED WHERE SETTLEMENT OF CLAIMS WAS GROSSLY NEGLIGENT

Suter v. General Accident Insurance Company, United States District Court for the District of New Jersey, 2006 U.S. Dist. LEXIS 48209 (July 14, 2006)

Following settlement of a group of defective artificial heart valve claims, including claims for anxiety caused by anticipation of valve failure, the insurer encountered refusal by its reinsurer to pay a share of the loss. The Court sided with the reinsurer, General Accident, against the reinsured, Integrity Insurance Company in Liquidation ("Integrity"), finding that some of the anxiety claims did not occur within the coverage period of the Integrity policies and that allowing those claims was "grossly negligent and amounted to bad faith." The Court stated: "Integrity did not make a reasonable, business like investigation and determination as to whether the heart valve claims should have been allowed. Consequently General Accident is not obligated to Integrity under the follow the settlements provision of its Facultative Certificate."

ANNUAL AGGREGATE LIMIT APPROACH APPLIED TO DETERMINE LIABILITY OF REINSURER

Travelers Casualty & Surety Co. v. ACE American Reinsurance Co., Second Circuit Court of Appeals, 2006 U.S. App. LEXIS 26161 (Oct. 18, 2006)

The insured settled a group of breast implant claims with Travelers, its insurer. Travelers then billed ACE American Reinsurance, one of its reinsurers, under three-year reinsurance certificates. ACE American Reinsurance refused to pay on the ground that its share of the loss should be calculated on the basis of a single aggregate limit for the three-year period of coverage. The Court of Appeals affirmed the finding of the District Court that ACE American Reinsurance was required to pay on the basis of annual aggregate limits for each policy year, even though the reinsurance certificates did not specify annual aggregate limits. The Court applied the rule that an ambiguity in the certificates should be resolved by reference to the underlying policies, which, in this case, provided for annual aggregate limits.

ARBITRATORS FOUND AUTHORIZED TO RULE ON WHETHER A CONSOLIDATED ARBITRATION CAN TAKE PLACE

Employers Insurance Company of Wausau v. Century Indemnity Company, Seventh Circuit Court of Appeals, 443 F.3d 573 (Apr. 4, 2006)

The Court affirmed a United States District Court decision, requiring the reinsurer, Employers Insurance Company ("Employers"), to participate in a consolidated arbitration of claims by the insurer, Century Indemnity Company ("Century"). The reinsurance agreements contained arbitration provisions, but no language requiring Employers to arbitrate in a consolidated arbitration with other reinsurers who had refused to make payments to Century. Century sought consolidated arbitration. The Court found that the issue of whether a consolidated arbitration should take place is a procedural issue to be resolved by the arbitrators and directed Employers to present that argument to an arbitration panel selected as specified in the reinsurance agreements.

REINSURER FAILS TO DEFEAT ALLEGATIONS OF A FRAUDULENT CONVEYANCE IN THE FRONTIER INSURANCE COMPANY REHABILITATION

Mills v. Everest Reinsurance Company and Benfield, Inc., U.S. District Court for the Southern District of New York, 410 F.Supp.2d 243 (Jan. 23, 2006)

In an action by the Rehabilitator of Frontier Insurance Co. against a reinsurer and reinsurance intermediary seeking, among other things, rescission of a reinsurance contract based on mutual mistake, fraud and fraudulent conveyance, the Court granted the reinsurer's motion to dismiss the Rehabilitator's claims alleging mutual mistake and fraud. The Court held, however, that the Rehabilitator's other claims against the reinsurer, including fraudulent conveyance under the New York Debtor and Creditor Law, were sufficiently pleaded and timely. From January 1, 1999 to July 31, 2000 Frontier paid more than $40 million in premiums, fees and costs to the defendants. The fraudulent conveyance cause of action alleges, inter alia, that "the defendants received grossly excessive and inappropriate compensation for their participation", that "Frontier was insolvent at the time the contract was entered into or was rendered insolvent thereby" and that "Frontier was engaged in or about to engage into a transaction for which the property remaining in Frontier's hands was unreasonably small."

* * * * *

***Michael Hamilton, Craig Bennion, Stephen Bishop**, and **William Knowles**, are members, and **Thomas Braun** and **Dylan Higgins** are associates, in the Insurance Coverage Practice Group. **William Broudy** is a member, and **Larry Shapiro** is an associate, in the Insurance Corporate & Regulatory Practice Group.*

For more information, please contact any of the above authors, ***William P. Shelley*** *(Philadelphia), National Insurance Department Chair,* ***Thomas M. Jones*** *(Seattle), National Insurance Department Vice-Chair,* ***Joshua Wall*** *(Philadelphia), Insurance Coverage Practice Group Chair, or Francine L. Semaya (New York Downtown), Insurance Corporate & Regulatory Practice Group Chair. See the office directory on the last page of this issue.*

RECENT VICTORIES

APPELLATE DECISIONS

WORLD TRADE CENTER PROPERTY INSURANCE LITIGATION APPEAL SUCCESSFUL

S.R. International Business Insurance Co., Ltd., v. World Trade Center Properties, LLC, 467 F.3d 107 (2d Cir. Oct. 18, 2006)

The World Trade Center Property Insurance Litigation team composed of **Steve Cozen** (Philadelphia) providing strategy, **Tom McKay** (Cherry Hill) arguing the case before the Second Circuit, and **Jack Cohn** (Philadelphia) and **Michael Hamilton** (Philadelphia) writing the briefs, earned a significant win in obtaining affirmation that our client, a major domestic property insurer, bound coverage for the World Trade Center on the WilProp form, under which the terrorist attack of September 11 was one occurrence. This decision saved the client $300 million. On October 17, 2006 the Second Circuit upheld the jury's verdict, finding that the jury and the trial judge did not error during the course of the trial in finding that the WilProp form applied and that there was only one occurrence. *See* **Significant Coverage Decisions in 2006--Property Insurance**, above, for more details.

NEW YORK REQUIRES "TOTAL CESSATION" IN ORDER TO TRIGGER BUSINESS INTERRUPTION COVERAGE

Broad Street, LLC v. Gulf Ins. Co.,--- N.Y.S.2d ---, 2006 WL 3593049 (N.Y.A.D. 1 Dept.), 2006 N.Y. Slip Op. 09316 (Dec 12, 2006)

Josh Wall (Philadelphia) and **Tyler Havey** (Philadelphia) made the lead story of the December 13, 2006 New York Law Journal, by successfully prevailing in their appeal of a major BI indemnity issue. The appellate court reversed the trial court and held that, irrespective of the "period of restoration," the standard BI insuring provision provided indemnity only for the period of time that the insured experienced a "total cessation" of business activity which, in this case, began on 9/11/02 and ended a week later, on 9/17/02. *See* **Significant Coverage Decisions in 2006--Property Insurance**, above, for more details.

FAULTY WORKMANSHIP DOES NOT CONSTITUTE AN OCCURRENCE

Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Insurance Co., 908 A.2d 888 (Pa. 2006).

Gaele Barthold (Of Counsel - Philadelphia), **Debbie Minkoff** (Philadelphia) and **Mike Hamilton** (Philadelphia) earned a tremendous victory for insurers with the Pennsylvania Supreme Court handing down its decision in *Kvaerner v. National Union*. The Supreme Court reversed the Superior Court, and held faulty workmanship does not constitute an occurrence under a general liability policy. The court also held that the Superior Court committed error by looking beyond the complaint to find a duty to defend. *See* **Significant Coverage Decisions in 2006—Construction Defect Coverage,** above, for more details.

"WRITTEN CONTRACT" CONSTRUED NARROWLY IN CONTEXT OF ADDITIONAL INSURED ANALYSIS

National Abatement Corp. et al v. National Union Fire Insurance Company of Pittsburgh, PA, 824 N.Y.S.2d 230 (A.D. Oct. 31, 2006)

Melissa Brill (New York) with trial court help from **Lisa Shreiber** (New York) briefed and argued the successful appeal to the Appellate Division, First Department, of an important issue involving "additional named insured" coverage under CGL policies. Typically, such policies provide additional insured coverage to a third party where the named insured has a written agreement to procure insurance for the third party. In this case of first impression, the Appellate Division strictly construed the policy requirement that there must be a "written contract" in order for an entity to attain the status of an additional insured. The Court stated "Contrary to plaintiffs' understanding, the fact that an unsigned contract may be enforceable if there is objective evidence the parties intended to be bound or the eventual writing was intended to be valid retroactively has no bearing on whether there is a 'written contract' pursuant to the policy endorsement." *See* **Significant Coverage Decisions in 2006—Construction Defect Coverage,** above, for more details.

ADVERSE TRIAL COURT RESULT REVERSED BY COZEN O'CONNOR APPELLATE TEAM

Sterling Gardens v. Northern Ins., 2696 EDA 2005, Superior Court Of Pennsylvania , 907 A.2d 1148, 2006 Pa. Super. LEXIS 3437, decision without published opinion (June 30, 2006)*, reargument denied* (September 1, 2006)

Bill Stewart (West Conshohocken), **Rick Wegryn** (West Conshohocken), **Gaele Barthold** (Of Counsel – Philadelphia), and **Liz Bailey** (Philadelphia) earned a Pennsylvania Superior Court reversal in a coverage case for a leading insurer against a commercial greenhouse in Northeastern Pennsylvania. Cozen's appellate team was retained following a loss for the insurer at the trial court level. The Cozen team filed post-trial motions, pursued the appeal and obtained a full reversal. The decision created new law on the "spoilage" and "power failure" exclusions -- and was widely reported in insurance industry trade publications.

INSURED MOLD REMEDIATION CONTRACTOR WINS APPEAL AFFIRMING ITS TRIAL COURT DEFENSE JUDGMENT

Janis v. Hamilton, 2006 WL 2048302 (Cal. App. 2 Dist.) [not officially published – Cal. Rules of Court 976, 977]

Michael Partos (Los Angeles) secured an appellate victory in a defense case for an insured of a major domestic insurer before the California Court of Appeal, Second Appellate District. TEG/LVI Environmental Services, the insured, is an environmental services provider. The case involved a $5 million dollar mold claim arising at large beachfront home in Malibu California, owned by the daughter of Gary Cooper. TEG/LVI was hired to conduct mold remediation on the home after it was gutted and reconstructed by Bob Villa in 1997. (The reconstruction was featured on "This Old House," with a guest appearance by neighbor Pamela Anderson.) TEG/LVI allegedly left substantial amounts of mold in the home which was encased in its walls in 1998. Mike handled the case from inception in late 2001, when TEG/LVI was sued in Los Angeles Superior Court, and later, when a closely related action involving the same parties was filed in Santa Monica Superior Court. The actions went to bench trial three separate times before three different judges between 2002 and 2004, each trial resulting in dismissal or defense judgment. The case was finally concluded by the Court of Appeal's affirming the 2004 dismissal of the Santa Monica action.

JUDGES' PAY IN PENNSYLVANIA LINKED TO FEDERAL JUDGES' PAY

Stilp v. Comm. of PA, 588 Pa. 539, 905 A.2d 918 (Pa. 2006)

Tom Wilkinson (Philadelphia), **Gaele Barthold** (Of Counsel – Philadelphia) and **Bob Fiebach** (Philadelphia) assisted the Pennsylvania Bar Association ("PBA") in

preparing and submitting an amicus brief in support of adequate compensation for Pennsylvania judges. The Pennsylvania Supreme Court handed down its much anticipated decision on the judicial and legislative pay raise issues. The Court determined that the state legislature's attempt to retroactively repeal the judicial pay raise was contrary to Article V, Section 16(a) of the state constitution. The 100-page decision also struck down the provision for unvouchered expenses for legislators as a constitutionally impermissible mid-term change in salary. As a result, the salaries of Pennsylvania judges will be linked to the salaries of federal judges at stepped-down levels, thereby removing state politics from the judicial compensation process. It also will eliminate what some argue is an appearance of a conflict of interest for judges who must rule on matters affecting the legislature. The Supreme Court opinion favorably referenced the arguments presented in the PBA amicus brief.

TRIAL COURT DECISIONS

$3 MILLION PROPERTY DAMAGE SUMMARY JUDGMENT WON

William "Bill" Stewart (West Conshohocken), **Nancy Portney** (West Conshohocken), and **Cyndi Bernstiel** (West Conshohocken) obtained a summary judgment for a major domestic insurer in a coverage case against the Township of Hamilton, New Jersey, in which $3 million in water damage was claimed under a property policy.

SUMMARY JUDGMENT IN ADA AND AGE DISCRIMINATION CASE

Kim Sullivan (Charlotte), with assistance from **Jeff Pasek** (Philadelphia), **Charles Kawas** (Philadelphia) and **Jerry Poslusny** (Philadelphia), set up discovery to eliminate issues of material fact and then filed a summary judgment motion in defending Extended Stay America, a large motel group, which was sued in U.S. District Court in North Carolina for violations both of the ADA and Age Discrimination statutes. The judge adopted at least two of the dispositive arguments and granted summary judgment in favor of Extended Stay America.

MOTION FOR COMPULSORY NON-SUIT GRANTED

Denise Houghton (Philadelphia) won at trial in Philadelphia Court of Common Pleas in which she defended Temple University Hospital against the claims of the estate of a 35-year old woman who committed suicide 16 days after being discharged by her psychiatrist and Temple University Hospital after a 23-day hospital stay. Right before the jury was to deliberate the case, but only after days of intense testimony and cross-examination, Judge Frederica Massiah-Jackson granted Temple University Hospital's Motion for Compulsory Non-Suit.

SUMMARY JUDGMENT GRANTED BY ILLINOIS COURT BECAUSE CLAIM NOT "FIRST MADE IN WRITING"

Greg Hopp (Chicago), **Matt Walsh** (Chicago) and **Dan Johnson** (Chicago) won a summary judgment on behalf of Certain Underwriters at Lloyd's. Union Electric sued Certain Underwriters, UnionAmerica and Aegis in state court in Madison County, Illinois, the #1 "judicial hellhole" in the country for the last two years, according to the American Tort Reform Association. Union Electric sought more than $3 million in coverage for repairs to railroad tracks adjoining one of its dams in the Mississippi River. In a 19-page opinion, the Madison County trial court agreed that the claim was not "first made in writing" after inception and that the property damage complained of did not result from an accident.

PRO BONO

DEATH PENALTY AVOIDED

Patrick J. O'Connor (Philadelphia) and **Peter Rossi** (Philadelphia), assisted by an all-star interoffice legal team of **Whitney Whisenhunt** (Philadelphia), **Glenn Reimann** (Philadelphia), **Don Waltz** (Dallas), **Bryan Vezey** (Houston), **Jennifer Kenchel** (Dallas), **Kendall Kelly** (Dallas), **Dawn Grossman** (San Diego), **Barry Boss** (Washington, D.C.), **Joe Ziemianski** (Houston), **Gaele Barthold** (Of Counsel – Philadelphia), **Curtis Quay** (San Diego/Philadelphia), and **George Gowen** (Philadelphia), obtained a success in the death penalty case of *Commonwealth v. Dennis Counterman*.

Counterman was convicted of three counts of first degree murder in the arson deaths of his three children and was sentenced to death. Counterman served eight years on death row and was two weeks away from execution when federal public defenders uncovered evidence that exculpatory material was withheld from the defense prior to trial. Counterman was awarded a new trial, and Patrick and Peter agreed to represent him at the second trial. Significant evidentiary issues were resolved and the Commonwealth backed off its death penalty case and offered a very favorable plea deal to third degree murder for time served plus probation. The terms of the unusual plea deal negotiated by Patrick and Peter permitted Counterman to assert his innocence, which he has always maintained, while acknowledging the evidence against him. Counterman was released to his family from the courtroom (which is very unusual in Pennsylvania).

PRO BONO SUCCESS IN FAVOR OF PENNSYLVANIA GOVERNOR

Debbie Minkoff (Philadelphia), with support from **Stuart Claire** (Philadelphia), were amici counsel, who argued in support of the Governor's veto power on behalf of the Family Planning Council and the American Civil Liberties Union of Pennsylvania. The Commonwealth Court ruled in favor of Governor Rendell in a fight over his right to veto language added to an appropriations bill. The language that Governor Rendell vetoed would have prevented Pennsylvania's poorer women and their newborns from obtaining extended post-partum care through federally-funded programs.

IMMIGRATION WIN

Elena Park (West Conshohocken) convinced the U.S. Immigrations and Customs Enforcement to allow an immigrant from China, who was 13-1/2 weeks pregnant with twins, to remain in the United States indefinitely while she and her husband appeal their respective deportation orders. The case has received a great deal of media, public and government attention both in the United States and China.

ASYLUM GRANTED

Jodi McDougall (Seattle) obtained an order granting the asylum claim of E.D., a Gambian national who was detained and tortured by the Gambian government for his role in protesting the treatment of elementary aged children during student demonstrations. E.D. publicized and protested the killing and rape of two young students at the hands of Gambian government forces and was thereafter detained and tortured. After his release, he went into hiding and escaped to the U.S. While here, he has continued his efforts to publicize the abuses of the current Gambian government.

Molly Siebert (Seattle) obtained asylum in the United States for a female journalist from the Democratic Republic of Congo (formerly Zaire) who was brutally persecuted by government soldiers on account of her activities critical of the government of Laurent Kabila. At the time Molly received the client's case, the asylum application had been pending for five years and had grown stale. Molly supplemented the application, filed briefing on the deplorable conditions in Congo, and attended the asylum interview. The grant of asylum arrived in near record time.

VICTORY FOR AIDS PATIENT

Jacob C. Cohn (Philadelphia) successfully represented an AIDS patient who had sold her life insurance policy to a Texas-based viatical settlement company in exchange for a promise to pay her health insurance premiums for the rest of her life. When the company determined it was no longer willing to support the costs, the patient contacted the nonprofit AIDS Law Project of Pennsylvania, which

recruited Cozen O'Connor to take the case. Jack prevailed in state court in New Jersey, which ordered the company to pay $837,357 into the court to be used as security for the cost of future premiums. Jack received a Pro Bono Award from the Pennsylvania Bar Association for his work on the case, and was also an Honoree at the AIDS Law Project of Pennsylvania's 2006 Annual Event for "his special commitment to [their] mission."

NOTEWORTHY HONORS, APPOINTMENTS AND PUBLICATIONS

HONORS

Ann Thornton Field (Philadelphia) was selected as one of the 2006 Women of Distinction by the *Philadelphia Business Journal.* Ann, Co-Chair of our firm's General Litigation department and Chair of the Commercial Litigation practice group, was honored both for her professional achievements in the legal field and for her personal contributions to the communities where she lives and works. Ann was profiled in a special section of the *Philadelphia Business Journal's* December 8, 2006 issue.

Cozen O'Connor's **2006 Summer Associate program** was ranked number 5 in the nation. The scores, compiled from surveys completed by all of our Philadelphia Summer Associates, were based on nine key areas relating to their internships, including the interest level of the work and how much of it was "real"; the training and guidance, interactions with partners and full-time associates, how well the firm communicated its goals, how accurately it portrayed itself in interviews, how it rated overall as a place to work, and the respondents' inclination to accept a job if one were offered. **Sean O'Donnell** (Philadelphia), ran the summer program with the assistance of **Scott Brucker** (Philadelphia) and the support of **Kelly Alcaro** (Philadelphia) of the Legal Recruiting Department.

The following Seattle attorneys were named "Rising Stars" by *Washington Law & Politics magazine*: **Shauna Ehlert**, **Ramona Hunter, Maggie Peterson,** and **Melissa O'Loughlin White.**

Alek McCune (Seattle) was nominated the "Volunteer of the Year" by the Housing Justice Project of Kent. The HJP provides legal assistance to low income tenants at eviction proceedings. Alek accepted the award on November 2, 2006 at the Seattle Aquarium.

APPOINTMENTS

Gaele Barthold (Of Counsel – Philadelphia) was appointed by the Pennsylvania Bar Association to co-chair the association's Amicus Brief Committee, which reviews and recommends to the Board whether the Bar Association should participate as an amicus on important appellate issues of concern to lawyers across the state.

PUBLICATIONS

Richard Bortnick (West Conshohocken) and **Kevin Mattessich** (New York Downtown) authored "European Class Actions: A Growing Movement?," *National Underwriter Property & Casualty* (November 6, 2006).

Richard Bortnick (West Conshohocken) and **Kevin Mattessich** (New York Downtown) were quoted in "Experts Eye Insurers' Exposure to Hedge Risks," *Best's Review* (November 2006). Richard was also quoted in two *National Underwriter Property & Casualty* articles: "Hedge Funds Still Wary of Insurance," (November 6, 2006), and a September 28, 2006 online "Breaking News" article entitled "Insurers Must Vet Hedge Funds Better."

Kenan Loomis (Atlanta) published an article entitled "Silver Lining: Co-Logo Agreements Can Help Health Insurers Glide Through the Clouds Enveloping Medicare Part D", *Best's Review* (November 2006).

COVERAGE ATTORNEYS "IN THE SPOTLIGHT"

Thomas M. Jones (Seattle) is scheduled to speak on April 12, 2007 on the topic of coverage for food contamination claims at the Insurance Coverage and Claims Institute sponsored by DRI. The two-day seminar will be in Chicago, IL. For registration information, see www.dri.org or call 312.795.1101.

Cozen O'Connor's Fall 2006 Insurance Seminar in Seattle included presentations by **Thomas M. Jones, Peter J. Mintzer, Helen A. Boyer, Robert A. Meyers, Melissa O'Loughlin White, Mark S. Anderson, Jamie Clausen**, and **John J. Soltys**. Topics included electronic discovery, cost-effective methods of coverage dispute resolution, responding to grand jury subpoenas for production of claim files, sexual abuse cases, factors in deciding whether to file an appeal, recovery of marine fire losses, and insurance coverage and tort law updates. Materials are available upon request.

Jennifer Kenchel (Dallas) and **April Zubizarreta** (Houston) participated in the Dallas Seminar & Golf Tournament attended by insurance professionals from the Dallas and Houston areas. The event was co-sponsored by the Dallas Subrogation and Insurance Departments and Jennifer and April presented current first and third party coverage issues.

Peter Mintzer (Seattle) participated on November 7, 2006 at the Mealey's All Sums: Reallocation and Settlement Credits Conference in Boston, MA in which he was one of three judges on the panel entitled "Mock Oral Argument on Summary Judgment: Allocation v. 'All Sums.'" On December 8, 2006, he presented "Environmental Insurance Claims in the Northwest: An Insurer's Perspective" at the 2006 Northwest Environmental Conference, which was sponsored by Associated Oregon Industries, the NW Environmental Business Counsel, the Oregon Department of Environmental Quality and the Washington State Department of Ecology.

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

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