Simpson Thacher

Insurance Law Alert

January 2011

The stage is set in 2011 for judicial review of several important insurance-related issues. Disputes and court decisions concerning insurance coverage for claims stemming from the financial crisis are likely to proliferate, as investors continue to try to recoup their losses. We also expect additional rulings in the drywall context, where the parameters of tort liability and insurance coverage obligations are only beginning to be defined. Arbitrator disqualification disputes will also likely continue to garner significant judicial attention. This year is poised to bring important United States Supreme Court rulings related to global warming and class actions with potentially significant implications for insurers. We look forward to providing you with up-to-date summaries and practical analyses of these and other rulings issued in the year ahead. Best wishes to you in the New Year.

- ***United States Supreme Court to Hear Global Warming Public Nuisance Suit***
  The Supreme Court granted certiorari in *Connecticut v. American Electric Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009), in which the Second Circuit reinstated a public nuisance claim for global warming. *Click here for full article*.

- ***Ninth Circuit Rules that Federal Policy Does Not Preempt California Claim Filing Requirements***
  The Ninth Circuit ruled that federal policy does not preempt a California state law which governs claims arising out of life insurance policies issued to Armenian Genocide victims. *Movsesian v. Versicherung AG*, 2010 WL 5028828 (9th Cir. Dec. 10, 2010). *Click here for full article*.

- ***Wisconsin Appellate Court Denies Coverage for Archdiocese, Finding that Alleged Misrepresentations Do Not Constitute Covered "Occurrences"***
  A Wisconsin appellate court affirmed that a commercial general liability insurer owed no coverage for claims of negligent misrepresentation against the Archdiocese of Milwaukee because the underlying complaints alleged volitional acts rather than "occurrences." *Doe v. Archdiocese of Milwaukee*, 2010 WL 4723728 (Wis. Ct. App. Nov. 23, 2010). *Click here for full article*.

- ***Virginia Court Issues Double Blow to Insurer, Concluding that Public Policy Does Not Negate D&O Coverage and that Insurer has No Right to Recoupment of Settlement Costs***

  A Virginia federal court ruled that an excess D&O insurer was obligated to cover a company's $15 million settlement of shareholder claims and that the insurance policy did not permit the insurer to recoup settlement payments. *Houston Cas. Co. v. Sprint Nextel Corp.*, 2010 WL 4852649 (E.D. Va. Nov. 22, 2010). *Click here for full article*.

- ***Insurer Entitled to Recoup Defense Costs Despite Initial Refusal to Defend, Says California District Court***

  A California district court granted an insurer's motion for reimbursement of defense costs, confirming the existence of such a right under California law. *Hewlett Packard Co. v. ACE Prop. & Cas. Ins. Co.*, No. C 99-20207 (N.D. Cal. Dec. 15, 2010). *Click here for full article*.

- ***Louisiana District Court Rules for Insurers in Multi-District Drywall Coverage Litigation***

  A Louisiana district court granted ten homeowners insurers' motions to dismiss a drywall coverage suit, finding that coverage is barred under faulty materials and corrosion exclusions. *In re: Chinese Manuf. Drywall Prod. Liab. Litig.*, MDL No. 2047 (E.D. La. Dec. 16, 2010). *Click here for full article*.

- ***Three Florida Courts Issue Rulings in Drywall-Related Property Damage Disputes***

  Two federal courts and one state court in Florida issued rulings in drywall-related property damage cases. The federal rulings were a mixed bag, one granted an insurer's motion for summary judgment, and the other dismissed an insurer's declaratory judgment action for lack of justiciability/subject matter jurisdiction. *Amerisure Ins. Co. v. Albanese Popkin The Oaks Dev. Grp., L.P.*, No. 09-81213 (S.D. Fla. Nov. 30, 2010); *National Union Fire Ins. Co. v. Vicino Drywall Inc.*, No. 10-60273 (S.D. Fla. Nov. 29, 2010). The state court ruling signaled a victory for Florida homebuilders, holding that builders may not be held strictly liable for damages allegedly caused by defective drywall. *Bennett v. Centerline Homes, Inc.*, No. 50 2009 CA 014458 (Fla. Cir. Ct. Nov. 5, 2010). *Click here for full article*.

- ***Asbestos Trust Discovery Battles Raise Important Issues Regarding Scope of Discovery in Bankruptcy Context***

  Disputes between insolvent companies (and oftentimes their insurers) and asbestos trusts over access to information about asbestos claimants, their injuries and recoveries are starting to proliferate. A number of discovery battles in this context are pending in several jurisdictions. *Click here for full article*.

- ***STB News Alerts***

  Click here for information on STB's involvement in insurance-related organizations and events.

Climate Change Alert:
United States Supreme Court to Hear Global Warming Public Nuisance Suit

In our July/August 2010 Alert, we discussed the Second Circuit's ruling in *Connecticut v. American Electric Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009), which reinstated a public nuisance claim for global warming brought by several states, the City of New York, and three environmental organizations against various electric utility companies seeking injunctive relief, in the form of limitations on defendants' carbon dioxide emissions. The Second Circuit reversed a district court ruling finding the claims non-justiciable and held that well-settled principles of tort and public nuisance law provide an adequate legal framework for resolution of these unique claims. The Second Circuit further found no "textual commitment in the Constitution that grants the Executive or legislative braches responsibility to resolve issues concerning carbon dioxide emissions or other forms of alleged nuisance." Thereafter, the defendants petitioned the United States Supreme Court for review.

On December 6, 2010, the Supreme Court granted certiorari. If the Supreme Court affirms the Second Circuit's ruling and allows the case to proceed, similar actions may follow across the country, causing policyholders to turn to their insurers for defense and possible indemnification.

Preemption Alert:
Ninth Circuit Rules that Federal Policy Does Not Preempt California Claim Filing Requirements

On December 10, 2010, the Ninth Circuit ruled that federal policy does not preempt a California state law which governs claims arising out of life insurance policies issued to Armenian Genocide victims. *Movsesian v. Versicherung AG*, 2010 WL 5028828 (9th Cir. Dec. 10, 2010). The court concluded that no "clear, express federal executive policy" conflicted with the state law, and thus there was no basis for preemption.

The suit arose out of a class action filed by persons of Armenian descent seeking benefits under life insurance policies issued by subsidiaries of Munich Re. At the trial court level, Munich Re moved to dismiss the action on several grounds, including because state law was preempted under the foreign affairs doctrine. Munich Re argued that federal foreign policy forbids states from using the term "Armenian Genocide" and that because the California statute included reference to that term, it was preempted. The trial court rejected

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this contention, and the Ninth Circuit affirmed, finding that several executive branch communications regarding the Armenian Genocide did not constitute an express federal policy on this issue. Accordingly, the doctrine of "conflict preemption" did not apply. Ruling on a related issue, the court also held that doctrine of "field preemption" was inapplicable. Field preemption comes into play when a state takes a position on a matter of foreign policy "with no serious claim to be addressing a traditional state responsibility." California's effort to regulate insurance clearly falls within the scope of legitimate traditional state interests, the court observed.

Movsesian illustrates that although executive authority over foreign affairs generally trumps state legislation, "not every executive action or pronouncement constitutes a proper invocation of that potentially preemptive policy-making power." Preemption issues are often outcome-determinative in insurance and other litigation, as exemplified by *Connecticut v. American Electric Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009), discussed above. In that matter, the Second Circuit addressed, among other things, whether the Clean Air Act and other federal statutes "displaced" the plaintiffs' federal common law nuisance claims.

Coverage Alerts:

Wisconsin Appellate Court Denies Coverage for Archdiocese, Finding that Alleged Misrepresentations Do Not Constitute Covered "Occurrences"

A Wisconsin appellate court affirmed that a commercial general liability insurer owed no coverage for claims of negligent misrepresentation against the Archdiocese of Milwaukee. *Doe v. Archdiocese of Milwaukee*, 2010 WL 4723728 (Wis. Ct. App. Nov. 23, 2010). The court explained that because the actions alleged in the underlying complaints were volitional acts rather than accidents, no "occurrence" had triggered insurance coverage.

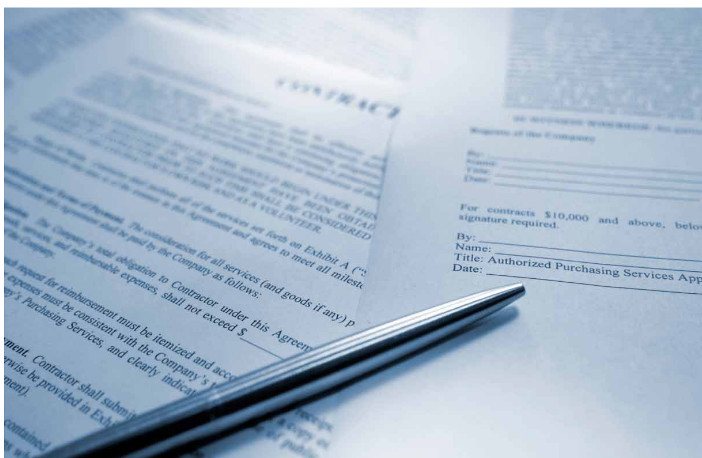
Numerous complaints were filed against the Archdiocese alleging that the church represented to families that their children were safe in the presence of priests despite knowledge of certain priests' history of sexual abuse. The Archdiocese tendered its defense of these claims to its insurer, which in turn, intervened in the underlying actions seeking a declaration of no coverage. Two trial courts held that the allegations in the complaints did not allege covered "occurrences." The parties stipulated to the same result in several other actions, and a consolidated appeal followed.

The Wisconsin appellate court affirmed that the insurer was not obligated to indemnify the Archdiocese. The court agreed with the insurer that "there was nothing accidental about the misrepresentation(s), rather the Archdiocese engaged in volitional acts." It mattered not, the court emphasized, that the Archdiocese did not intend or anticipate harm to the plaintiffs. "[W]hile a result may be unexpected, the *causal event* must be accidental for an event to be construed as an accidental occurrence. … The [Archdiocese]'s ability to foresee the results of their actions was not relevant to the question of coverage." This decision reinforces a fundamental principle of insurance coverage law: whether an "occurrence" is covered turns on whether the underlying acts that lead to the injury (here, the misrepresentations) are accidental, not whether the resulting injury was accidental.

On January 4, 2011, less than two months after the Wisconsin appellate court issued its ruling denying coverage, the Milwaukee Archdiocese filed for Chapter 11 bankruptcy, citing an inability to pay claims and legal expenses arising from civil suits alleging sexual abuse by priests and other church employees.

Virginia Court Issues Double Blow to Insurer, Concluding that Public Policy Does Not Negate D&O Coverage and that Insurer Has No Right to Recoupment of Settlement Costs

A Virginia federal court ruled that an excess D&O insurer was obligated to cover a company's $15 million settlement of shareholder claims and that the insurance policy did not permit the insurer to recoup settlement payments. *Houston Cas. Co. v. Sprint Nextel Corp.*, 2010 WL 4852649 (E.D. Va. Nov. 22, 2010).



Several class action lawsuits were filed against Sprint and its executives in Kansas state court. The complaints sought damages for the alleged loss in value of certain Sprint shares as a result of stock conversions. Sprint provided notice of the claims to Houston Casualty, its excess D&O carrier. In turn, Houston Casualty issued a letter reserving its rights. Thereafter, Houston Casualty agreed to pay its $15 million policy limit towards a global settlement of the class action litigation. Houston Casualty reiterated in writing its right to deny coverage and reserved its right to seek reimbursement of the settlement payment. More than two years later, Houston Casualty initiated a coverage action seeking reimbursement of the $15 million settlement payment.

In dismissing Houston Casualty's complaint, the court addressed two discrete issues. First, the court ruled that the settlement fell within coverage provided by the policy. In doing so, the court rejected the insurer's contention that the settlement was, in essence, "payment of a preexisting corporate obligation." Similarly, the court dismissed Houston Casualty's contention that because the settlement "merely redistributed assets among different classes of Sprint shareholders," it was not a covered loss. The court also rejected the argument that this type of shareholder settlement is uninsurable as a matter of public policy, finding that if such settlements by aggrieved shareholders were uninsurable, "D&O coverage would effectively be a nullity." Similar arguments were likewise rejected by the First Circuit in *Genzyme Corp. v. Federal Ins. Co.*, 622 F.3d 62 (1st Cir. 2010), discussed in our December 2010 Alert.

Turning to the second issue, the court ruled that there was no basis in the insurance policy for Houston Casualty to recoup the settlement payment. Houston Casualty's unilateral attempt to create such a right was ineffective, the court held, particularly where, as here, Sprint did not consent to such recoupment. Other courts (including several in California and the Sixth Circuit), however, have allowed an insurer to recoup uncovered settlement costs from an insured based on an implied-in-law contract theory, insurer's explicit reservation of rights to seek reimbursement, and the insured's control of the defense and settlement process.

Defense Alert:

Insurer Entitled to Recoup Defense Costs Despite Initial Refusal to Defend, Says California District Court

In our September 2010 Alert, we highlighted a frequently-litigated issue: whether an insurer is entitled to reimbursement of defense costs expended under a reservation of rights following a judicial determination

that the insurer has no obligation to defend and/or indemnify. Earlier this year, two courts issued opposing rulings, adding to the nationwide jurisdictional divide on this issue. *See American & Foreign Ins. Co. v. Jerry's Sports Center*, 2010 WL 3222404 (Pa. Aug. 17, 2010) (absent express policy provision, insurer has no right to reimbursement); *Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, No. 09-1251 (10th Cir. Aug. 16, 2010) (Colorado law recognizes an insurer's right to reimbursement).

On December 15, 2010, a federal court in California granted an insurer's motion for reimbursement of defense costs, confirming the existence of such a right under California law. *Hewlett Packard Co. v. ACE Prop. & Cas. Ins. Co.*, No. C 99-20207 (N.D. Cal. Dec. 15, 2010). Here, ACE did not defend under a reservation of rights, but rather denied a defense altogether, determining that the claims were not even arguably covered under the general liability policy. Hewlett Packard brought suit against ACE for failure to defend, and ultimately won an $11 judgment for its defense costs. ACE paid the $11 million, subject to a written reservation of ACE's right to seek reimbursement of the payment in the event that it was determined that there was no duty to defend. Hewlett Packard ultimately succeeded in the underlying patent infringement action and was awarded approximately $28 million. Following this judgment, ACE appealed the trial court's duty to defend ruling. The Ninth Circuit reversed the trial court, and ruled that ACE had no duty to defend the underlying counterclaims against Hewlett Packard. ACE then filed a motion seeking reimbursement of the defense costs it had previously paid.

The court agreed with ACE that "it is a well-established principle under California law that a carrier has a right to reimbursement of defense costs paid under a reservation of rights for claims that are 'not even potentially covered' under the policy." Indeed, another California district court recently ordered reimbursement of defense costs to an insurer for claims that were not arguably covered by the relevant policy. *Burlington Ins. Co. v. Devdhara*, 2010 WL 3749301 (N.D. Cal. Sept. 23, 2010).

Chinese Drywall Alerts:

Louisiana District Court Rules for Insurers in Multi-District Drywall Coverage Litigation

On December 16, 2010, a Louisiana district court granted insurers' motions to dismiss a drywall coverage suit, finding that coverage is barred under faulty materials and corrosion exclusions. *In re: Chinese Manuf. Drywall Prod. Liab. Litig.*, MDL No. 2047 (E.D. La. Dec. 16, 2010). The dismissal marks the end of homeowners' attempts to obtain coverage from ten homeowners insurers in this multidistrict litigation involving more than 7,000 homeowners nationwide.

As a preliminary matter, the court found that the drywall-related damage constituted a direct physical loss within the meaning of the property policies. However, the court ruled that the losses were excluded from coverage under the faulty materials and corrosion exclusions of the homeowner policies at issue. The court reasoned that the faulty materials exclusion squarely applied because the drywall served its intended purpose but was composed of defective materials. Similarly, the corrosion exclusion was triggered because the homeowners explicitly alleged that the drywall's off-gassing resulted in corrosion to metallic and electrical components in the homes.

In many respects, this decision mirrors the ruling

in *Travco Ins. Co. v. Ward*, 2010 WL 2222255 (E.D. Va. June 3, 2010), discussed in our July/August Alert. Both decisions reasoned that although the damage to the homes constituted a covered loss, numerous policy exclusions nonetheless barred coverage. Additionally, both decisions rejected the reasoning of *Finger v. Audubon Ins. Co.*, 2010 WL 1222273 (La. Civ. Ct. Mar. 22, 2010) (discussed in our April 2010 Alert), in which the state court ruled that a latent defect exclusion did not apply to Chinese drywall property damage claims, but failed to provide explanation or persuasive authority for its ruling. Furthermore, both federal decisions rejected the homeowners' contentions that coverage was resurrected by the policies' ensuing loss provisions, while leaving open the door for possible future coverage on this basis. The present ruling is less sweeping than *Travco*. In *Travco*, the court held that the pollution and latent defect exclusions also barred coverage, a position rejected by the federal court in the present case. Here, the court found that although the latent defect exclusion presented a "close call," the insurers had not met their burden for dismissal as a matter of law. In declining to apply the pollution exclusion, the court followed Louisiana precedent, which endorses a relatively stringent application of the pollution exclusion—limited largely to traditional environmental pollution activities. In this respect, the court sided with the ruling in *Finger*.

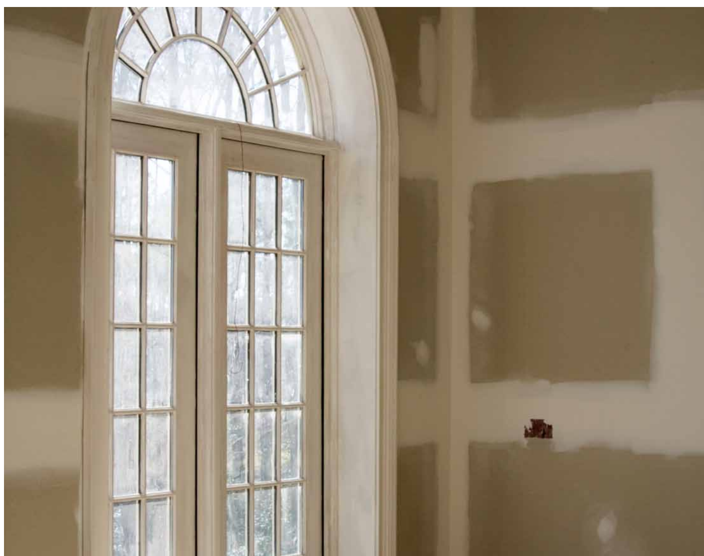
Three Florida Courts Issue Rulings in Drywall-Related Property Damage Disputes

A Florida state court ruled for home builders who had used allegedly defective drywall in construction projects, deciding that builders may not be held strictly liable for damages allegedly caused by defective Chinese drywall. *Bennett v. Centerline Homes, Inc.*, No. 50 2009 CA 014458 (Fla. Cir. Ct. Nov. 5, 2010). The court reasoned that because the builders did not manufacture the drywall and were not within the chain of distribution, there was no basis for imposing strict liability. Ruling on another issue, the court also concluded that some of the homeowners' claims against the builders were barred by Florida's "contractual privity economic loss rule," which limits tort claims arising out of contract where the damages suffered are purely economic. The court explained that, although claims for physical injury could survive the contractual privity economic loss rule, all other claims were based on the homeowners' economic losses and were thus barred. Finally, the court ruled that the homeowners failed to state a claim for private nuisance based on the off-gassing of the defective drywall, finding that the doctrine of private nuisance protects "property rights of one land owner from the unrestrained exercise of the property rights of another," facts not applicable in the instant action.

With respect to insurance coverage for drywall-related damage, a Florida federal court granted an insurer's motion for summary judgment, finding that property damage claims fell outside the applicable policy periods. *Amerisure Ins. Co. v. Albanese Popkin The Oaks Dev. Grp., L.P.*, No. 09-81213 (S.D. Fla. Nov. 30, 2010). Applying a "manifestation" trigger, the court explained that the relevant occurrence for coverage purposes was when the damage first manifested itself. Here, the underlying complaint alleged that homeowners first noticed damage and a sulfuric odor more than one year prior to the inception of the first policy. Therefore, the court concluded, "there was no 'bodily injury' or 'property damage' during the policy period." The court rejected the homeowners' argument that under a "continuous trigger" the policies were triggered because property damage continued to occur throughout the policy periods. *Amerisure* reinforces Florida's endorsement of a manifestation trigger and provides strong support for insurers seeking to dismiss drywall-related coverage claims where the underlying property damage first manifested itself prior to the start of the relevant policy period.

In another Florida decision, a federal court addressed an issue of justiciability in a drywall coverage dispute. *National Union Fire Ins. Co. v. Vicino*

Drywall Inc., No. 10-60273 (S.D. Fla. Nov. 29, 2010). In that case, National Union filed a declaratory judgment action, arguing that the pollution exclusion excused the insurer from having to defend or indemnify several drywall companies in various lawsuits. The court dismissed the action, finding a lack of subject matter jurisdiction. The court explained that National Union's complaint did not allege that the drywall



companies had sought a defense or reimbursement pursuant to National Union's umbrella policies, or that the underlying policy limits had been exhausted. Therefore, the court held, National Union's liabilities were "merely contingent" and did not present a justiciable case or controversy. The *Vicino Drywall* court took a hard line with respect to the "case or controversy" requirement, reasoning that under Eleventh Circuit precedent, "[t]he issue of justiciability plays a significant role in insurance coverage disputes." Where, as here, the insurance dispute involves excess layer coverage, the "critical test for justiciability" is whether primary level coverage has been exhausted, not whether (in light of judgments in similar cases) primary coverage is likely to be exhausted. The *Vicino* ruling illustrates the tension between the necessity for prompt judicial determination of insurance disputes and strict application of the "case or controversy" requirement for subject matter jurisdiction.

Discovery Alert:

Asbestos Trust Discovery Battles Raise Important Issues Regarding Scope of Discovery in Bankruptcy Context

Discovery disputes involving asbestos bankruptcy trusts are heating up. These trusts possess a trove of information about asbestos claimants, their injuries and recoveries. Yet, the information is often inaccessible to asbestos defendants and their insurers trying to obtain prior claimant filings in order to assess the consistency of representations to defend against what many believe are "bogus" claims. Disputes over access to this information are starting to proliferate.

In *In re Garlock Sealing Technologies LLC*, No. 10-BK-31607 (Bankr. W.D.N.C. June 5, 2010), debtor Garlock moved for an order authorizing the service of subpoenas compelling the production of data from claims processing facilities for asbestos trusts. Garlock seeks electronically-stored claimant specific information collected from claims forms and other filings. According to Garlock's motion papers, the information sought is essential to the accurate estimation of asbestos claims, in that it concerns "the nature and breadth of those claims to determine how they overlap with claims by persons who have lodged claims against [Garlock] and the extent to which funding through trusts will be available to pay these claims and thus reduce the value of the claims against [Garlock]." Garlock claims that analogous requests for discovery in bankruptcy cases have been routinely granted. The Asbestos Claimants Committee has opposed the motion, arguing that the discovery sought by Garlock is irrelevant, burdensome and overbroad. A hearing in the matter is scheduled for January 13, 2011.

Similar battles are being waged in bankruptcy courts in Delaware. In *In re Specialty Products Holding Corp.*, No. 10-11780 (Bank. D. Del.), an ongoing discovery dispute has been waging between an asbestos defendant-debtor, asbestos claimants and their attorneys, Section 524(g) trusts and others. In

this case as well, the debtor companies seek discovery to determine the validity of claims being asserted against the debtor by comparing claims made by those claimants against other trusts and defendants in related asbestos litigation. While the presiding judge has issued some guidelines regarding the scope of appropriate discovery (which appear to represent a middle-of-the-road approach), the court has not yet issued definitive rulings on these disputes. Additional discovery-related motions and rulings are expected in these proceedings.

In addition, multiple asbestos trusts filed an adversary proceeding seeking declaratory and injunctive relief in connection with several pending bankruptcy actions in Delaware involving ACandS, Specialty Products, Kaiser Aluminum, Owens Corning and USG. *ACandS Inc. v. Hartford Accident and Indem. Co.*, Adversary Case No. 10-53702 (Bankr. D. Del. filed Oct. 27, 2010). In this action, the trusts seek to proactively prohibit insurance companies and insolvent companies with asbestos liability from obtaining claimant information from the asbestos trusts. According to the trusts, the discovery sought is burdensome and overbroad, and constitutes an improper attempt to use the trusts to obtain discovery that "no tort system participant would have access to." The complaint seeks expansive injunctive relief, including a declaration that "the Trusts need not and may not provide individual claimant information except pursuant to subpoenas issued in connection with an asbestos personal injury lawsuit relating to a single claimant. …" On November 18, 2010, several defendants (including, among others, Hartford and Specialty Products) moved to dismiss the suit on numerous grounds, and a group of solvent asbestos-related companies filed *amicus curiae* briefs in opposition to the preliminary injunction. As the *amicus* parties observed, the foreclosure of such discovery would significantly impact the transparency of asbestos trusts to the mass tort system. We will continue to monitor these and other similar proceedings to keep you apprised of developments in this and related initiatives.

STB News Alerts:

STB partner Mary Kay Vyskocil was elected President Elect of ARIAS-US, a non-profit organization that focuses on improving the insurance and reinsurance arbitration process for international and domestic markets. May Kay also serves as the chair of the ARIAS-US Education Committee and the International Committee and has been a member of the ARIAS-US Board for the past three years.

STB senior counsel Deborah L. Stein continues to write a monthly column on insurance issues for the Los Angeles and San Francisco *Daily Journals*. Her recent columns have discussed topics as varied as the nature of business interruption losses following the Gulf oil spill and the interplay between product recalls and insurance coverage.

In December 2010, Aspen Publishers released a 2011 Supplement to the *Handbook on Insurance Coverage Disputes*, co-authored by STB partner Barry R. Ostrager. The Supplement includes three new chapters, which provide comprehensive analyses of the following topics: (1) settlement and subrogation in the insurance context; (2) application and scope of the pollution exclusion; and (3) the impact of Chapter 11 bankruptcy on a debtor's insurers. In addition, the Supplement includes revised versions of several *Handbook* chapters, reflecting the most recent judicial rulings in numerous substantive areas of insurance law.

STB partner Andrew T. Frankel will co-chair and speak at an upcoming conference on emerging insurance coverage, allocation and bankruptcy issues. The event, to be held on January 24, 2011 at the Helmsley Park Lane Hotel in New York, will cover a broad range of issues of interest to insurers, reinsurers and policyholders, and in particular topics relating to bankruptcy and mass tort litigation. Andy will also moderate panels addressing asbestos bankruptcies, and trigger, allocation and related issues.

Simpson Thacher has been an international leader in the practice of insurance and reinsurance law for a quarter of a century. Our insurance litigation team practices worldwide.

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