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INSURANCE LAW ALERT

FEBRUARY 2011

This Alert addresses a variety of decisions relating to coverage under a general liability policy, including the definition of the term "suit" under California law and whether faulty workmanship constitutes a covered "occurrence" under South Carolina law. This Alert also discusses court rulings on the scope of "advertising injury," choice of law, arbitrator disqualification, and the legal effect of a certificate of insurance. Please "click through" to view articles of interest.

- ***Second Circuit Asks New York Court of Appeals to Decide Whether the Issuance of a Certificate of Insurance Estops an Insurer from Denying Coverage***

  The Second Circuit certified to the New York Court of Appeals the question of whether issuance of a certificate of insurance by a contractor's insurer erroneously confirming "additional insured" coverage for an owner estops an insurer from denying that owner coverage. *10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co.*, 2010 WL 5186041 (2d Cir. Dec. 23, 2010). *Click here for full article*.

- ***California Supreme Court Rules that Administrative Agency Proceeding Constitutes a "Suit" Triggering a General Liability Insurer's Duty to Defend***

  The California Supreme Court ruled that an adversarial proceeding before an administrative law judge of the former United States Department of Interior Board of Contract Appeals constitutes a "suit" for purposes of the duty to defend under a CGL policy. *Ameron Int'l Corp. v. Insurance Co. of the State of Pennsylvania*, 50 Cal.4th 1370 (Cal. 2010). *Click here for full article*.

- ***Failure to Comply With Proof of Loss Requirement Bars Coverage, Says New York Federal Court***

  A federal court in New York granted an insurer summary judgment that the policyholder could not assert a claim based on the policyholder's failure to timely submit a proof of loss as required by the applicable Standard Flood Insurance Policy, reasoning that strict compliance with proof of loss requirements is a precondition to coverage. *Jacobson v. Metropolitan Prop. & Cas. Ins. Co.*, 2010 WL 5391530 (N.D.N.Y. Dec. 21, 2010). *Click here for full article*.

- ***South Carolina Supreme Court Rules that Faulty Workmanship is Not an "Occurrence" Where the Resulting Damage Was Not "Fortuitous"***

  The Supreme Court of South Carolina held that damage that is the natural and probable consequence of faulty workmanship does not constitute an "occurrence" under a general liability policy. *Crossman Communities of North Carolina v. Harleysville Mutual Ins. Co.*, No. 26909 (S.C. Jan. 7, 2011). *Click here for full article*.

- ***Texas Appellate Court Vacates Arbitration Award, Finding Basis for Disqualification of Arbitrator***
  A Texas appeals court tossed an arbitration award based on an arbitrator's failure to disclose that he had presided over an arbitration case involving one of the same party representatives and a former parent company of one of the parties to the current arbitration. *Alim v. KBR-Halliburton*, 2010 WL 61868 (Tex. Ct. App. Jan. 10, 2011). *Click here for full article*.

- ***Citing Judicial Efficiency, Florida District Court Dismisses Drywall Coverage Action in Favor of Later-Filed Colorado State Court Action***
  A Florida district court dismissed an insurer's first-filed declaratory judgment action, holding that drywall-related insurance coverage issues should be decided in a subsequent suit filed by the policyholder in Colorado state court. *Granite State Ins. Co. v. ProBuild Holdings, Inc.*, No. 10-60246 (S.D. Fla. Jan. 21, 2011). *Click here for full article*.

- ***Illinois Appellate Court Affirms Dismissal of Claims Against Insurer, Finding that Policyholder's Promotional Displays Did Not Constitute an "Advertisement" Within Meaning of Policies***
  An Illinois appellate court held that a company's display of its products and packaging at a showroom event did not constitute an "advertisement" within the meaning of a general liability insurance policy. *Santa's Best Craft, LLC v. Zurich American Ins. Co.*, 2010 WL 5293369 (Ill. App. Ct. Dec. 21, 2010). *Click here for full article*.

- ***Sixth Circuit Affirms that Insurer Had No Duty to Defend or Indemnify Lawsuit Alleging Breach of Confidentiality Agreement***
  The Sixth Circuit affirmed a grant of summary judgment that, under a policy exclusion, an insurer had no duty to defend or indemnify the insured in a lawsuit arising out of its employee's alleged breach of a confidentiality agreement with the employee's former employer. *Capitol Specialty Ins. Corp. v. Industrial Electronics LLC*, 2011 WL 96521 (6th Cir. Jan. 2011). *Click here for full article*.

- ***Indiana Supreme Court Applies "Uniform" Approach to Choice of Law Dispute in Multi-State Contamination Coverage Litigation***
  The Indiana Supreme Court held that the law of a single state governs interpretation of an insurance contract, even though the claims involve environmental contamination in multiple states. *National Union Fire Ins. Co. v. Standard Fusee Corp.*, 2010 WL 5392678 (Ind. Dec. 29, 2010). *Click here for full article*.

- ***United States Supreme Court Denies Certiorari in Global Warming Nuisance Suit***
  The United States Supreme Court denied certiorari in a global warming nuisance suit after granting certiorari in a similar suit earlier this term. *In re Ned Comer*, 2011 WL 55857 (U.S. Jan. 10, 2011). *Click here for full article*.

- ***Asbestos Trusts Change Course and Voluntarily Dismiss Adversarial Action***
  Several asbestos trusts voluntarily dismissed without prejudice an adversarial action seeking declaratory and injunctive relief aimed at preventing discovery of claims information by debtors in a number of Delaware bankruptcy cases. *ACandS Inc. v. Hartford Accident and Indem. Co.*, Adversary Case No. 10-53702 (Bankr. D. Del.). *Click here for full article*.

Coverage Alerts:

Second Circuit Asks New York Court of Appeals to Decide Whether the Issuance of a Certificate of Insurance Estops an Insurer from Denying Coverage

The Second Circuit enforced as written a policy provision that conditioned additional insured coverage on the existence of an "executed" construction contract between the insured and the additional insured. In addition, the Circuit certified to the New York Court of Appeals the question of whether the issuance of a certificate of insurance estops an insurer from denying coverage. *10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co.*, 2010 WL 5295420 (2d Cir. Dec. 23, 2010).

Plaintiffs, an owner and construction manager of a commercial building, contracted with a contractor for a demolition project. The construction agreement required the contractor to secure insurance to cover any liability arising out of the project. The contractor obtained a primary and an umbrella policy from Mountain Valley Indemnity Company. Mountain Valley, through its agent, issued a certificate of insurance evidencing the policies and the status of the plaintiffs as additional insureds. Following receipt of the certificate, the contractor began work on the project. Critically, the primary policy explicitly required that the underlying construction agreement be "executed" for coverage to be operative. Before either party signed the construction agreement, however, a worker on the demolition project was injured. The worker filed suit and the plaintiffs sought defense and indemnification from Mountain Valley. Mountain Valley denied coverage, arguing that because the construction agreement was neither signed nor fully performed prior to the worker's injury, it had not been "executed," and thus the primary policy did not provide coverage. The Second Circuit agreed. Reversing the district court, the Second Circuit ruled that, under well-established New York law, a contract must either be signed or fully performed to be considered "executed." Thus, the primary policy was not in effect as of the date of the worker's injury.

The more complex issue before the court was whether Mountain Valley was estopped from denying coverage under the primary policy in light of the issuance of a certificate of insurance for that policy. The certificate of insurance stated that "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. … THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE

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TERMS, EXCLUSIONS AND CONDITIONS OF [THE POLICIES BELOW]." Additionally, the reverse side of the certificate contained the following "Disclaimer": "This Certificate of Insurance … does not constitute a contract between the issuing insurer … and the certificate holder.…" Despite this language, the court found that two competing and equally reasonable arguments could be made as to whether or not—in light of the parties' intent to enter into an insurance contract and the plaintiffs' reasonable reliance on the certificate—the certificate should estop Mountain Valley from denying coverage. Appellate courts in New York are split on this issue, the Second Circuit observed. While the First and Second Departments have rejected estoppel arguments based on the issuance of a certificate of insurance, the Third and Fourth Departments have held that under certain circumstances, a certificate of insurance can estop an insurer from denying coverage. In light of this divide, the Second Circuit reserved ruling on this issue and certified the following question of law to the New York Court of Appeals:

> *In a case brought against an insurer in which a plaintiff seeks a declaration that it is covered under an insurance policy issued by that insurer, does a certificate of insurance issued by an agent of the insurer that states that the policy is in force but also bears language that the certificate is not evidence of coverage, is for informational purposes only, or other similar disclaimers, estop the insurer from denying coverage under the policy?*

The New York Court of Appeals' analysis of this issue will have significant consequences beyond the specific coverage dispute in *10 Ellicott Square Court Corp.* A ruling that provides policyholders with an estoppel argument by virtue of a certificate of insurance seems to run counter to the generally accepted principle that a typical certificate of insurance serves merely as evidence of an insurance contract, rather than as a valid contract itself.

California Supreme Court Rules that Administrative Agency Proceeding Constitutes a "Suit" Triggering a General Liability Insurer's Duty to Defend

Courts across the country have issued conflicting rulings on the issue of whether an administrative remediation order and/or an administrative proceeding constitute a "suit" so as to trigger a general liability insurer's duty to defend. Adopting a functional approach, some courts have ruled that the receipt of an agency notification or participation in an administrative proceeding is the functional equivalent of a "suit" in terms of its coercive nature and potential consequences. Other jurisdictions, however, have endorsed a "literal meaning" approach, reasoning that a suit refers only to a judicial action initiated by the filing of a complaint. By virtue of the landmark ruling in *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 18 Cal.4th 857 (Cal. 1998), California falls within the latter category. Under California law, absent insurance policy language specifying otherwise, a "suit" is a "proceeding brought in a court of law by the filing of a complaint."

In a recent decision, the California Supreme

Court ruled that an adversarial proceeding before an administrative law judge of the former United States Department of Interior Board of Contract Appeals did constitute a "suit" for purposes of the duty to defend under a CGL policy. *Ameron Int'l Corp. v. Insurance Co. of the State of Pennsylvania*, 50 Cal.4th 1370 (Cal. 2010). The court reasoned that the bright line rule set forth in *Foster-Gardner* did not apply because, unlike the administrative remediation order at issue in *Foster-Gardner*, the administrative proceeding in the present case (lasting 22 days and involving numerous witnesses and the introduction of substantial evidence) constituted a "suit" as any reasonable insured would understand the term.

Although the court was clear in its refusal to overrule *Foster-Gardner*, its decision in *Ameron* appears to represent some erosion of California's bright line rule in this context. In the wake of *Ameron*, policyholders may argue that other quasi-judicial proceedings, such as arbitration or agency hearings, likewise fall within the commonly understood meaning of the term "suit." The extent to which California courts will accept such arguments is uncertain in light of the continued vitality of *Foster-Gardner*. However, *Ameron* suggests that insurers are well-advised to investigate the nature of an administrative proceeding initiated against an insured before denying a defense on *Foster-Gardner* "suit" grounds.

Failure to Comply With Proof of Loss Requirement Bars Coverage, Says New York Federal Court

A federal court in New York granted an insurer summary judgment that the policyholder had failed to timely submit a proof of loss as required by the applicable Standard Flood Insurance Policy. *Jacobson v. Metropolitan Prop. & Cas. Ins. Co.*, 2010 WL 5391530 (N.D.N.Y. Dec. 21, 2010). The court reasoned that strict compliance with proof of loss requirements is a precondition to coverage under a federal insurance program. The court rejected the homeowners' argument that the proof of loss deficiencies should be excused in light of the homeowners' reliance on a public adjuster whom the homeowners had hired to assist them in their coverage efforts. The court also rejected the homeowners' contention that the insurer repudiated the policy by denying coverage prior to the lapse of the sixty-day period for filing a proof of loss. An insurer's denial of benefits, standing alone, does not generally constitute a repudiation of the insurance policy, the court observed. Rather, in most cases, repudiation requires a renouncement of the policy.

The strict enforcement of the proof of loss requirement in *Jacobson* comports with decisions issued by the vast majority of cases interpreting this provision. As the *Jacobson* court noted, "every circuit to address the requirements of recovery under an SFIP has held that an insured's claim cannot be paid unless he has timely submitted a complete proof of loss which is signed and sworn to."

FAULTY WORKMANSHIP ALERT:

South Carolina Supreme Court Rules that Faulty Workmanship is Not an "Occurrence" Where the Resulting Damage Was Not "Fortuitous"

In our April 2010 Alert, we discussed a frequently-litigated issue: whether and under what circumstances faulty workmanship constitutes an "occurrence" under a general liability policy. On January 7, 2011, the Supreme Court of South Carolina clarified previous precedent and held that damage that is the natural and probable consequence of faulty workmanship does not constitute an "occurrence" under a general liability policy. *Crossman Communities of North Carolina v. Harleysville Mutual Ins. Co.*, No. 26909 (S.C. Jan. 7, 2011). The court explained that for faulty workmanship to give rise to potential coverage, it must result in "an unintended, unforeseen, fortuitous or injurious event."

Developers of condominiums in South Carolina were sued by numerous homeowners for negligence, breach of warranty, unfair trade practices and breach of fiduciary duty. The homeowners alleged that construction defects resulted in substantial decay and deterioration of the condominiums. Following a settlement of this action, the developers sought coverage from Harleysville Mutual Insurance Co., their general liability insurer. Harleysville denied coverage, and the developers filed a declaratory judgment action to determine Harleysville's obligations under the policy. The trial court ruled that the underlying facts established "property damage [ ] caused by an occurrence," thereby implicating coverage under Harleysville's policy.

The South Carolina Supreme Court reversed. The court explained that the damage to the housing units was not caused by an "occurrence" because the damage was a natural and expected consequence of negligent workmanship. Without the essential element of fortuity, there can be no covered "occurrence" under a general liability policy, the court reasoned. In reaching this decision, the court clarified previous decisions in this context, noting that it is not the case that a CGL policy will *never* provide coverage for faulty workmanship. Rather, the analysis depends on the presence/absence of an "occurrence," which inherently turns on the element of fortuity. Likewise, the court rejected the position that there can never be "property damage" when the damage is only to the insured's product. The court observed that to the extent that the threshold showing of an "occurrence" is made, "property damage" may be established where there is damage to work other than the negligently-constructed component—even if the damage is to other parts of the insured's work product.

As the *Harleysville* court observed, courts across the country continue to wrestle with the question of whether a CGL policy covers damage to property caused by faulty workmanship. Although a majority of courts have ruled that negligent workmanship, standing alone, is not a covered "occurrence," these courts have applied various and sometimes inconsistent analyses to arrive at this conclusion. A smaller number of courts have reasoned that where faulty workmanship causes property damage, an "occurrence" exists, so long as the damage was neither expected nor intended. As discussed in our April 2010 Alert, the Mississippi Supreme Court ruled that CGL coverage may be implicated where unexpected or unintended property damage results from the negligent acts of a sub-contractor. *Harleysville* appears to take a middle-of-the-road approach, endorsing a position that turns primary on the question of fortuity under the specific circumstances presented.

Arbitration Alert:

Texas Appellate Court Vacates Arbitration Award, Finding Basis for Disqualification of Arbitrator

On January 10, 2011, a Texas appeals court tossed an arbitration award, finding that an arbitrator's failure to disclose that he had presided over an arbitration case involving one of the same party representatives and a former parent company of one of the parties to the current arbitration created a reasonable impression of partiality. *Alim v. KBR-Halliburton*, 2011 WL 61868 (Tex. Ct. App. Jan. 10, 2011). Central to the court's ruling was the fact that the arbitrator, in his notice of appointment, swore under oath that none of the party representatives or parties had appeared before him in previous arbitrations. The court also emphasized the arbitrator's failure to conduct a diligent conflicts check prior to or during the course of his service on the arbitration panel.

Under the Federal Arbitration Act, evident partiality of an arbitrator can be a valid basis for vacating an arbitration award. As the *Alim* court noted, evident partiality may be established by non-disclosure, regardless of whether the non-disclosed information created actual partiality or bias. Although arbitration awards are afforded great deference under the Federal Arbitration Act, *Alim* demonstrates that courts will vacate an award on the basis of arbitrator disqualification where the arbitrator has failed to disclose information that the court deems relevant to the perception of bias. In a wave of decisions over the past year, numerous other courts have evaluated whether specific non-disclosures justified the disqualification of arbitrators. *Compare Scandanavian Reins. Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 2010 WL 653481 (S.D.N.Y. Feb. 23, 2010) (discussed in our April 2010 Alert) (disqualifying arbitrator on the basis of non-disclosure) *and Benjamin, Weill & Mazer v. Kors*, 189 Cal. App.4th 126 (1st Dist. 2010) (discussed in our December 2010 Alert) (disqualifying arbitrator on the basis of non-disclosure) *with Arrowood Indem. Co. v. Trustmark Ins. Co.*, No. 3:03-CV-1000 (D. Conn. Feb. 2, 2010) (declining to disqualify arbitrator on the basis of non-disclosure). As these cases demonstrate, the degree and timeliness of arbitrator disclosures is a critical factor in upholding the validity of arbitration awards. Therefore, parties to arbitrations should obtain and adequately document detailed arbitrator disclosures in connection with panel appointments.

Chinese Drywall Alert:

Citing Judicial Efficiency, Florida District Court Dismisses Drywall Coverage Action in Favor of Later-Filed Colorado State Court Action

Coverage litigation arising out of the installation of allegedly defective drywall continues to proliferate. Over the past year, courts across the country have issued numerous decisions affecting the rights and obligations of insurers faced with drywall-related claims. We have highlighted many of these rulings in previous Alerts, which have addressed a variety of legal issues: choice of law and jurisdictional issues (*see* November 2010 Alert, January 2011 Alert), whether damage allegedly caused by drywall constitutes an "occurrence" (*see* September 2010 Alert); and the application of numerous policy exclusions to bar coverage for drywall-related losses (*see* April 2010 Alert, July/August 2010 Alert, January 2011 Alert).

On January 21, 2011, a federal court in Florida issued another noteworthy decision in this context, dismissing an insurer's declaratory judgment action in light of a similar action pending in Colorado. *Granite State Ins. Co. v. ProBuild Holdings, Inc.*, No. 10-60246 (S.D. Fla. Jan. 21, 2011).

Granite State Insurance Company filed an action in Florida district court seeking a declaration as to the duties it owed, if any, to ProBuild Holdings for damages allegedly caused by defective drywall installed by ProBuild in the construction of new homes. The day after ProBuild was served with notice of the Florida action, ProBuild filed a declaratory judgment action in Colorado district court, naming Granite and ten other insurers as defendants. After concerns were raised regarding a possible lack of diversity jurisdiction, ProBuild re-filed the action in Colorado state court. ProBuild then moved to dismiss the Florida action, arguing that all claims should be resolved in the Colorado state proceeding.

Following Eleventh Circuit precedent, the Florida district court applied a multi-factor test to determine whether the Florida declaratory judgment action should be dismissed in favor of the Colorado state court action. Factors relating to judicial efficiency weighed in favor of dismissing the Florida action, the court reasoned, because the Florida action would settle only the dispute between Granite and ProBuild, leaving unresolved similar disputes between ProBuild and its other insurers. Along similar lines, dual litigation in two jurisdictions could present *res judicata* issues, given that the same policy exclusions would likely be interpreted in both proceedings. Overall, the court concluded that the "scale tips in favor" of dismissal of the Florida action. In so ruling, the court rejected Granite's reliance on the "first-filed rule," which provides that "in the event of parallel litigation in different courts, the first court in which jurisdiction attaches should hear the case 'in absence of compelling circumstances.'" The court held that the strong interest in the efficient administration of justice presents "compelling circumstances" which justify an exception to the first-filed rule.

Advertising Injury Alerts:

Illinois Appellate Court Affirms Dismissal of Claims Against Insurer, Finding that Policyholder's Promotional Displays Did Not Constitute an "Advertisement" Within Meaning of Policies

An Illinois appellate court narrowly interpreted the term "advertisement" in a general liability policy, holding that the insured's product and packaging displays at a showroom event, at which the insured and numerous market competitors presented their products to select retailers for future purchase, did not constitute an "advertisement." Accordingly, the court held that trademark claims against the insured based on the packaging used during the showroom display were not subject to indemnification under the policy's "advertising injury" provision. The court also held that the insurer had no duty to reimburse the insured for the costs of defending a third-party that had a license agreement with the insured. *Santa's Best Craft, LLC v. Zurich American Ins. Co.*, 2010 WL 5293369 (Ill. App. Ct. Dec. 21, 2010).

The insured, a manufacturer and wholesaler of Christmas lights, promoted its business by participating in seasonal showroom displays. A competitor filed suit against the insured, alleging trademark infringement and deceptive trade practices based on the insured's packaging of its products. The insured tendered the loss to Zurich under a commercial general liability policy and an umbrella policy. The general liability policy provided coverage for "advertising injury," which was defined as injury arising out of "the use of another's advertising idea in your 'advertisement'; or [i]nfringing upon another's copyright, trade dress or slogan in your 'advertisement.'" The term "advertisement" was defined as "a notice that is broadcast or published to the general public or specific market segments."

Although the insured acknowledged that it did not advertise to the general public, it argued that the invitation of 75-100 retailers to its showroom to view

products and packaging constituted an "advertisement" within the meaning of the advertising injury provision of the general liability policy. The court disagreed. Applying precedent interpreting similar policy language and common sense understanding of what constitutes an advertisement, the court held that the "published or broadcast" language in the definition of advertising requires the widespread dissemination of promotional materials. In so ruling, the court rejected the insured's argument that because the insured's displays were directed at a "specific market segment," it need not be broadcast to a large and disparate audience. Absent widespread dissemination of the product information, the court reasoned, the insured's conduct was more akin to personal solicitation of business, which is not advertising under the policy language.

The court further held that Zurich was not obligated to reimburse the insured for defense costs expended on behalf of a company with whom the insured entered into a licensing agreement. The court analyzed the insured's request for reimbursement under a "duty to indemnify" standard. Even if Zurich might have had an initial duty to defend the licensee as an additional insured, once the insured paid those costs, the issue became one of indemnification, the court held. Because the court had already determined that the policies did not provide coverage for the injuries alleged in the underlying complaint, there was necessarily no duty to indemnify the insured for the expenses paid in providing a defense for the licensee.

The question of what types of activities give rise to covered "advertising injury" has received significant attention in recent months. While a few courts have endorsed an approach that evaluates the notion of "advertising" on a case-by-case basis (taking into consideration various factors, including the target audience of the marketing activity), *Santa's Best* aligns itself with what appears to be the majority position, which requires widely disseminated promotional activities. Even under this less malleable standard, however, court rulings will ultimately turn on the specific nature of the activities at issue. As discussed in our May 2010 Alert, the Ninth Circuit ruled that website advertising, even if based on an individualized, customer-driven concept, nonetheless constituted "advertising" given its publication and availability to the internet public at large. *See Hyundai Motor America v. National Union Fire Ins. Co.*, 2010 WL 1268234 (9th Cir. Apr. 5, 2010).

Sixth Circuit Affirms that Insurer Had No Duty to Defend or Indemnify Lawsuit Alleging Breach of Confidentiality Agreement

On January 12, 2011, the Sixth Circuit affirmed a district court's grant of summary judgment that an insurer had no duty to defend or indemnify the insured in a lawsuit arising out of its employee's alleged breach of a confidentiality agreement with the employee's former employer. *Capitol Specialty Ins. Corp. v. Industrial Electronics LLC*, 2011 WL 96521 (6th Cir. Jan. 2011).

A company engaged in the repair of industrial electronic equipment entered into an employment agreement with an employee that included a confidentiality provision. This provision prohibited disclosure of the company's confidential information or trade secrets during the employee's tenure with

the company and for a period of two years thereafter. The employee ultimately left the company and was hired by the insured, Industrial Electronics, LLC. The company sued Industrial Electronics for tortious interference and its former employee for breach of the confidentiality agreement based on the improper use and disclosure of the company's trade secrets and proprietary information. The insured noticed a claim to Capitol, its general liability insurer, and Capitol sought a declaration that it had no duty to defend or indemnify the insured or its new employee because the allegations in the underlying action fell outside the scope of coverage for "personal and advertising injury," the only possible basis for coverage.

The district court granted Capitol summary judgment, holding that the allegations in the underlying complaint did not fall within the policy's provision for "personal and advertising injury." The district court concluded that the alleged misappropriation of a competitor's customer and price lists did not constitute a claim for "advertising injury." The district court further held that, in any event, coverage was barred by a number of policy exclusions, including an exclusion for claims arising out of breach of contract.

The Sixth Circuit affirmed, holding that regardless of whether coverage existed under the "advertising injury" provision, the "breach of contract" exclusion barred coverage for all claims because it excluded coverage for personal and advertising injury "arising out of a breach of contract, except an implied contract to use another's advertising idea in your 'advertisement.'" The court explained that the exclusion clearly and unambiguously applied because the claims against the insured and its employee arose directly from the employee's alleged breach of the employee's prior employment contract with the company. It mattered not, the court held, that the company did not specifically assert a breach of contract claim against Industrial Electronics.

In affirming the district court decision on this basis, the Sixth Circuit avoided ruling on a matter of first impression under Kentucky law: whether the misappropriation of customer and price lists constitutes an "advertising injury" within the meaning of general liability coverage. As the district court observed, other jurisdictions are split on the issue.

Choice of Law Alert:

Indiana Supreme Court Applies "Uniform" Approach to Choice of Law Dispute in Multi-State Contamination Coverage Litigation

Reversing an intermediate appellate court, the Indiana Supreme Court ruled that Indiana follows a "uniform" approach to choice of law disputes, such that the law of a single state governs interpretation of an insurance contract, even where the claims involve environmental contamination in multiple states. *National Union Fire Ins. Co. v. Standard Fusee Corp.*, 2010 WL 9392678 (Ind. Dec. 29, 2010). The court rejected the "site-specific" approach utilized by the appellate court, which found that different state laws would govern interpretation of policies with respect to the sites depending on their geographic location.

A court's resolution of a choice of law dispute may have critical and even outcome determinative consequences in insurance coverage disputes. Choice of law rulings in insurance coverage cases, like other contract disputes, typically involve consideration of the Restatement factors: the principal place of business or place of incorporation of the parties; the place of contract formation, negotiation and performance; and the location of the subject matter of the contract. Where coverage litigation involves multiple risks in multiple states, and/or the negotiation of insurance policies across numerous state lines, the choice of law analysis can become particularly complicated. Depending on the choice of law approach utilized, the result may be application of a single state's law (as in *Standard Fusee*) or the application of multiple states' laws to different aspects of the dispute.

CLIMATE CHANGE ALERT:

United States Supreme Court Denies Certiorari in Global Warming Nuisance Suit

Our January 2011 Alert reported the United States Supreme Court's grant of certiorari in *Connecticut v. American Electric Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009), a case in which the Second Circuit reinstated a public nuisance claim for global warming. *American Electric Power* is one of three global warming suits currently pending in the federal court system. On January 10, 2011, the United States Supreme Court denied certiorari in a second of these suits, *Comer v. Murphy Oil USA*, prompting much speculation about the Court's position on this issue. *In re Ned Comer*, 2011 WL 55857 (U.S. Jan. 10, 2011). Although some experts theorize that the court's refusal to hear *Comer* reveals something about the Court's position on the substantive issues of the lawsuit, others posit that the denial of certiorari relates to the complicated and unusual procedural posture of that case. As detailed in our July/August 2010 Alert, the Fifth Circuit had reversed a district court's dismissal of *Comer* and then subsequently agreed to rehear the case en banc.

The en banc hearing never occurred, however, due to the recusal of seven judges. The net effect of this procedural muddle was a reinstatement of the district court's dismissal of the class action. The third climate change litigation matter, *Native Village of Kivalina v. Exxon Mobil Corp.*, 2008 WL 2951742 (N.D. Cal. May 15, 2008), remains pending on appeal to the Ninth Circuit. A decision in *Kivalina* could further complicate this novel arena of tort law.

DISCOVERY ALERT:

Asbestos Trusts Change Course and Voluntarily Dismiss Adversarial Action

In our January 2011 Alert, we discussed the proliferation of discovery disputes involving asbestos bankruptcy trusts, including the filing of an adversary proceeding by multiple asbestos trusts seeking declaratory and injunctive relief aimed at preventing discovery of claims information by debtors in several bankruptcy cases pending in Delaware. *ACandS Inc. v. Hartford Accident and Indem. Co.*, Adversary Case No. 10-53702 (Bankr. D. Del.). On December 28, 2010, the plaintiff trusts notified the court that the matter was dismissed without prejudice. We will continue to keep you apprised of other developments in related actions.

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