SIMPSON THACHER
INSURANCE LAW ALERT
MAY 2011

This Alert addresses decisions relating to the application of pollution exclusions in non-traditional contexts, coverage under an additional insured provision, and the filed rate doctrine. It also analyzes several recent rulings related to oral settlement agreements, subrogation, privilege, and the meaning of the terms "accident" and "occurrence." Please "click through" to view articles of interest.

- ***Two Federal Courts Further Trend of Enforcing Pollution Exclusion in Non-Traditional Contexts***

  Two courts applied the pollution exclusion to bar coverage outside the realm of traditional environmental pollution. The Eleventh Circuit held that a curry odor constituted a contaminant within the meaning of the exclusion, *Maxine Furs, Inc. v. Auto-Owners Ins. Co.,* 2011 WL 1197466 (11th Cir. Mar. 31, 2011), and a Florida district court applied absolute pollution exclusions to bar coverage for drywall-related claims, *General Fidelity Ins. Co. v. Foster,* No. 09-80743-CIV (S.D. Fla. Mar. 24, 2011). *Click here for full article*.

- ***Fifth Circuit Affirms Jury Instruction on Definition of "Occurrence" in Faulty Workmanship Context***

  In a dispute raising the issue of whether faulty workmanship constitutes a covered "occurrence," the Fifth Circuit upheld a district court's jury instructions regarding the meaning of the term "occurrence." *Maryland Cas. Co. v. Acceptance Indem. Ins. Co.,* 2011 WL 1534373 (5th Cir. Apr. 25, 2011). *Click here for full article*.

- ***New York Court of Appeals Rules That Intentional Acts May Constitute an "Accident" from Insured's Perspective***

  A divided New York Court of Appeals ruled that the victim of an intentional crime is entitled to coverage under his automobile liability policy because the event was accidental from the victim's perspective. *State Farm Mut. Auto. Ins. Co. v. Langan,* 2011 WL 1118579 (N.Y. Mar. 29, 2011). *Click here for full article*.

- ***Second Circuit Interprets "Arising out of" Narrowly, Rejecting Coverage Claim under Additional Insured Provision***

  The Second Circuit ruled that an additional insured provision does not entitle a tortfeasor to obtain coverage where the tortfeasor's conduct, although related to the operations of the primary insured, did not "arise out of" those operations. *Federal Ins. Co. v. Am. Home Assurance Co.,* 2011 WL 1312188 (2d Cir. Apr. 7, 2011). *Click here for full article*.

- ***Two Federal Courts Address Scope of Filed Rate Doctrine***

  A New Jersey district court and the Tenth Circuit issued decisions addressing the application of the filed rate doctrine to fraud-based claims against insurance companies. The Tenth Circuit applied the doctrine to dismiss a putative class action suit against several title insurance companies, *Coll v. First Am. Title Ins. Co.,* 2011 WL 1549233 (10th Cir. Apr. 26, 2011), whereas the New Jersey district court applied the doctrine to bar some, but not all, such claims, *Clark v. Prudential Ins. Co. of Am.*, 2011 WL 940729 (D.N.J. Mar. 15, 2011). *Click here for full article*.

- ***Limiting Texas Precedent, Fifth Circuit Affirms Pro Rata Allocation of Defense and Settlement Costs between Co-Insurers Based on Contractual Subrogation***

  The Fifth Circuit held that an insurer could pursue contractual subrogation to obtain pro rata allocation of defense and settlement costs from a non-participating co-insurer. *Maryland Cas. Co. v. Acceptance Indem. Ins.* Co., 2011 WL 1534373 (5th Cir. Apr. 25, 2011). *Click here for full article*.

- ***North Carolina Appellate Court Upholds Enforcement of Oral Settlement and Sanctions against Insurer***

  A North Carolina appellate court ruled that an insurer was bound by an oral settlement agreement reached in mediation and that sanctions against the insurer are appropriate, based on the insurer's failure to appear at the mediation with decision-making authority. *SPX Corp. v. Liberty Mut. Ins. Co.,* 2011 WL 1238310 (N.C. Ct. App. Apr. 5, 2011). *Click here for full article*.

- ***Attorney-Client Privilege May Not Be Invoked to Prevent Transfer of Documents from Absorbed Company to Surviving Company after Merger***

  The Oklahoma Supreme Court held that ownership of an absorbed company's assets, including its attorney-client privilege, transfers to the surviving company as a result of a corporate merger. *Girl Scouts-Western Oklahoma, Inc. v. Barringer-Thomson,* 2011 WL 1159139 (Okla. Mar. 29, 2011). *Click here for full article*.

- ***United States Supreme Court Holds That Federal Arbitration Act Preempts State Law That Requires Availability of Class Arbitration***

  The United States Supreme Court ruled that an arbitration agreement precluding class arbitration is valid, and that the Federal Arbitration Act preempts state law deeming such agreements to be unconscionable. *AT&T Mobility LLC v. Concepcion,* 2011 WL 1561956 (U.S. Apr. 27, 2011). *Click here for full article*.

- ***Arbitrator Disqualification Dispute Subject of Supreme Court Petition***

  A writ of certiorari with the United States Supreme Court seeks a reversal of a Seventh Circuit ruling related to arbitrator disqualification. *Trustmark Ins. Co. v. John Hancock Life Ins. Co.,* 2011 WL 1336426 (U.S. writ filed Apr. 6, 2011). *Click here for full article*.

- ***Simpson Thacher News Alerts***

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POLLUTION EXCLUSION ALERT:
Two Federal Courts Further Trend of Enforcing Pollution Exclusion in Non-Traditional Contexts

Two additional courts have recently applied the pollution exclusion to bar coverage outside the realm of traditional environmental pollution.

In late March, the Eleventh Circuit found that a curry odor, which emanated from an Indian restaurant, constituted a contaminant within the meaning of the exclusion. *Maxine Furs, Inc. v. Auto-Owners Ins. Co.*, 2011 WL 1197466 (11th Cir. Mar. 31, 2011). At issue in the case was a fur shop's request for coverage for expenses incurred in the cleaning of fur coats necessitated by the smell of curry wafting into the fur shop from the adjoining restaurant. The insurer denied coverage, citing the policy's pollution exclusion. The court upheld the insurer's denial. Applying Alabama law, the court reasoned that because the curry aroma allegedly soiled the furs, a person of ordinary intelligence would conclude that the aroma constituted a "contaminant."

In another recent decision, a Florida district court applied absolute pollution exclusions in general liability policies to bar coverage for injuries and property damage allegedly caused by the installation of defective drywall. *General Fidelity Ins. Co. v. Foster*, No. 09-80743-CIV (S.D. Fla. Mar. 24, 2011). The court concluded that the compounds released by the drywall were "pollutants" within the plain meaning of that term. In so ruling, the court rejected the argument that the vapors emitted from the drywall could not be pollutants because they were "naturally occurring elements." Citing a Florida Supreme Court case, the court also rejected the homeowners' contention that the pollution exclusion applied only to environmental or industrial pollution and/or was ambiguous in this respect.

Foster joins a growing number of decisions issued in the defective drywall context relating to the applicability of pollution exclusion clauses. As discussed in our July/August 2010 Alert, a Virginia district court relied on the pollution exclusion (as well as several other exclusions) to deny coverage for drywall-related claims. *Travco Ins. Co. v. Ward*, 715 F. Supp.2d 699 (E.D. Va. 2010). Conversely, a few other courts have ruled that the pollution exclusion does not apply to claims arising out of defective drywall. *See In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 2010 WL 5288032 (E.D. La. Dec. 16, 2010) (declining to apply pollution exclusion, but nonetheless barring coverage pursuant to the faulty materials and corrosion exclusions) (discussed in January 2011 Alert); *Finger v. Audubon Ins. Co.*, 2010 WL 1222273 (La. Civ. Dist. Ct. Mar. 22, 2010) (declining to apply pollution exclusion to drywall claims) (discussed in April 2010 Alert). Further judicial guidance is anticipated: *Travco* is on appeal

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to the Fourth Circuit, and a federal district court in Virginia has certified to the Virginia Supreme Court the question of whether pollution exclusions bar coverage for damages caused by defective drywall. *Nationwide Mut. Ins. Co. v. The Overlook, LLC,* No. 4:10cv69 (E.D. Va. Apr. 12, 2011) (order of certification). In addition, an insurer has recently moved for summary judgment in a coverage dispute in Florida, arguing that a pollution exclusion bars coverage for all drywall-related claims, thereby eliminating any duty to defend or indemnify the insured drywall supplier in several pending class action suits. *Auto-Owners Ins. Co. v. Am. Bldg. Materials, Inc.,* No. 8:10-cv-313-T24-AEP (M.D. Fla. filed Apr. 20, 2011).

Coverage Alerts:

Fifth Circuit Affirms Jury Instruction on Definition of "Occurrence" in Faulty Workmanship Context

In a dispute raising the issue of whether faulty workmanship constitutes a covered "occurrence," the Fifth Circuit upheld jury instructions which appeared to favor a broad reading of the term "occurrence." *Maryland Cas. Co. v. Acceptance Indem. Ins. Co.,* 2011 WL 1534373 (5th Cir. Apr. 25, 2011). The case arose out of a contractor's claim for coverage for property damage caused by the negligent construction of a swimming pool. The pool contractor sought coverage for the damage from two general liability insurers. One insurer agreed to defend and ultimately settled the underlying lawsuit. That insurer then sought reimbursement from the non-participating insurer, and the question of whether the property damage was caused by an "occurrence" (and which policies were triggered by any such occurrence) was sent to a jury. The district court provided the following jury instruction regarding the meaning of the term "occurrence": *"A deliberate act, performed negligently, is an accident if the effect is not the intended or expected result."* The district court declined to include additional explanatory language proposed by Acceptance, which provided that *"[a]n occurrence is not an accident if circumstances confirm that the resulting damage was the natural and expected result of the insured's actions, that is, was highly probable whether the insured was negligent or not."*

The Fifth Circuit held that the jury instructions given were not clearly erroneous, and that the district court did not abuse its discretion by excluding Acceptance's additional instruction. As we have discussed in numerous Alerts, there are conflicting precedents on whether and under what circumstances faulty workmanship constitutes an occurrence. In recent decisions issued by the Supreme Courts of Mississippi, South Carolina, and Georgia (highlighted in our April 2010, February 2011 and April 2011 Alerts, respectively), the courts held that the question of whether faulty workmanship constitutes an occurrence turns, in part, on whether the resulting property damage was an unintended or unexpected consequence of the negligence.

New York Court of Appeals Rules That Intentional Acts May Constitute an "Accident" from Insured's Perspective

A divided New York Court of Appeals ruled that the victim of an intentional crime was entitled to

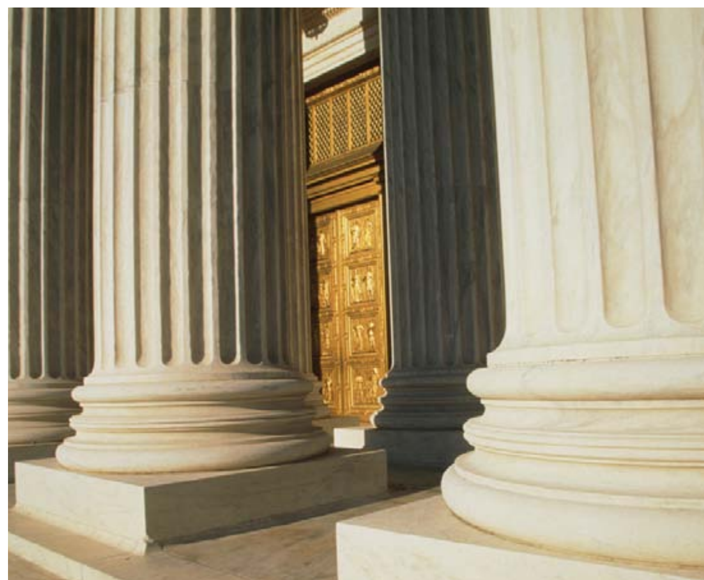
coverage under his automobile liability policy because from the victim's perspective, the event was accidental. *State Farm Mut. Auto. Ins. Co. v. Langan*, 2011 WL 1118579 (N.Y. Mar. 29, 2011).

The deceased victim was struck by a car which was intentionally driven into a group of pedestrians. The driver of the car admitted that he intended to cause the victim's death and pled guilty to second degree murder. The administrator of the decedent's estate sought coverage under the underinsured motorist ("UM") provision of the decedent's automobile policy, which provided benefits for injury caused by "an accident." The insurer denied coverage, arguing that the decedent's death was caused by intentional conduct rather than an accident. The trial court agreed and granted the insurer's motion for summary judgment. The appellate division affirmed the ruling in part, but held that coverage was due under other endorsements. Both parties appealed, and the New York Court of Appeals affirmed that coverage was due under both the UM provision and the other endorsements.

The central issue before the Court of Appeals was whether the decedent's injuries were caused by an "accident"—a term undefined in the policy. The court acknowledged that whether an event constitutes an accident is typically determined from the point of view of the insured, rather than the injured party. Here, however, the injured party was also the insured. As such, the court concluded that the decedent/insured's perspective governed the analysis, and therefore the event constituted an unexpected and unintended accident. The court stated, "[T]he intentional assault of an innocent insured is an accident within the meaning of his or her own policy." The court distinguished cases in which the insured is the tortfeasor rather than the victim—circumstances in which public policy might militate against providing coverage. According to the court, its ruling comports with "the national trend toward allowing innocent insureds to recover uninsured motorist benefits under their own policies when they have been injured through the intentional conduct of another."

Second Circuit Interprets "Arising out of" Narrowly, Rejecting Coverage Claim under Additional Insured Provision

Reversing a New York federal district court decision, the Second Circuit ruled that additional insured provisions in several general and umbrella liability policies did not entitle a tortfeasor to obtain coverage where the tortfeasor's conduct, although related to the operations of the primary insured, did not "arise out of" those operations. *Federal Ins. Co. v. Am. Home Assurance Co.*, 2011 WL 1312188 (2d Cir. Apr. 7, 2011).



AAA Mid-Atlantic ("AAAMA") is an independently-operated automobile club that responds to roadside assistance phone calls from members of the American Automobile Association ("AAA"). In the course of responding to one such call, a tow truck driver dispatched by AAAMA was involved in a collision, causing severe injuries to another driver. A suit by the driver against AAAMA resulted in a $27.25 million settlement. Federal Insurance Company, AAAMA's general liability insurer, funded the settlement and then filed a declaratory judgment action against AAA's insurers. Federal argued that AAA's insurers were obligated to contribute to the settlement pursuant to

the "additional insured" provisions in those policies. In particular, Federal argued that the injuries sustained in the car accident "arose out of" AAA's operations within the meaning of the additional insured clauses, thereby triggering coverage under AAA's policies. The district court agreed and held that the settlement amount was subject to equitable contribution between AAAMA's insurer and AAA's insurers. In reaching its decision, the district court found that AAA's national operations "include a level of emergency roadside oversight and coordination that is, at the very least, 'connected to' the [ ] accident and AAAMA's liability."

Applying New York law, the Second Circuit reversed, holding that the district court misapplied the additional insured policy language to the facts at issue. The Second Circuit explained that AAA's activities were largely unrelated to the automobile accident. Unlike AAAMA and other regional providers of emergency roadside services, AAA is a not-for-profit national organization engaged exclusively in administrative functions, such as the accreditation of members and the issuance of manuals and standards. These activities, the Second Circuit concluded, have no causal connection to the injuries sustained in the car accident.

Federal represents a stringent interpretation of the "arising out of operations" language found in many additional insured provisions. In support of its reasoning, the Second Circuit cited to several other New York decisions which have denied additional insured coverage on the grounds that there was no causal relationship between the injury at issue and the risk for which additional insured coverage was provided. Courts in other jurisdictions have held that the "arising out of" standard is met so long as there is some causal nexus between the primary insured's operations and the injuries sustained.

Regulatory Alert:
Two Federal Courts Address Scope of Filed Rate Doctrine

A New Jersey district court and the Tenth Circuit recently issued decisions addressing the application of the filed rate doctrine to fraud-based claims against insurance companies. As a general matter, the filed rate doctrine provides that any rate approved by a governing regulatory agency is "per se reasonable and unassailable in judicial proceedings brought by ratepayers." As evidenced by these decisions, the parameters of the filed rate doctrine vary by jurisdiction.

Applying New Mexico law, the Tenth Circuit applied the filed rate doctrine to dismiss a putative class action suit against several title insurance companies. *Coll v. First Am. Title Ins. Co.,* 2011 WL 1549233 (10th Cir. Apr. 26, 2011). The complaint alleged, among other things, that the defendants conspired with the state superintendent of insurance to establish unreasonably high premium rates for title insurance. The Tenth Circuit held that because the premium rates at issue were set by the superintendent of insurance, the doctrine squarely applied. The court explained that allegations of bribery of and conspiracy with state officials in setting the rate were irrelevant, because New Mexico has not endorsed a fraud exception to the filed rate doctrine. The filed rate doctrine applies when a judicial ruling on the claims will impact agency procedures and rate determinations, regardless of the particular underlying conduct alleged. In reaching its decision, the court noted that although the New Mexico filed rate doctrine precludes monetary damage claims for already-charged rates, it would not necessarily prevent (1) challenges to the reasonableness of rates through appropriate administrative processes, or (2) injunctive relief, to the extent that such relief would not implicate the reasonableness of the approved rates.

In contrast to the Tenth Circuit, a federal court in New Jersey applied the filed rate doctrine to bar some, but not all fraud-based claims against an insurance company. *Clark v. Prudential Ins. Co. of Am.,* 2011 WL

940729 (D.N.J. Mar. 15, 2011). Here, the putative class action suit alleged that the insurer failed to inform policyholders that it had ceased writing certain medical policies—a decision that would ultimately result in a "death spiral"—repeated cycles of increasing premiums and decreasing numbers of healthy policyholders. In a decision issued last year (and discussed in our October 2010 Alert), *Clark* held that New Jersey's filed rate doctrine barred these fraud and bad faith claims because the alleged non-disclosure related directly to the setting of the premiums. *Clark v. Prudential Ins. Co. of Am.*, 736 F. Supp.2d 902 (D.N.J. 2010).

In a decision issued last month, the *Clark* court addressed the filed rate doctrine under the laws of New York, Ohio and Texas. With respect to New York law, the court found that New York endorses the same application of the filed rate doctrine as New Jersey. Citing to its previous decision, the court dismissed the New York claims. As to Clark's Texas and Ohio claims, the court reached a contrary conclusion. The court held that the Texas filed rate doctrine did not apply because although the heath insurance rates at issue were filed with the Texas Department of Insurance, the Department had no statutory authority to approve or reject the rates. With respect to Ohio law, the court noted that Ohio has not broadly embraced the filed rate doctrine and that "the Ohio doctrine does not appear to bar claims based on misrepresentations or omissions by a defendant."

Subrogation Alert:

Limiting Texas Precedent, Fifth Circuit Affirms Pro Rata Allocation of Defense and Settlement Costs between Co-Insurers Based on Contractual Subrogation

In a 2007 ruling, the Texas Supreme Court held that an insurer may not bring a subrogation claim against a co-primary insurer for reimbursement of settlement costs where the insured had been fully indemnified. *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.,* 236 S.W.3d 765 (Tex. 2007). In recent years, several district courts and the Fifth Circuit have chipped away at *Mid-Continent*, allowing subrogation claims between co-insurers under various circumstances:

- *In Amerisure Ins. Co. v. Navigators Ins. Co.,* 611 F.3d 299 (5th Cir. 2010), the Fifth Circuit held that although the insured had been fully indemnified, contractual subrogation was appropriate where one insurer had denied coverage altogether. The court distinguished *Mid-Continent* by noting that both insurers participated in the settlement and the subrogation claim was based on an alleged disproportionate contribution by one insurer. In contrast, in *Amerisure*, one insurer refused to indemnify altogether.

- *In Employers Ins. Co. of Wausau v. Penn-America Ins. Co.,* 705 F. Supp.2d 696 (S.D. Tex. 2010), the court held that *Mid-Continent* did not bar subrogation claims by an insurer of one tortfeasor against the insurer of a joint tortfeasor. Citing several Texas district court opinions issued in the wake of *Mid-Continent*, the court emphasized that *Mid-Continent* is a ruling that "is limited to its facts."

- *In Trinity Universal Ins. Co. v. Employers Mut. Cas. Co.,* 592 F.3d 687 (5th Cir. 2010), the Fifth Circuit held that *Mid-Continent's* subrogation ruling was inapplicable to an insurer's claim for

reimbursement of defense costs from a co-insurer who violates its duty to defend.

Most recently, the Fifth Circuit held that an insurer could pursue contractual subrogation to obtain pro rata allocation of defense and settlement costs from a non-participating co-insurer. *Maryland Cas. Co. v. Acceptance Indem. Ins. Co.*, 2011 WL 1534373 (5th Cir. Apr. 25, 2011). The policyholder had tendered certain property damage claims to Maryland Casualty Company and Acceptance Indemnity Insurance Company, both of which had issued commercial general liability policies during the relevant time frame. Maryland agreed to provide a defense, but Acceptance refused to defend. Maryland ultimately settled the lawsuit in exchange for a full release of liability, and then filed suit against Acceptance, seeking a declaration that Acceptance had a duty to defend and indemnify the contractor, and a pro rata share of the defense and settlement costs under theories of contribution, and contractual and equitable subrogation. The district court ruled as a matter of law that Acceptance had a duty to defend and was thus required to reimburse Maryland a pro rata portion of the defense costs. The subrogation claim for settlement costs was sent to a jury, which concluded that 75% of the settlement amount paid by Maryland was attributable to damage that occurred during the Acceptance policy periods. Acceptance appealed the jury verdict, arguing that *Mid-Continent* prevented Maryland from pursuing a subrogation claim because the policyholder had been fully indemnified.

On appeal, the Fifth Circuit upheld the validity of Maryland's subrogation claim. Citing to *Amerisure*, the Fifth Circuit held that *Mid-Continent* did not bar contractual subrogation after the insured had been fully indemnified where one insurer had denied coverage altogether. And citing to *Trinity*, the court ruled that *Mid-Continent* did not eradicate Maryland's entitlement to reimbursement of defense costs. It remains to be seen whether the Fifth Circuit and federal Texas courts will continue to interpret *Mid-Continent* in a limited manner and allow subrogation claims to proceed in various contexts. Insurance-related subrogation claims appear to be proliferating across all jurisdictions, and we will continue to monitor noteworthy rulings and their potential impact.

Settlement Alert:

North Carolina Appellate Court Upholds Enforcement of Oral Settlement and Sanctions against Insurer

Sending a strong warning that it will enforce agreements reached at mediation, a North Carolina appellate court ruled that (1) an insurer was bound by an oral settlement agreement reached in mediation, despite a dispute as to whether the agreement was absolute or contingent, and (2) sanctions against the insurer were appropriate, based on the insurer's failure to send to the settlement conference a representative with decision-making authority. *SPX Corp. v. Liberty Mut. Ins. Co.*, 2011 WL 1238310 (N.C. Ct. App. Apr. 5, 2011).

The appeal arose from a coverage litigation concerning the deductibles that SPX Corporation would be required to pay under Liberty Mutual's policies. In an attempt to resolve this dispute, SPX and Liberty Mutual participated in mediation with

the presiding judge serving as mediator. After three days of mediation, the parties believed they had reached an agreement. Liberty Mutual's counsel understood the agreement to be conditioned on its client's approval of an annual cap on deductibles. SPX, however, understood the agreement to be absolute. The "agreement" was neither written nor announced in open court. Approximately one month after the mediation, Liberty Mutual informed SPX that there was no agreement because its management did not approve of the annual cap. Following a hearing on the matter, the court ordered the settlement enforced and sanctioned Liberty Mutual by dismissing its defenses related to policy deductibles. The court also denied Liberty Mutual's motion to disqualify the judge based on his role as mediator. Liberty Mutual appealed, and the North Carolina appellate court affirmed on all grounds.

As a preliminary matter, the appellate court rejected Liberty Mutual's argument that only written settlement agreements are enforceable under North Carolina statutory law. The court explained that the relevant statute, N.C.G.S. § 7A-38.1, applied only to "court-ordered mediation" and not to settlement conferences conducted by the trial court as part of its inherent case management authority. The court held that several technical requirements set forth in the statute were not satisfied. The court discounted its prior references to the process as "court-ordered mediation," stating "a slip of the tongue or misnomer cannot overcome statutory requirements and transform a settlement conference into a court-ordered mediation under [the statute]."

The appellate court also held that: (1) the trial court did not err in considering statements made at mediation to find that an oral settlement agreement was reached, despite the parties' stipulation that all evidence produced at mediation would be confidential and inadmissible, because Liberty Mutual itself relied on statements made during mediation in arguing that the settlement was contingent; (2) the trial court did not improperly use personal knowledge gained during the mediation to resolve disputed factual issues; (3) the trial judge did not abuse his discretion in refusing to recuse himself in light of personal knowledge about disputed factual issues; and (4) the trial court did not err in imposing sanctions on Liberty Mutual for "inappropriate negotiating conduct." On this last issue, the court emphasized that the parties' mediation stipulations explicitly required participants to have authority to settle the dispute. The court held that Liberty Mutual's violation of this requirement justified the imposition of sanctions.

SPX confirms that parties should carefully review mediation orders and stipulations and be vigilant about complying with their terms. It also suggests that it is prudent for parties to develop a complete understanding of state law bearing on the enforcement of oral and contingent settlement agreements prior to engaging in mediation.

Privilege Alert:

Attorney-Client Privilege May Not Be Invoked to Prevent Transfer of Documents from Absorbed Company to Surviving Company after Merger

Insurance coverage disputes, particularly those involving longtail claims, can present privilege issues that are complicated by a party's corporate history. It is often unclear whether a party "owns" and is in a position to assert privilege, given the company's prior asset sales or mergers and acquisitions.

A recent Oklahoma Supreme Court decision provides some guidance on this issue. In *Girl Scouts-Western Oklahoma, Inc. v. Barringer-Thomson,* 2011 WL 1159139 (Okla. Mar. 29, 2011), the Oklahoma Supreme Court evaluated whether the ownership of an absorbed company's assets, including its attorney-client privilege, transferred to the surviving company as a result of the corporate merger. After the merger, the attorney who had represented the merged

company declined to turn over certain documents to the surviving company, claiming that the materials were protected by attorney-client and work-product privilege. Rejecting this argument, the court held that any privilege vis-à-vis the documents transferred to the surviving company as a result of the merger agreement, which provided that "all of the assets, properties, rights, privileges, immunities, powers and franchises" of the merged company shall vest in the surviving entity. The merger agreement did not "restrict or exclude" any documents or files from the agreement, the court observed. This ruling, along with two analogous New York Court of Appeals decisions cited by the *Girl Scouts* court, illustrates that privilege calls may swing, in part, on the terms and conditions of global merger agreements.

Arbitration Alerts:

United States Supreme Court Holds That Federal Arbitration Act Preempts State Law That Requires Availability of Class Arbitration

On April 27, 2011, the United States Supreme Court issued a much anticipated ruling in *AT&T Mobility LLC v. Concepcion,* 2011 WL 1561956 (U.S. Apr. 27, 2011), a case involving the validity of class action waivers in consumer contracts which also contain mandatory arbitration provisions. Abrogating a substantial body of California case law, the Court ruled that an arbitration agreement precluding class arbitration is valid, and that a state law finding such an agreement to be unconscionable was preempted by the Federal Arbitration Act. The Supreme Court's decision casts doubt on the continued vitality of *In re American Express Merchs.' Litig.,* 634 F.3d 187 (2d Cir. 2011) (discussed in our April 2011 Alert), in which the Second Circuit held that a mandatory arbitration clause that includes a class action waiver was unenforceable as against public policy where the practical effect of the waiver would be to preclude recovery under the contract. For a full discussion of the Supreme Court's *Concepcion* decision, please click here.

Arbitrator Disqualification Dispute Subject of Supreme Court Petition

In prior Alerts, we have discussed a variety of recent decisions addressing the standards for arbitrator disqualification. (See March 2010 Alert, April 2010 Alert, December 2010 Alert, and February 2011 Alert.) Our March 2011 Alert highlighted *Trustmark Ins. Co. v. John Hancock Life Ins. Co.,* 631 F.3d 869 (7th Cir. 2011), in which the Seventh Circuit reversed a district court order enjoining the continuation of reinsurance arbitration proceedings because a party-appointed arbitrator had violated a confidentiality agreement executed by the parties (and by the arbitrator) in a prior related arbitration and was thus no longer "disinterested." The Seventh Circuit held that consideration of the arbitrator's disinterestedness should not have been resolved prior to the issuance of a final arbitration award, and that in any event, there was no evidence that the arbitrator was, in fact, disinterested. On April 6, 2011, Trustmark filed a writ of certiorari with the United States Supreme Court, seeking a reversal of the Seventh Circuit's order.

Trustmark's petition argues that the question of whether the arbitrator violated the confidentiality agreement must be decided by a court of law, rather than the arbitration panel because the confidentiality agreement did not contain an arbitration clause. The petition also argues that Trustmark will suffer irreparable harm if it is required to await a post-arbitration review of the panel's decisions.

Simpson Thacher News Alerts:

Mary Kay Vyskocil spoke at the 18th Annual Insurance Insolvency & Reinsurance Roundtable on March 31, 2011 in Phoenix. Mary Kay's panel presentation discussed damages and liability updates, coverage complications, and privilege and confidentiality issues in the context of the Gulf of Mexico oil spill.

Mary Beth Forshaw spoke at the Defense Research Institute's annual Insurance Coverage and Claims conference on April 1, 2011. Mary Beth's presentation addressed coverage issues that arise in the wake of mass product recalls.

Bryce Friedman was named by *Law360* as one of the top "five insurance lawyers under 40 to watch." A March 28, 2011 article detailed Bryce's accomplishments in several matters, including whistleblower litigation in Louisiana district court and the Fifth Circuit following Hurricane Katrina.

Lynn Neuner was honored by *The American Lawyer* as one of the top "45 under 45" women lawyers in The Am Law 200 firms. The publication acknowledged Lynn as "an eloquent oral advocate and master of the facts and the law."

Chet Kronenberg published an article discussing coverage issues that arise in the context of dry cleaner contamination suits in the May 2011 edition of the *Insurance Coverage Law Bulletin*. Click here to read the full article.

Joseph McLaughlin published an article in the *New York Law Journal Online* entitled, "Insurance for Attorney's Fees in Derivative and Class Actions." The April 14, 2011 article discusses D&O insurance coverage issues relating to payment of plaintiffs' legal fees in shareholder derivative suits. Click here to read the full article.

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—Chambers USA 2010, Litigation: New York, quoting a client

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