SIMPSON THACHER

# INSURANCE LAW ALERT

OCTOBER 2011

This Alert addresses three significant highest state court decisions—one by the Virginia Supreme Court finding no coverage under general liability policies for global warming claims, another by the Delaware Supreme Court regarding the validity of stranger-originated life insurance transactions, and one by the Vermont Supreme Court upholding pro rata allocation. We also address decisions relating to general liability coverage for fax blasting and drywall claims and rulings relating to the "follow the settlements" doctrine and excess directors and officers liability insurance coverage. Further, we address a recent decision in which a Delaware bankruptcy court modified a settlement between a policyholder-debtor and its insurers. Finally, we highlight recent legal developments that may affect the practice of insurance-related and other litigation.

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- ***Virginia Supreme Court Finds No Coverage for Global Warming Claims***

  The Supreme Court of Virginia held that an insurer did not owe defense or indemnity under comprehensive general liability policies for global warming-related claims because the underlying complaint did not allege an "occurrence." *AES Corp. v. Steadfast Ins. Co.*, 2011 WL 4139736 (Va. Sept. 16, 2011). *Click here for full article*

- ***Eighth Circuit Rejects Reinsurer's Challenge to "Follow the Settlements" Clause***

  The Eighth Circuit held that a reinsurance treaty contained a "follow the settlements" clause and, thus, that the reinsurer was required to reimburse the ceding insurer for settlement amounts paid to underlying policyholders. *Employers Reinsurance Co. v. Mass. Mut. Life Ins. Co.*, 2011 WL 3903244 (8th Cir. Sept. 7, 2011). *Click here for full article*

- ***Delaware Bankruptcy Court Finds Insurers Must Honor Settlement Despite Pending Appeals***

  A bankruptcy court in Delaware declined to enforce a finality provision in a settlement agreement and required insurers to immediately pay a settlement, finding that an appeal regarding the policyholder-debtor's reorganization plan would have no effect on the settlement. *In the Matter of Catholic Diocese of Wilmington, Inc.*, 2011 WL 3903244 (Bankr. D. Del. Sept. 9, 2011). *Click here for full article*

- ***Delaware Supreme Court Sets Parameters for Stranger-Originated Life Insurance Transactions***

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- ***Vermont Supreme Court Upholds Pro Rata Allocation***

  In an environmental contamination action, the Supreme Court of Vermont held that allocation of multiple general liability insurers' indemnity obligations must be determined on a pro rata, time-on-the-risk basis. *Bradford Oil Co., Inc. v. Stonington Ins. Co.*, 2011 WL 3962914 (Vt. Sept. 9, 2011). *Click here for full article*

- ***Two More Courts Weigh in on Whether Fax Blasting Claims Constitute "Advertising Injury" and Allege "Occurrences"***

  Two federal district courts reached conflicting conclusions as to whether general liability polices provide coverage for fax blasting claims brought under the Telephone Consumer Protection Act (TCPA). *Owners Ins. Co. v. European Auto Works, Inc.*, 2011 WL 3847469 (D. Minn. Aug. 30, 2011); *Maryland Casualty Co. v. Express Products, Inc.*, 2011 WL 4402275 (E.D. Pa. Sept. 22, 2011). *Click here for full article*

- ***Ohio Court Rules That Payment of Full Primary Policy Limits Is Condition Precedent to Excess Coverage***

  An Ohio court held that where a policyholder agreed to a settlement with its primary insurer for an amount less than the primary policy limits, the policyholder could not access excess coverage. *Goodyear Tire & Rubber Co. v. National Union Ins. Co.*, No. 5:08CV1789 (N.D. Ohio Sept. 19, 2011). *Click here for full article*

- ***Virginia Court Rules That Pollution Exclusion Bars Coverage for All Drywall-Related Claims***

  A Virginia court ruled that pollution exclusions in general liability policies bar coverage for all claims arising out of the installation of defective drywall. *See Evanston Ins. Co. v. Harbor Walk Dev., LLC*, 2011 WL 4495686 (E.D. Va. Sept. 9, 2011). *Click here for full article*

- ***Judiciary Heightens Standards for Filing Cases Under Seal***

  The U.S. Judicial Conference advises federal courts to limit instances in which they seal the entire file of a civil case. *Click here for full article*

- ***American Bar Association Directs Attorneys to Warn Clients about Confidentiality Concerns Related to E-Mail Communications***

  A formal opinion issued by the American Bar Association states that attorneys who engage in electronic mail communications with their clients must warn clients about the confidentiality-related risks of using employer-owned computers or other communication devices issued by employers. *Click here for full article*

# Climate Change Alert:

## *Virginia Supreme Court Finds No Coverage for Global Warming Claims*

In what appears to be the first ruling of its kind nationwide, the Supreme Court of Virginia held that an insurer did not owe defense or indemnity under comprehensive general liability policies for global warming-related claims because the underlying complaint did not allege an "occurrence." *AES Corp. v. Steadfast Ins. Co.*, 2011 WL 4139736 (Va. Sept. 16, 2011).

The coverage case arose from the much-cited *Kivalina* action (currently on appeal to the Ninth Circuit), in which an Eskimo village sued AES Corp., a Virginia-based energy company, and other energy companies for alleged property damage to the village arising from global warming caused by the defendants' emission of greenhouse gases. The *Kivalina* complaint alleged that AES "intentionally or negligently" created a nuisance.

Steadfast, AES's general liability insurer, defended AES under a reservation of rights, and filed a declaratory judgment action to determine its obligations under the policies. Steadfast's principal argument was that the underlying complaint did not allege an "occurrence," contending that despite utilization of the term "negligence" in the underlying complaint, the property damage purportedly caused by AES could not be considered accidental. Both Steadfast and AES moved for summary judgment, and the circuit court issued a summary ruling in favor of Steadfast.

The Virginia Supreme Court affirmed, holding that Steadfast had no duty to defend the global warming suit. The court based its decision on a comparison of the complaint with the definition of "occurrence" in the insurance policies. The policies defined "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful condition." The *Kivalina* complaint alleged that AES intentionally released greenhouse gases into the atmosphere as part of its routine business operations, and that AES knew or should have known the damage that its emissions activities would cause. The complaint further alleged that there is a clear consensus that the natural and probable consequence of such emissions is global warming and damages such as Kivalina suffered. The court held that even if AES "did not intend to cause the damage that occurred, the gravamen of Kivalina's nuisance claim is that the damages it sustained were the natural and probable consequence of AES's intentional emissions." As such, these alleged damages cannot constitute an occurrence because they are not "the result of a fortuitous event or accident." Given the significance of the *AES* ruling, review by the U.S. Supreme Court may be sought. We will continue to monitor this and other related cases in this emerging context.

This edition of the Insurance Law Alert was prepared by Chet A. Kronenberg (ckronenberg@stblaw.com/310-407-7557) and Elisa Alcabes (ealcabes@stblaw.com/212-455-3133).

## Reinsurance Alert:

### *Eighth Circuit Rejects Reinsurer's Challenge to "Follow the Settlements" Clause*

The Eighth Circuit held that a reinsurance treaty contained a "follow the settlements" clause and, thus, that the reinsurer was required to reimburse the ceding insurer for settlement amounts paid to underlying policyholders. *Employers Reinsurance Co. v. Mass. Mut. Life Ins. Co.*, 2011 WL 3903244 (8th Cir. Sept. 7, 2011).

The reinsurance treaty at issue covered losses sustained by the ceding insurer under a class of disability policies. The reinsurer sought recoupment from the cedent for certain claims the reinsurer had indemnified, alleging that the cedent had mishandled the claims and that the reinsurer had reimbursed claims that were not covered under the treaty. The cedent denied the request for recoupment, citing the "follow the settlements" clause. The reinsurer then filed suit against the cedent, alleging breach of contract and a violation of the duty of good faith and fair dealing. Shortly after filing the action, the reinsurer ceased reimbursing the cedent for all claims under the treaty.

Applying Connecticut law, the Eighth Circuit concluded that the treaty contained a "follow the settlements" clause that required the reinsurer to indemnify the cedent for all reasonable, good faith settlements. Although the contract did not contain a specific "follow the settlements" clause, the court reasoned that treaty provisions requiring the reinsurer to "indemnify [the cedent] against the part of such loss indicated in [the treaty]" and to "reimburse [the cedent] promptly for loss against which indemnity is herein provided" constituted a "follow the settlements" provision. The court sidestepped the issue of whether a "follow the settlements" (or "follow the fortunes") clause is implied in a reinsurance contract as a matter of law.

Having determined that the treaty contained a "follow the settlements" provision, the court concluded that the reinsurer was obligated to reimburse the

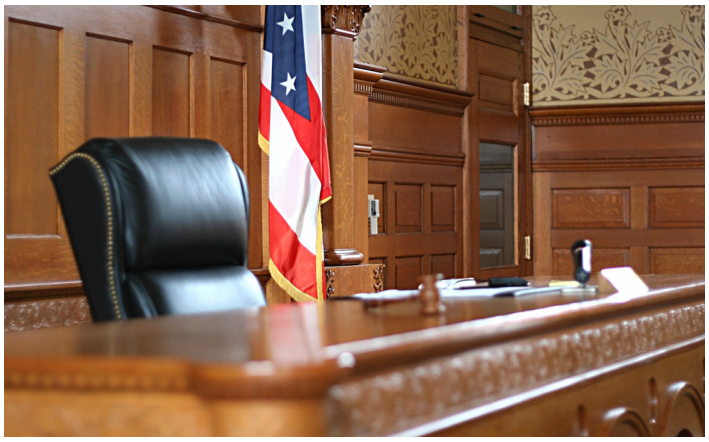
cedent for good faith, reasonable settlements paid pursuant to the disability policies. The court further held that by withholding reimbursements during the course of litigation, the reinsurer breached the treaty (and the duty of good faith and fair dealing). As *Employers Reinsurance* illustrates, courts may strictly enforce the "follow the settlements" doctrine, affording reinsurers limited opportunity to challenge a cedent's settlement decisions.

## Bankruptcy Alert:

### *Delaware Bankruptcy Court Finds Insurers Must Honor Settlement Despite Pending Appeals*

A bankruptcy court in Delaware declined to enforce a finality provision in a settlement agreement and required insurers to immediately pay a $15 million settlement, finding that an appeal regarding the policyholder-debtor's reorganization plan would have no effect on the insurance settlements. *In the Matter of Catholic Diocese of Wilmington, Inc.*, 2011 WL 3903244 (Bankr. D. Del. Sept. 9, 2011). The settlement, in which the bankrupt church released its insurers from any liability for claims of sexual abuse by clergy members in exchange for a $15 million payment, required that the reorganization plan be outside the reach of an appeals court prior to payment. The insurers argued

that a challenge to the plan filed by two defrocked priests constituted a valid basis for delaying payment of the settlement. In particular, the insurers argued that the pending appeals raised the possibility that confirmation of the plan would be reversed, thereby leaving the insurers vulnerable to lawsuits by abuse victims despite having paid the settlement. The debtor refuted the insurers' argument, noting that the plan would be going effective despite the pendency of the appeals and that the equitable mootness doctrine in the Third Circuit is clear. The debtor also argued that if the appellate courts were inclined to do anything with the confirmation order, they would "use a scalpel" and deal with the narrow issue on appeal. The court agreed. The court found that the insurers were asserting form over substance, noting that the pending appeal addressed a narrow issue unrelated to the insurance settlements and that any appellate ruling would have no impact on consummation of the plan. Ordering the insurers to make full payment within seventeen days of the bench ruling, the court reasoned that the scenario posited by the insurers was "extremely unlikely" and that any further delay of



payment to the abuse victims would "inflict significant, perhaps irrevocable harm." Citing the doctrine of "disproportionate forfeiture," the court held that the insurers' obligation to fund the settlement only upon entry of a final confirmation order "is overwhelmingly outweighed by the harm that would occur in this case, were the Court to uphold that provision of the contracts."

# Life Insurance Alert:

## *Delaware Supreme Court Sets Parameters for Stranger-Originated Life Insurance Transactions*

On September 20, 2011, the Delaware Supreme Court answered three certified questions relating to the "insurable interest" requirement of a life insurance policy under Delaware statutory and common law. *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust*, 2011 WL 4360034 (Del. Sept. 20, 2011). The case arose when an insurance company contested the validity of a life insurance policy that had been issued to a trust formed by the insured individual, and then transferred to a private investing entity. The insurer alleged that because the investment company had no insurable interest in the individual's life, the policy was void as an illegal wager on human life. The district court overseeing the case denied the trust's motion to dismiss and certified three questions to the Delaware Supreme Court.

The first question was whether Delaware law permits an insurer to challenge the validity of a life insurance policy based on a lack of insurable interest after the expiration of the two-year contestability period required by Delaware statutory law. The court answered this question in the affirmative. The court explained that because a life insurance policy that lacks an insurable interest at inception is void *ab initio*, and thus never came into force in the first place, the incontestability provision is inapplicable.

The second question was whether Delaware's statutory insurance interest requirement is violated where the insured procures a life insurance policy with the intent to immediately transfer the benefit to an individual or entity lacking an insurable interest. The court answered this question in the negative, so long as the policy is not a mere cover for an illegal wager on human life. The court explained that it would be unlawful for a third party having no insurable interest to use the insured as a "straw man" to procure a life insurance policy. However, Delaware law does not prohibit the insured from subsequently

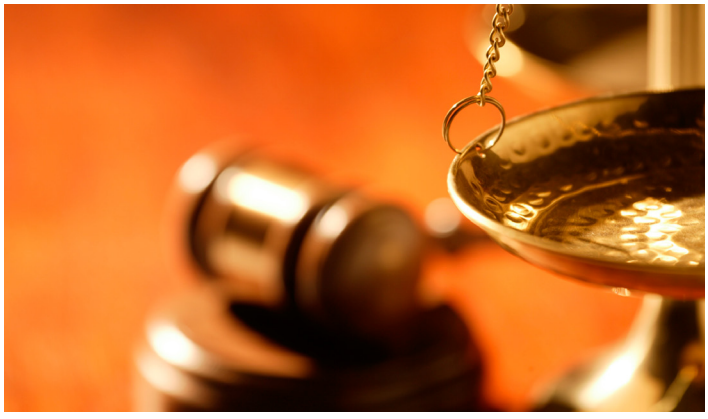
selling or transferring a lawfully-procured policy. As the court noted, this standard necessitates case-by-case factual inquiries relating to the circumstances under which the policy was issued, including for example, the identity of the party paying the premiums.

The third question was whether a trustee of a Delaware trust, established by an individual insured, has an insurable interest in the life of that individual when, at the time the policy was procured, the insured intended to transfer the interest in that trust to a third party investor with no insurable interest. The court answered this question in the affirmative, so long as the insured actually established the trust. The court stated, "a trust has an insurable interest in the life of the person who established—*created and initially funded*—the trust without regard to whether the beneficial interest in the trust is subsequently sold or transferred." The court warned, however, that the insurable interest requirement is not satisfied where the trust is created through "nominal funding as a mere formality."

## Allocation Alert:
### *Vermont Supreme Court Upholds Pro Rata Allocation*

In an environmental contamination action, the Supreme Court of Vermont held that allocation of multiple general liability insurers' indemnity obligations must be determined on a pro rata, time-on-the-risk basis. *Bradford Oil Co., Inc. v. Stonington Ins. Co.*, 2011 WL 3962914 (Vt. Sept. 9, 2011). The court rejected the argument that each insurer on the risk should be jointly and severally liable for all costs up to its policy limits, with the right to obtain contribution from other insurers and/or the insured for uninsured periods. The court held that occurrence-based policies, which provide coverage only for damage that occurs "during the policy period," mandate pro rata allocation for continuous or progressive damage spanning multiple policy periods. In so ruling, the court rejected the argument that the insurers' liability should follow the policyholder's liability, which here was joint and several under applicable state cleanup statutes. As the court noted, insurer liability turns on policy language, not on the nature of underlying claims against the policyholder. The court also rejected a "reasonable expectations" argument, explaining that even assuming the reasonable expectations doctrine applied, the unambiguous policy language eliminated any expectation that a single carrier would cover all losses caused by contamination occurring over the course of two decades. Finally, the court found unpersuasive the argument that pro rata allocation should not apply where the plaintiff in the insurance litigation is the State, rather than the policyholder (as was the case here). Regardless of the State's statutory right to recover cleanup costs from insurers, the State's rights against the insurers are limited by policy language.

Ruling on a related issue, the court also held that pro-ration to the policyholder was appropriate for any periods in which the policyholder lacked collectible insurance, regardless of the reason underlying the absence of insurance. The court held that it would be unreasonable to place on the insurer the burden of "showing the presence and availability of other insurance and [the policyholder]'s reasons for its actions." While some courts have focused on the reasons for any gap in insurance (e.g., insurer insolvency, lost policy, or decision to self-insure), the Vermont Supreme Court held that the reason for an absence of insurance in any given time period is irrelevant under a time-on-the-risk allocation scheme.

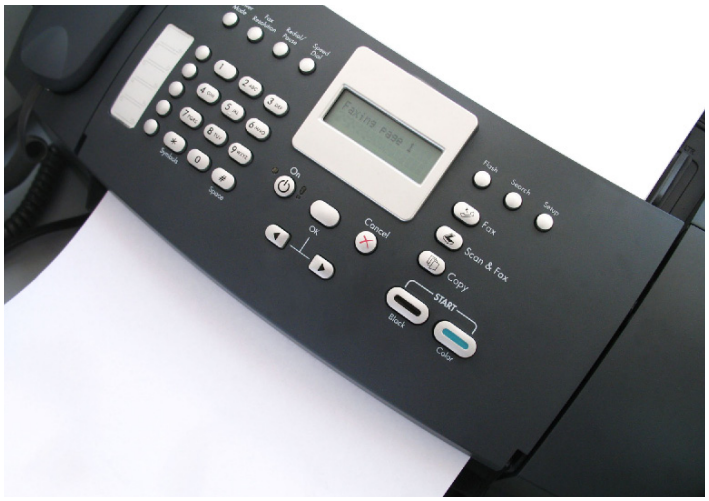


# COVERAGE ALERT:

## *Two More Courts Weigh in on Whether Fax Blasting Claims Constitute "Advertising Injury" and Allege "Occurrences"*

Our March 2010 Alert reviewed the lack of consensus among courts as to whether general liability polices provide coverage for fax blasting claims brought under the Telephone Consumer Protection Act (TCPA), a federal statute that creates a private right of action for recipients of unsolicited facsimile advertisements (*See* March 2010 Alert). Coverage disputes in this context typically focus on two issues: (1) whether fax blasting constitutes advertising injury, defined as "oral or written publication of material that violates a person's right of privacy"; and (2) whether fax blasting constitutes an "occurrence." Two recent decisions addressed these issues and arrived at conflicting conclusions.

In *Owners Ins. Co. v. European Auto Works, Inc.*, 2011




WL 3847469 (D. Minn. Aug. 30, 2011), a Minnesota district court granted a policyholder's motion for summary judgment, holding that general and umbrella liability insurers owed coverage for fax blasting claims under the TCPA. Applying Minnesota law, the court held that the undefined term "right of privacy" within the advertising provision encompassed the right to be left alone, free from unwanted fax advertisements. Citing to decisions in other jurisdictions reaching the same conclusion, the court observed that the legal concept of privacy includes not only the right to keep private information secret, but also the right to seclusion. Having found coverage under the advertising injury provision, the court declined to address the question of whether fax advertising constituted "property damage" under the policy.

Interpreting identical policy language, a Pennsylvania district court reached the opposite conclusion in *Maryland Casualty Co. v. Express Products, Inc.*, 2011 WL 4402275 (E.D. Pa. Sept. 22, 2011). There, the court granted summary judgment in favor of the insurers, finding no duty to defend the TCPA class action suit against the policyholder. First, the court held that although the underlying complaint alleged property damage (i.e., loss of paper and toner, and temporary loss of use of fax line), the complaint failed to allege that the damage was caused by an "occurrence." Because the complaint alleged intentional, willful conduct, the damage could not be considered accidental. For this same reason, the court found that the policies' "expected or intended" exclusion barred coverage. Second, the court denied coverage under the "advertising injury" provision, holding that the term "privacy," when read in context of the entire policy, referred only to a person's right to secrecy, not the right to seclusion.

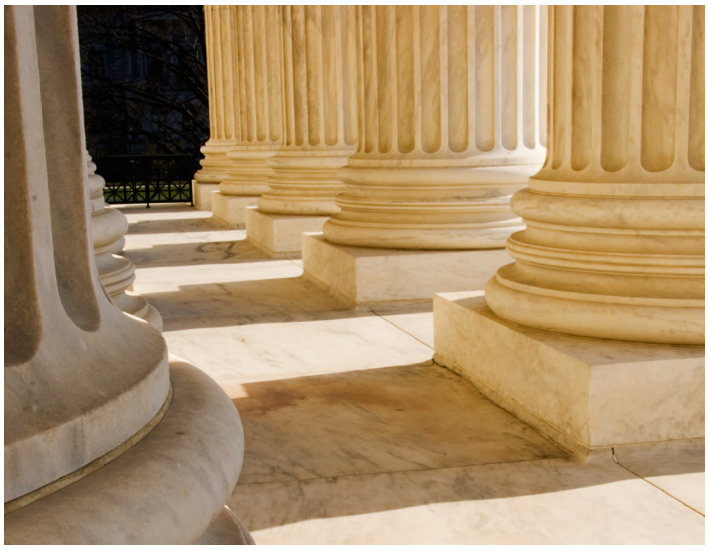
As these decisions illustrate, the meaning attributed to the term "right to privacy" can be outcome determinative in fax blasting coverage cases. Although *Owners Insurance Company* did not reach the "occurrence" question, the court noted that the policyholder had not sent the faxes itself, but instead had employed a third party to conduct the fax-advertising program. According to the policyholder, the third party vendor had represented that it would comply with applicable faxing guidelines and would send advertisements only to consenting recipients. In contrast, in *Maryland Casualty Company*, the policyholder was the sender of the unwanted faxes. Other courts have found the use of a third party vendor to be factually significant in this context,

reasoning that employment of a third party vendor may create a question of fact as to whether the policyholder expected or intended to send unwanted faxes. *See Telecommunications Network Design, Inc. v. Brethren Mut. Ins. Co.*, 2007 WL 3760745 (Pa. C.P. May 10, 2007) (insurer has duty to defend fax blasting claims because questions of fact exist as to whether policyholder intended intermediary to send faxes to unwilling recipients), *aff'd*, 5 A.3d 331 (Pa. Super. Ct. 2010).

## Excess Alert:

### *Ohio Court Rules That Payment of Full Primary Policy Limits Is Condition Precedent to Excess Coverage*

In last month's Alert, we reported on a Fifth Circuit opinion holding that where a policyholder agreed to a settlement with its primary insurer for an amount less than the primary policy limits, the policyholder could not access excess coverage. *See Citigroup Inc. v. Fed. Ins. Co.*, 2011 WL 3422073 (5th Cir. Aug. 5, 2011). An Ohio court recently reached the same conclusion in *Goodyear Tire & Rubber Co. v. National Union Ins. Co.*, No. 5:08CV1789 (N.D. Ohio Sept. 19, 2011). There, Goodyear entered into a settlement with National Union, its directors and officers liability insurer, relating to coverage for securities and derivative claims. The settlement required National Union to pay Goodyear $10 million—an amount less than the $15 million aggregate policy limit. Goodyear then sought coverage under an excess policy issued by Federal Insurance Company. Federal denied coverage, citing to the lack of exhaustion of the National Union policy. The court agreed, finding that language in the excess policy providing for payment "only after the insurers of the underlying insurance shall have paid in legal currency the full amount of the underlying limit for such policy period" required



payment of the full $15 million. In so ruling, the court rejected Goodyear's argument that the exhaustion provision was unenforceable given Ohio's strong public policy favoring settlements. The court also dismissed Goodyear's argument that the exhaustion requirement was a condition precedent, which should result in the forfeiture of coverage only where the excess insurer is prejudiced. Without ruling on whether a showing of prejudice was necessary, the court concluded that Federal had, in fact, been prejudiced by being forced to litigate the exhaustion issue for nearly three years.

## Drywall Alert:

### *Virginia Court Rules That Pollution Exclusion Bars Coverage for All Drywall-Related Claims*

In previous Alerts, we have discussed whether an absolute pollution exclusion precludes coverage for property damage and/or bodily injury claims arising from defective drywall. *See* April 2010 Alert, July/August 2010 Alert, January 2011 Alert, May 2011 Alert and June 2011 Alert. Although decisions in several states—Florida, Virginia and Louisiana—have been mixed, the recent trend in Virginia appears to

be toward enforcement of the pollution exclusion as a bar to coverage for drywall-related claims. As reported in our June 2011 Alert, although the Virginia Supreme Court declined to accept a certified question on this issue, a Virginia district court concluded that the pollution exclusion precluded any possibility of coverage for drywall-related claims. *See Nationwide Mut. Ins. Co. v. The Overlook, LLC*, 2011 WL 1988396 (E.D. Va. May 13, 2011). In that case, the court cited to another Virginia decision reaching the same conclusion. *See Travco Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010). Most recently, another Virginia court similarly ruled that pollution exclusions in general liability policies bar coverage for (and therefore relieve the insurers of their duty to defend) all claims arising out of the installation of defective drywall. *See Evanston Ins. Co. v. Harbor Walk Dev., LLC*, 2011 WL 4495686 (E.D. Va. Sept. 9, 2011). The court held that the pollution exclusions were unambiguous and applicable to claims arising from non-traditional environmental pollution.

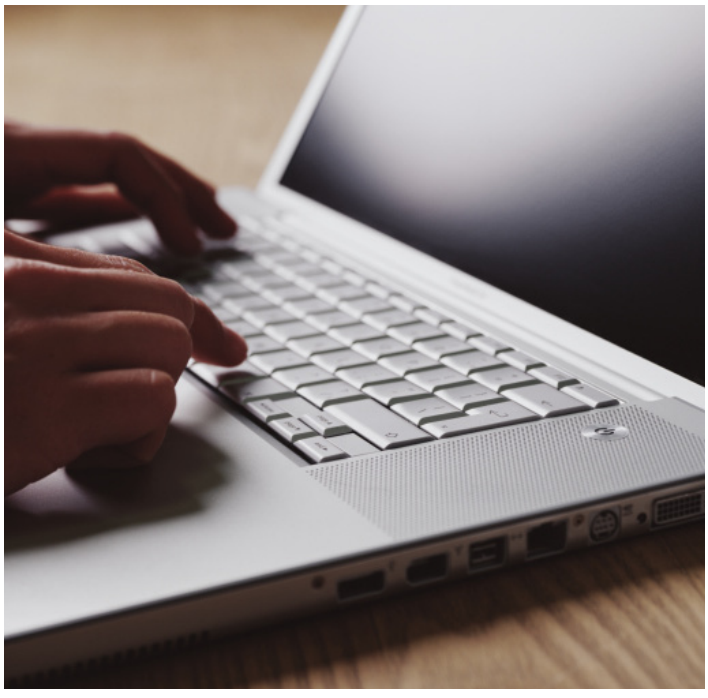
# Legal Practice Alerts:

## *Judiciary Heightens Standards for Filing Cases Under Seal*

Insurance coverage disputes often involve sensitive facts and information that the parties opt to cloak in confidentiality. The U.S. Judicial Conference, the policy-setting organization for the federal judiciary, recently stated that an entire civil case file should be sealed only when required by law or when "justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives such as sealing discrete documents or redacting information." In light of this stringent standard, courts may be less willing to grant global seal protection in civil cases. Rather, counsel is advised to seek narrower remedies in order to protect the privacy interests of their clients.

## *American Bar Association Directs Attorneys to Warn Clients about Confidentiality Concerns Related to E-Mail Communications*

In a constantly changing technological landscape, attorney vigilance is warranted to avoid potential pitfalls in the protection of privileged and confidential communications. In a formal opinion issued on August 4, 2011, the American Bar Association stated that attorneys who engage in electronic mail communications with their clients must warn clients about the risk of using employer-owned computers or other communication devices issued by employers. According to the Opinion, an attorney's duty to warn arises, at a minimum, when the lawyer knows or reasonably should know that the client is likely to send or receive attorney-client communications via e-mail or other electronic means. Although the Opinion highlights the use of a business (i.e., employer-issued) device, the Opinion expressly extends to any other circumstance (including those outside the workplace context) in which there is a significant risk that privileged communications may be read by a third party.



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