SIMPSON THACHER

# INSURANCE LAW ALERT

MAY 2012

This Alert addresses decisions relating to the statute of limitations for a claim alleging breach of an insurance contract and the scope of "direct physical loss" in a property policy. It also discusses the viability of contribution claims against an insurer that has settled with its policyholder, the viability of negligent misrepresentation claims against an insurer, and rulings interpreting "breach of contract" and "business pursuits" exclusions. Finally, we highlight three noteworthy bankruptcy rulings affecting the rights and obligations of insurers, and a recent ruling discussing class arbitration. Please "click through" to view articles of interest.

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- ***New York Court of Appeals Holds That Statute of Limitations Begins to Run Upon Right to Demand Payment***

  The New York Court of Appeals held that the six-year statute of limitations applicable to an insurer's breach of contract claim against a policyholder began to run when the insurer acquired the right to demand payment of premiums, not when the insurer issued invoices for such premiums. *Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co.*, 2012 WL 1032768 (N.Y. Mar. 29, 2012). *Click here for full article*

- ***Mold and Bacterial Contamination Do Not Constitute Direct Physical Loss, Says Sixth Circuit***

  The Sixth Circuit held that the presence of mold spores and bacteria in a commercial building did not constitute a "direct physical loss" for the purposes of triggering property coverage. *Universal Image Productions, Inc. v. Federal Ins. Co.*, 2012 WL 1181541 (6th Cir. Apr. 10, 2012). *Click here for full article*

- ***Settlement with Policyholder Does Not Insulate Insurer from Contribution Claim, Says New Jersey Appellate Court***

  A New Jersey appellate court held that a defending insurer may seek contribution of defense costs from a non-participating insurer despite that insurer's settlement with the policyholder. *Potomac Ins. Co. of Ill. v. Penn. Manuf. Assoc. Ins. Co.*, 2012 WL 1231841 (N.J. Super. Ct. App. Div. Apr. 13, 2012). *Click here for full article*

- ***Fifth Circuit Interprets "Breach of Contract" Exclusion Narrowly***

  The Fifth Circuit held that a breach of contract exclusion applies only where the alleged injury would not have occurred "but for" the breach of contract and that the exclusion does not bar coverage where allegations supporting the breach of contract claim also support an independent tort claim. *Looney Ricks Kiss Architects, Inc. v. State Farm Fire & Cas. Co.*, 2012 WL 1109058 (5th Cir. Apr. 4, 2012). *Click here for full article*

- ***Illinois Appellate Court Highlights Distinction Between Business and Personal Insurance, Ruling That Official Not Entitled to Coverage Under Personal Liability Policy***

  An Illinois appellate court ruled that a mayor is not entitled to coverage under his personal liability insurance policy for claims that the village and village officials supplied residents with contaminated drinking water. *Metropolitan Prop. and Cas. Ins. Co. v. Stranczek*, 2012 WL 1108413 (Ill. App. Ct. Mar. 30, 2012). *Click here for full article*

- ***Mississippi Law Does Not Recognize Negligent Misrepresentation Claim Against Insurer, Says Fifth Circuit***

  The Fifth Circuit dismissed as a matter of law a negligent misrepresentation claim against an insurer. *Grissom v. Liberty Mutual Fire Ins. Co.*, 2012 WL 1383069 (5th Cir. Apr. 23, 2012). *Click here for full article*

- ***Arbitrator Did Not Exceed Authority By Construing Agreement to Authorize Class Arbitration, Says Third Circuit***

  The Third Circuit refused to vacate an arbitrator's decision to allow class arbitration, reasoning that the arbitrator did not exceed his power by construing the arbitration agreement to authorize class arbitration. *Sutter v. Oxford Health Plans, LLC*, 2012 WL 1088887 (3d Cir. Apr. 3, 2012). *Click here for full article*

- ***524(g) Stay Does Not Bar "Apparent Manufacturer" Liability Suits Against Debtor's Parent Company, Says Second Circuit***

  The Second Circuit ruled that an injunction issued pursuant to Section 524(g) of the Bankruptcy Code does not bar claims against a non-debtor's parent company based on an "apparent manufacturer" liability theory. *In re Quigley, Co.*, 2012 WL 1171848 (2d Cir. Apr. 10, 2012). *Click here for full article*

- ***New York Bankruptcy Court Lifts Stay to Allow Insurers to Defend Individual Insureds in MF Global Suits***

  A New York bankruptcy court permitted insurers to reimburse and/or advance defense costs to individual policyholders sued in connection with MF Global Holdings Ltd., over the objections of plaintiffs suing the company, who claimed that the insurance proceeds were estate property. *In re MF Global Holdings Ltd.*, 2012 WL 1191892 (Bankr. S.D.N.Y. Apr. 10, 2012). ***Click here for full article***

- ***Rights Under Liability Policies May Be Transferred to Asbestos Trust Notwithstanding Anti-Assignment Provisions, Says Third Circuit***

  The Third Circuit held that a debtor may transfer the rights under liability policies to an asbestos trust notwithstanding the policies' anti-assignment provisions. *In re Federal-Mogul Global Inc.*, 2012 WL 1511773 (3d Cir. May 1, 2012). ***Click here for full article***

- ***On Rehearing, Virginia Supreme Court Affirms That Global Warming Claims Do Not Allege an "Occurrence"***

  The Virginia Supreme Court affirmed a prior decision holding that an insurer did not owe defense or indemnity under general liability policies for global warming-related claims because the complaint did not allege an "occurrence." *AES Corp. v. Steadfast Ins. Co.*, 2012 WL 1377054 (Va. Apr. 20, 2012). ***Click here for full article***

- ***STB News Alert***

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## Statute of Limitations Alert:

### *New York Court of Appeals Holds That Statute of Limitations Begins to Run Upon Right to Demand Payment*

The New York Court of Appeals held that the six-year statute of limitations applicable to an insurer's breach of contract claim against a policyholder began to run when the insurer acquired the right to demand payment of premiums, not when the insurer issued invoices for such premiums. *Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co.*, 2012 WL 1032768 (N.Y. Mar. 29, 2012).

Hahn Automotive Warehouse, Inc. secured general liability, automotive liability and workers' compensation policies from Zurich for coverage periods between September 1992 and September 2003. In 2005, Zurich realized that due to a clerical error, it had failed to collect various amounts owed by Hahn under the policies and billed Hahn for these amounts. When Hahn refused to pay, Zurich drew on a $400,000 letter of credit posted by Hahn and applied that amount to the outstanding bills. Hahn filed suit, and Zurich counterclaimed to collect the outstanding balance due.


The parties disputed whether the six-year statute of limitations applicable to Zurich's breach of contract counterclaims began to run when Zurich first acquired the legal right to demand payment or when Zurich issued the invoices. The court held that the statute of limitations began to run at the time Zurich first acquired the right to demand payment, reasoning that to hold otherwise would allow Zurich to extend the statue of limitations indefinitely, simply by failing to make a demand.

*Hahn* puts both insurers and policyholders on notice as to the limited timeframe in which to bring claims alleging a breach of an insurance contract. In order to avoid dismissal based on a statute of limitations defense, claims seeking payments pursuant to an insurance policy (premium, defense, indemnification, or other) should be brought as soon as the right to demand such payment accrues.

## Property Damage Alert:

### *Mold and Bacterial Contamination Do Not Constitute Direct Physical Loss, Says Sixth Circuit*

Affirming a Michigan district court opinion, the Sixth Circuit held that the presence of mold spores and bacteria in a commercial building did not constitute a "direct physical loss" for purposes of triggering

This edition of the Insurance Law Alert was prepared by Mary Beth Forshaw (mforshaw @stblaw.com/212-455-2846) Bryce L. Friedman (bfriedman@stblaw.com/212-455-2235).

property coverage. *Universal Image Productions, Inc. v. Federal Ins. Co.*, 2012 WL 1181541 (6th Cir. Apr. 10, 2012).

The policyholder, Universal, leased office space in a commercial building. Following heavy rainstorms, Universal detected a strong odor in the building and conducted air quality testing. During testing, the heating, ventilation and air conditioning systems in the building were shut down, resulting in excessive heat and uncomfortable work conditions. The inspection revealed microbial contamination and black mold in the building's ductwork and air. Although no evacuation was ordered, Universal vacated the premises during the landlord's remediation. Universal then sought coverage for its alleged losses from Federal, its property insurer. Federal denied coverage, arguing that Universal did not suffer any "direct physical loss" as required by the policy. The trial court agreed, and the Sixth Circuit affirmed.

Applying Michigan law, the Sixth Circuit found that Universal did not sustain any tangible damage to physical property as a result of the contamination. The court also concluded that expenses relating to moving and cleaning, and the alleged loss of business income do not constitute "direct physical loss" under the Federal policy. Additionally, although other courts have found that a pervasive odor can constitute a "direct physical loss" under certain circumstances, the present case did not warrant such a finding because (1) the odor was short-lived, and (2) the policy explicitly excluded "air" from the definition of "building" and "personal property." Finally, the court held that even under a broad interpretation of "direct physical loss," there would still be no coverage because the building was not declared uninhabitable or unusable. Uncomfortable or difficult work conditions do not rise to the level of physical loss, even under the most expansive of interpretations, the court noted.

## Contribution Alert:

### *Settlement with Policyholder Does Not Insulate Insurer from Contribution Claim, Says New Jersey Appellate Court*

Previous Alerts have discussed decisions in which insurers seek contribution from other insurers for defense and/or settlement costs in connection with a common insured. *See* April and June 2010 Alerts; May, July/August and November 2011 Alerts. Addressing an issue of first impression under New Jersey law, an appellate court analyzed the doctrine of equitable contribution and held that a defending insurer may seek contribution of defense costs from a non-participating insurer despite the non-participating insurer's settlement with the policyholder. *Potomac Ins. Co. of Ill. v. Penn. Manuf. Assoc. Ins. Co.*, 2012 WL 1231841 (N.J. Super. Ct. App. Div. Apr. 13, 2012). Citing to California law, the court reasoned that where multiple insurers are obligated to defend the same claim, each insurer has an independent basis to assert a claim for equitable contribution against co-carriers. The court explained that because this equitable right belongs to each insurer, and is not based on principles of subrogation, it is not extinguished by a settlement between an insurer and the policyholder.

# Coverage Alerts:

## *Fifth Circuit Interprets "Breach of Contract" Exclusion Narrowly*

The Fifth Circuit held that a breach of contract exclusion applies only where the alleged injury would not have occurred "but for" the breach of contract. Therefore, the exclusion does not bar coverage where allegations supporting the breach of contract claim also support an independent tort claim. *Looney Ricks Kiss Architects, Inc. v. State Farm Fire & Cas. Co.*, 2012 WL 1109058 (5th Cir. Apr. 4, 2012).

The coverage dispute arose from an architecture firm's litigation against a former client. The complaint alleged tort claims (federal copyright law violations) and contract claims (breach of contract, which prohibited improper use of the firm's drawings). The client sought defense and indemnity from State Farm, its liability insurer. State Farm, in turn, sought a declaration that it had no duty to defend or indemnify the suit by virtue of a breach of contract exclusion, which barred coverage for personal and advertising injuries "arising out of a breach of contract."

The central issue before the court was interpretation of the phrase "arising out of." The policyholder argued that it required "but for" causation, such that exclusion applied only if the injury would not have occurred but for the breach of contract. In contrast, State Farm argued that it required only an incidental relationship, such that the exclusion applied "as long as the contract bears some relationship to the dispute." Applying Louisiana law, the court held that the exclusion required "but for" causation. Therefore, because the facts alleged in the underlying complaint supported a tort claim independent of the parties' contract, the court held that the exclusion did not apply.

The court acknowledged that the "incidental relationship" approach advocated by State Farm was a reasonable interpretation of the exclusion and one that has been employed by other courts. However, absent a clear definition of "arising out of" in the policy exclusion, the court held that Louisiana law required construction in favor of coverage.

## *Illinois Appellate Court Highlights Distinction Between Business and Personal Insurance, Ruling That Official Not Entitled to Coverage Under Personal Liability Policy*

Reversing a lower court decision, an Illinois appellate court ruled that a mayor was not entitled to coverage under his personal liability insurance policy for claims that the village and village officials supplied its residents with contaminated drinking water. *Metropolitan Prop. and Cas. Ins. Co. v. Stranczek*, 2012 WL 1108413 (Ill. App. Ct. Mar. 30, 2012). Although the court relied primarily on a "business pursuits" exclusion, the court also held that a personal liability policy was not intended to cover business-oriented claims in the first place.

The policy's business pursuits exclusion precluded coverage for liability connected with the policyholder's "business, profession or occupation." Illinois courts have interpreted this exclusion to apply to "continuous or regular activity, done for the purpose of returning

a profit." The appellate court concluded that service as village mayor fell squarely within the scope of a business pursuit, rejecting the lower court's reasoning that the policyholder's role as mayor did not constitute a business pursuit because it was part-time and because he donated his de minimus salary to the village. The appellate court concluded that the determinative factor for the business pursuit analysis is whether the position constitutes an "occupation," not the amount of salary or how that salary was spent.

Exclusionary language aside, the court also noted that the personal liability policy at issue provided "personal protection" by combining several types of coverage, including personal liability for third-party claims, homeowner's property insurance, and vehicle and boat coverage. Given the "context of the entire policy and the risks it was intended to protect against," the court held that it was evident that the personal liability policy did not provide coverage for claims connected to the policyholder's business or occupation—such as the contamination claims at issue.

## *Mississippi Law Does Not Recognize Negligent Misrepresentation Claim Against Insurer, Says Fifth Circuit*

The Fifth Circuit held that a Mississippi district court erred in submitting a claim of negligent misrepresentation against an insurer to a jury, holding that there is no basis in Mississippi law for such a claim. *Grissom v. Liberty Mutual Fire Ins. Co.*, 2012 WL 1383069 (5th Cir. Apr. 23, 2012).

The policyholder began purchasing flood insurance from Liberty Mutual in 1977. In 1989, a preferred risk policy became available, but Liberty Mutual did not affirmatively inform the policyholder that he was eligible for the preferred coverage. In 2004, the policyholder renewed his Liberty Mutual policy, which covered $121,200 loss for a $531 premium. The renewal

notice mentioned the preferred rate policies, but did not indicate whether the policyholder was eligible for such coverage. The preferred risk policy would have provided $350,000 in coverage for a $317 premium. In 2005, the policyholder's home was destroyed by Hurricane Katrina. Liberty Mutual paid the $121,200 policy limit. Thereafter, the policyholder brought a negligent misrepresentation claim against Liberty Mutual, seeking to recover the difference between his policy limit and the coverage he would have had under the preferred risk policy. A Mississippi district court denied Liberty Mutual's motions to dismiss and submitted the case to a jury, which found in favor of the policyholder. The Fifth Circuit reversed, and instructed the district court to dismiss the claim against Liberty Mutual.

Noting that there was no Mississippi law directly on point, the Fifth Circuit reasoned that because there is no fiduciary relationship between an insurer and insured, an insurer is not required to advise policyholders as to their coverage needs and options. Moreover, because Liberty Mutual did not make any affirmative misrepresentations as to the lack of alternative insurance options, there was no viable claim for negligent misrepresentation.

## ARBITRATION ALERT:

### *Arbitrator Did Not Exceed Authority By Construing Agreement to Authorize Class Arbitration, Says Third Circuit*

The Third Circuit refused to vacate an arbitrator's decision to allow class arbitration, reasoning that the arbitrator did not exceed his power by construing the arbitration agreement to authorize class arbitration. *Sutter v. Oxford Health Plans, LLC*, 2012 WL 1088887 (3d Cir. Apr. 3, 2012).

A physician entered into a health services contract with Oxford Health Plans. The contract contained an arbitration clause which made no express reference to class arbitration. Nonetheless, when a dispute arose regarding Oxford's reimbursement practices, an arbitrator construed the clause to authorize class arbitration. Oxford moved to vacate the class certification, arguing that it contravened the U.S. Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), which held that a party may not be compelled under the Federal Arbitration Act to submit to class arbitration absent an agreement to do so. A New Jersey district court refused to vacate, and the Third Circuit affirmed.

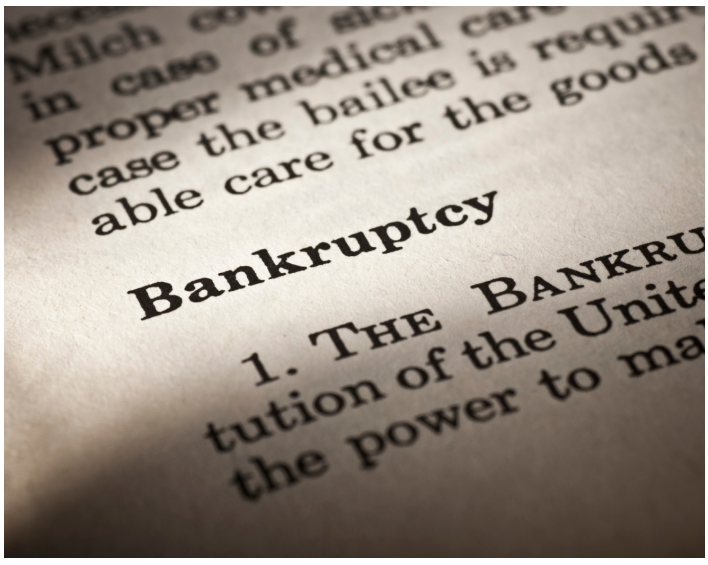
The Third Circuit interpreted *Stolt-Nielsen* narrowly, finding that it stood for the proposition that an arbitration panel exceeds its authority by allowing class arbitration only when the parties have reached no agreement on the issue. If, however, an arbitrator concludes that the parties have addressed the issue of class arbitration implicitly, *Stolt-Nielsen* does not apply, the Third Circuit reasoned. Here, although the contract did not expressly address the issue of class arbitration, the arbitrator concluded that the unusually broad text of the arbitration clause justified a finding that the contract implicitly contemplated class arbitration. The Third Circuit held that because the arbitrator had a "contractual basis" for allowing class arbitration (unlike *Stolt-Nielsen*, in which the parties had stipulated that the contract was "silent" with respect to class certification), the arbitrator acted within the scope of his authority in ordering class arbitration.

Given the Third Circuit's restrictive interpretation of *Stolt-Nielsen*, disputes regarding class arbitration are likely to continue. *Sutter* illustrates that the validity of class arbitration awards may depend, in part, upon the basis upon which an arbitrator rests his decision to allow or disallow class arbitration.

## BANKRUPTCY ALERTS:

### *524(g) Stay Does Not Bar "Apparent Manufacturer" Liability Suits Against Debtor's Parent Company, Says Second Circuit*

The Second Circuit ruled that an injunction issued pursuant to Section 524(g) of the Bankruptcy Code does not bar claims against a non-debtor's parent company based on an "apparent manufacturer" liability theory. *In re Quigley, Co.*, 2012 WL 1171848 (2d Cir. Apr. 10, 2012).



Quigley was acquired by Pfizer in 1968. Following the acquisition, certain Quigley products included Pfizer's name and trademark, some of which allegedly contained asbestos. Ultimately, thousands of plaintiffs filed asbestos-related personal injury suits against Quigley, some of which also named Pfizer as a defendant. Quigley filed for bankruptcy in 2004, and in 2007, the bankruptcy court issued a Section 524(g) injunction barring, among other things, asbestos-related personal injury actions against Pfizer "alleging that Pfizer is directly or indirectly liable for the conduct of, claims against, or demands on Quigley." Pfizer claimed that this injunction operated to bar suits against it based on an "apparent manufacturer" theory of liability. In contrast, plaintiffs argued that the suits were not barred by the injunction because Pfizer's "apparent manufacturer" liability was based on Pfizer's own conduct in allowing its name to be affixed to Quigley products, and not on actions undertaken by Quigley.

The bankruptcy court concluded that the injunction encompassed the apparent manufacturer claims against Pfizer, reasoning that analogous claims against Pfizer (*i.e.*, successor liability, alter ego liability, and respondeat superior liability) would all plainly be barred by the injunction. On appeal, the New York district court reversed and the Second Circuit affirmed. The Second Circuit explained that for a claim to be barred by Section 524(g), the "alleged liability of a third party for the conduct of or claim against the debtor [must] arise[], in the circumstances, as a legal consequence of one of the four relationships between the debtor and the third party enumerated in subsections (I) through (IV)" of Section 524(g). Because Pfizer's alleged liability as an "apparent manufacturer" turned on the presence of Pfizer's logo on Quigley products, rather than any of the statutory relationships enumerated in Section 524(g), the suits were not barred.

## *New York Bankruptcy Court Lifts Stay to Allow Insurers to Defend Individual Insureds in MF Global Suits*

A bankruptcy court in New York permitted insurers to reimburse and/or advance defense costs to individual policyholders sued in connection with debtor MF Global Holdings Ltd., over the objections of plaintiffs suing the company, who claimed that the insurance proceeds were property of the estate. *In re MF Global Holdings Ltd.*, 2012 WL 1191892 (Bankr. S.D.N.Y. Apr. 10, 2012).

Numerous directors, officers and employees of MF Global (the "Debtor") have been sued by shareholders, commodity customers and other parties alleging violations of federal and state law and various torts. Insurers which provided professional liability and D&O insurance to the Debtor sought a determination that proceeds of the policies were not the property of the Debtor's estate. Alternatively, the insurers sought to lift the automatic stay in order to allow payment of defense costs on behalf of the individual insureds in the underlying cases. In opposing the motion, plaintiffs in the underlying cases argued that proceeds of the policies were property of the Debtor's estate and that allowing the insurers to pay the individual insureds' defense costs would diminish the amount of funds available to pay future claims against the Debtor.

Assuming (without deciding) that the Debtor had an interest in the proceeds of the policies, the court nonetheless concluded that cause existed to lift the automatic stay to permit the payment of defense costs for the individual insureds. The court reasoned that the individual insureds "have a present need for payment of their defense costs" which "far outweighs the Debtors' hypothetical or speculative need for coverage." Focusing on the language and nature of the policies, the court noted that certain policies contained Priority of Payment provisions which provided the individual insureds with priority to any interests of the Debtor and that other policies were clearly

"obtained for the protection of" the individuals and "not a vehicle for corporate protection." In addition, the court noted that principles of equity justified the payment of defenses costs for individual insureds, who unlike the Debtor, were not protected from litigation by the automatic stay. On April 24 plaintiffs appealed the bankruptcy court's ruling to a New York federal district court. The bankruptcy court adhered to its ruling in a subsequent decision in which it denied plaintiffs' motion for a stay pending appeal. *In re MF Global Holdings Ltd.*, No. 11-15059 (Bankr. S.D.N.Y. Apr. 30, 2012).

The question of whether insurance proceeds are property of a debtor's estate—a question that the *MF Global* court declined to decide—is frequently litigated. Decisions in this context turn largely on applicable policy language, including in particular, whether the policy provides only direct coverage to the debtor (in which case proceeds are typically property of the estate) or alternatively, coverage only to individuals (in which case proceeds are not typically property of the estate). As the *MF Global* court noted, the issue is more complex where, as here, the policies provide coverage to both individual insureds and the debtor.

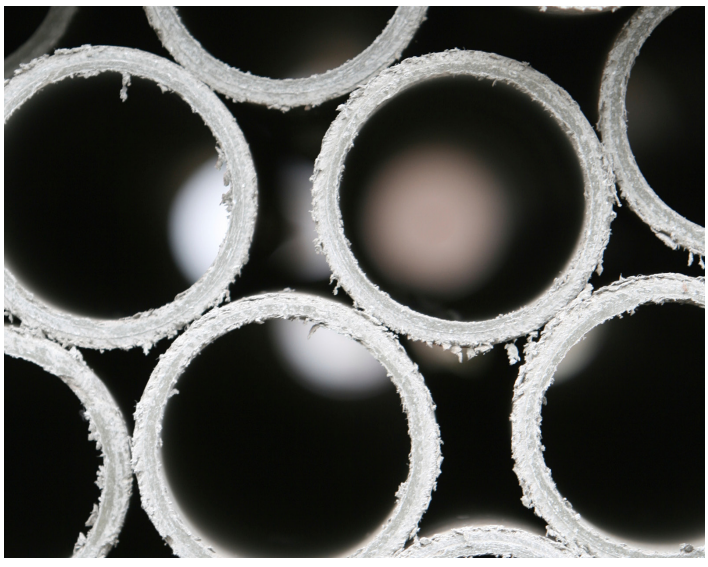
## *Rights Under Liability Policies May Be Transferred to Asbestos Trust Notwithstanding Anti-Assignment Provisions, Says Third Circuit*

Reasoning that the Bankruptcy Code trumps anti-assignment provisions in insurance policies, the Third Circuit affirmed a Delaware district court decision holding that a debtor may transfer the rights under liability policies to an asbestos trust. *In re Federal-Mogul Global Inc.*, 2012 WL 1511773 (3d Cir. May 1, 2012).

Federal-Mogul's plan of reorganization assigned various assets to a Section 524(g) asbestos trust, including the rights to recovery under certain liability policies. The insurers objected to the plan's confirmation, claiming that it violated the policies' anti-assignment provisions. Federal-Mogul argued that federal bankruptcy law preempted these provisions, rendering the transfer of insurance rights valid. The bankruptcy court agreed, and a Delaware district court affirmed.

The Third Circuit upheld the ruling, relying primarily on *In re Combusion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004), to find that Section 1123 of the Code, which permits the transfer of property from the debtor's estate to other entities, together with other Code provisions, trumps the policies' prohibition of assignment without the insurers' consent. The court explained that the language of the applicable Bankruptcy Code provisions indicated an intent to override conflicting provisions in private contracts, such as the policies at issue. In so ruling, the court rejected the insurers' contentions that the transfer would materially alter the insurers' risks, reasoning that the events underlying the asbestos liability had already occurred and that the insurers were already potentially liable.

*Federal-Mogul* is, in some sense, a narrow ruling. It leaves unanswered several significant issues, including the scope of Bankruptcy Code preemption. Although the court found preemption under the circumstances presented, it acknowledged possible



scenarios in which preemption might not be appropriate. The court stated, "we do not believe that the scope is limitless, but it is broad enough to encompass the anti-assignment provisions of insurance policies that purport to bar transfer to a § 524(g) trust." In addition, the court noted that under certain circumstances, the creation of a trust might alter an insurer's risk exposure, or might be the result of collusion between the debtor and the claimants, and warrant a different outcome.

## Climate Change Alert:

### *On Rehearing, Virginia Supreme Court Affirms That Global Warming Claims Do Not Allege an "Occurrence"*

In our October 2011 Alert, we reported on a Virginia Supreme Court decision holding that an insurer did not owe defense or indemnity under general liability policies for global warming-related claims because the complaint did not allege an "occurrence." *AES Corp. v. Steadfast Ins. Co.*, 282 Va. 252, 715 S.E.2d 28 (2011). In January 2012, the court granted a motion to rehear the matter. Last month, the court reaffirmed its ruling. *AES Corp. v. Steadfast Ins. Co.*, 2012 WL 1377054 (Va. Apr. 20, 2012). The court reasoned that because the "gravamen of Kivalina's nuisance claim is that the damages it sustained were the natural and probable consequences of AES's intentional emissions," the complaint could not be construed as alleging an accidental occurrence. In so ruling, the court rejected AES's contention that because certain underlying claims sounded in negligence, they alleged accidental conduct. The court stated: "[w]hether or not AES's intentional act constitutes negligence, the natural or probable consequence of that intentional act is not an accident under Virginia law."

## STB News Alert:

Partner Mary Kay Vyskocil has been recognized by *Law360* in its 2012 Female Trial Attorneys series as a "Top Female Trial Attorney." *Law360's* new series highlights the achievements of female litigators who have scored landmark victories for their clients. The winners were selected based on the number of trials they first or second chaired, the significance of the trials they have handled and the number of wins the attorneys had at trial. Ms. Vyskocil was one of 15 female attorneys in the United States to receive this recognition.

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"[Simpson Thacher's] insurance practice [is] acknowledged by peers as being 'pre-eminent' and 'first rate.'"

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