SIMPSON THACHER
INSURANCE LAW ALERT
DECEMBER 2013

This Alert discusses recent rulings relating to the availability of excess coverage following a below-limits settlement, the number of occurrences arising out of distribution-based claims, and whether faulty workmanship constitutes a covered "occurrence." In addition, we address decisions relating to the pollution exclusion, an insurer's right to recoup defense costs, and the anti-subrogation doctrine. Finally, we highlight a Delaware Supreme Court ruling that holds that unused insurance policies may constitute assets of a dissolved company justifying the appointment of a receiver. Please "click through" to view articles of interest. Happy Holidays!

- ***Excess Coverage is Not Triggered Unless There is "Actual Payment" of Primary Policy Limits, Says Washington Appellate Court***

  A Washington appellate court ruled that excess coverage was not implicated where a policyholder had entered into a below-limits settlement with a primary insurer. *Quellos Group LLC v. Federal Ins. Co.*, 312 P.3d 734 (Wash. Ct. App. 2013). Click here for full article

- ***California Court Declines to Find That Distributor-Based Injury Claims Constitute A Single Occurrence***

  A California federal district court denied an insurer's summary judgment motion, finding that the number of occurrences arising out of a tuna recall and salmonella outbreak required a factual analysis. *Golden Eagle Ins. Co. v. Moon Marine (U.S.A.) Corp.*, No. C 12-05438 (N.D. Cal. Nov. 15, 2013). Click here for full article

- ***Sixth Circuit Rules That Subcontractor's Faulty Workmanship Does Not Constitute an "Occurrence"***

  The Sixth Circuit ruled that a subcontractor's faulty preparation of a building pad, which resulted in structural damage to a building, did not constitute an "occurrence" under a general liability policy. *Liberty Mutual Fire Ins. Co. v. Kay & Kay Contracting,* 2013 WL 6084276 (6th Cir. Nov. 19, 2013). Click here for full article

- ***Proposed New Jersey Legislation Defines "Occurrence" To Encompass Construction Defect Claims***

  A New Jersey legislator introduced a bill that would require general liability policies issued to contractors or other "construction professionals" to include coverage for faulty workmanship. N.J. Assembly, No. 4510 (Introduced Nov. 25, 2013). Click here for full article

- ***New York Court Applies Anti-Subrogation Rule to Bar Insurers' Claims Against Liable Party***

  A New York trial court ruled that the anti-subrogation doctrine barred insurers' subrogation claims against a liable entity because the claims were based on the same risk covered by the insurers' policies. *Millennium Holdings LLC v. The Glidden Co.*, 2013 WL 6182552 (N.Y. Sup. Ct. New York Cnty. Nov. 25, 2013). *Click here for full article*

- ***Delaware Supreme Court Rules That Unused Insurance Policies Constitute Property of a Dissolved Corporation***

  The Delaware Supreme Court granted a petition to appoint a receiver for a dissolved company, finding that the company's unused insurance policies constituted distributable assets with respect to third party claims against the company. *In re Krafft-Murphy Co., Inc.*, 2013 WL 6174485 (Del. Nov. 26, 2013). *Click here for full article*

- ***When Does A Pollution Exclusion Bar Coverage for Claims Arising Out of Fumes or Odors?***

  An Illinois appellate court ruled that a pollution exclusion does not bar coverage for claims based on the emanation of foul odors from a hog farm. *Country Mutual Ins. Co. v. Hilltop View, LLC*, No. 4-13-0124 (Ill. App. Ct. Nov. 13, 2013). The ruling surveys the various analyses utilized by courts in deciding whether a pollution exclusion applies to odor-based claims. *Click here for full article*

- ***Insurer Entitled to Recoup Defense Costs for Uncovered Claim, Says New York Appellate Court***

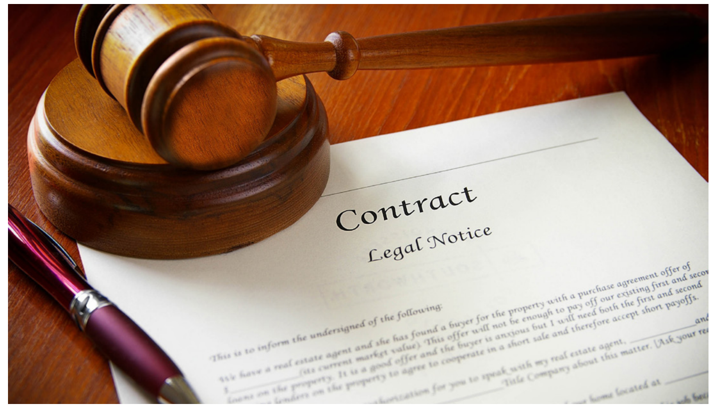
  A New York appellate court ruled that an insurer was entitled to recoup defense costs following a finding of no coverage where it had reserved its right to seek reimbursement. *Certain Underwriters at Lloyd's London v. Lacher & Lovell-Taylor, P.C.*, 2013 WL 6284081 (N.Y. App. Div. 1st Dep't Dec. 5, 2013). *Click here for full article*

Excess Alert:

Excess Coverage is Not Triggered Unless There is "Actual Payment" of Primary Policy Limits, Says Washington Appellate Court

A Washington appellate court ruled that excess coverage was not implicated where a policyholder had entered into a below-limits settlement with a primary insurer. *Quellos Group LLC v. Federal Ins. Co.*, 312 P.3d 734 (Wash. Ct. App. 2013).

Quellos Group, an investment management company, was insured from 2000 to 2005 by primary policies issued by American International Specialty Lines Insurance Company ("AISLIC") and excess policies issued by Federal Insurance Company and Indian Harbor Insurance Company from 2004-2005. The government investigated certain tax shelter strategies utilized by Quellos, and several clients threatened Quellos with litigation. Ultimately, Quellos settled the civil suits and two company officers pled guilty to conspiracy to defraud the Internal Revenue Service. Quellos sought approximately $80 million for defense and indemnity costs from its primary and excess insurers. AISLIC paid approximately $5 million of its $10 million primary policy limit for the 2004-2005 policy. Federal and Indian Harbor refused to pay on the grounds that the underlying insurance limits were not exhausted. Thereafter, AISLIC and Quellos reached a settlement under which AISLIC paid an additional $10 million without allocating any additional amounts to the 2004-2005 policy. In an effort to obtain excess coverage for the 2004-2005 policy period, Quellos agreed to "pay the gap" between the $5 million AISLIC payment and the $10 million primary policy limit. In ensuing coverage litigation, the excess carriers maintained that excess coverage was unavailable unless and until AISLIC paid the full $10 million primary limit. The Washington courts agreed.



Federal's excess policy attached "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." Similarly, Indian Harbor's second-tier excess policy attached "only after all of the Underlying Insurance has been exhausted by the actual payment of loss by the applicable insurers thereunder." The appellate court ruled that this excess policy language unambiguously required actual payment of policy limits by AISLIC as a precondition to exhaustion. In so ruling, the court rejected Quellos's argument that an exhaustion requirement should be treated like a cooperation or notice requirement, which involves a showing of prejudice in order to deny coverage. The court also rejected the notion that the exhaustion provision violated public policy favoring the promotion of settlements.

Quellos illustrates the importance of policy language in the context of exhaustion-related excess coverage disputes. As the court noted, other excess policies issued to Quellos included language that

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allowed for exhaustion by payment from underlying insurers or the insured. Numerous other decisions in this context, including a recent Pennsylvania decision relating to exhaustion of primary policies for purposes of an excess carrier's defense obligations, have similarly turned on applicable policy language. *See Lexington Ins. Co. v. The Charter Oak Fire Ins. Co.*, 2013 PA Super 286 (Pa. Superior Ct. Nov. 6, 2013) (exhaustion requirement in excess policy requires actual payment of primary insurance in order to trigger excess insurer's duty to defend); *see also* September and October 2011 Alerts, October 2012 Alert, June 2013 Alert.

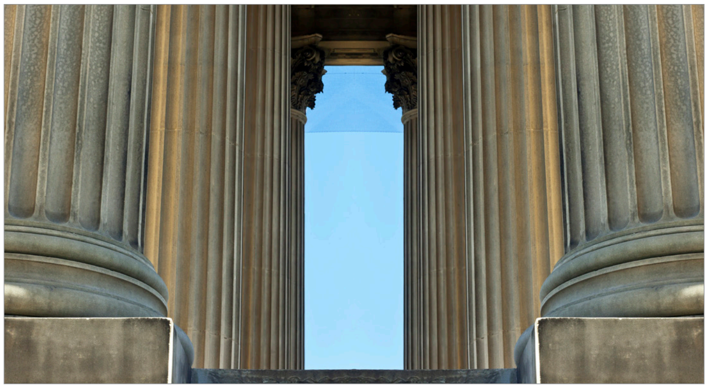
Number of Occurrences Alert:

California Court Declines to Find That Distributor-Based Injury Claims Constitute A Single Occurrence

A California federal district court denied an insurer's summary judgment motion, finding that the number of occurrences arising out of a tuna recall and salmonella outbreak required a factual analysis. *Golden Eagle Ins. Co. v. Moon Marine (U.S.A.) Corp.*, No. C 12-05438 (N.D. Cal. Nov. 15, 2013).

Moon Marine, a tuna distributor, announced a recall of imported tuna. Following the recall, twenty-five individuals asserted claims for damages against Moon Marine for salmonella poisoning. Moon Marine sought coverage from General Insurance, its liability insurer. General's policy had a $1 million per occurrence limit and a $2 million aggregate limit. General filed a declaratory judgment action seeking a ruling that all salmonella claims arose from a single occurrence, limiting coverage to $1 million. General then sought summary judgment on this issue, which the court denied.

The court noted that under California law, the



number of occurrences determination turns on the number of proximate causes of the harm. Here, the central issue in dispute was whether claims arising out of the distribution of the contaminated product were governed by the proximate cause rule, or alternatively, whether the distribution of a single product from a single source "merges all proximate causes into one." General argued that because the contamination of the tuna occurred prior to the distribution stage, "discovery is not required into how the salmonella got into the fish in the first place or whether there were multiple causes of the contamination." The court disagreed, finding that the number of occurrences turned on whether there were multiple causes of the contamination. More specifically, the court noted that multiple strands of salmonella might have existed based on evidence in the record indicating that there might have been multiple sources of contamination at the tuna factory.

Other courts have reached a contrary conclusion, finding that the distribution of a single product from a single source gives rise to only one occurrence. For example, as discussed in our March 2013 Alert, a Pennsylvania court ruled that numerous drywall-related claims constituted a single occurrence because they originated from a common source. *Cincinnati Ins. Co. v. Devon Int'l, Inc.*, 2013 WL 592302 (E.D. Pa. Feb. 15, 2013). Here, the court distinguished several single-occurrence distribution-based coverage rulings on the basis that those cases involved the use of a single defective product (e.g., stucco, lime plaster) where there was no possibility of multiple contamination sources.

Construction Defect Alerts:

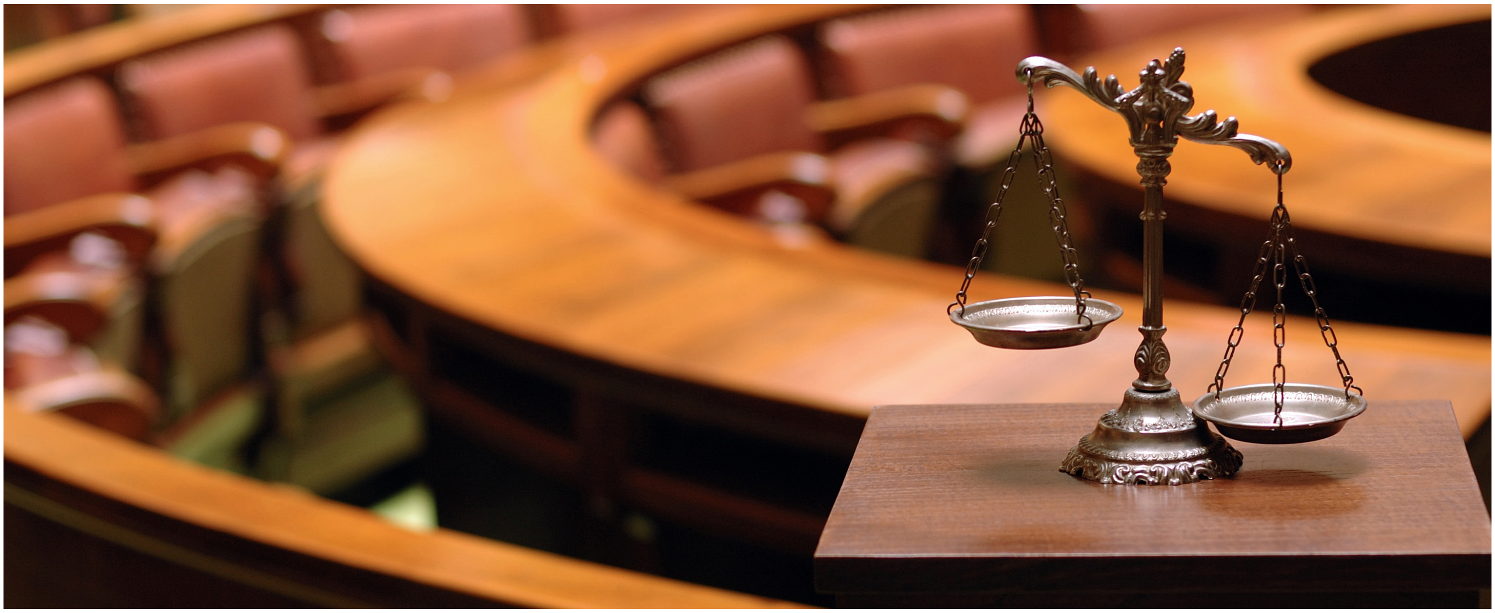
Sixth Circuit Rules That Subcontractor's Faulty Workmanship Does Not Constitute an "Occurrence"

Addressing a matter of first impression under Kentucky law, the Sixth Circuit ruled that a subcontractor's faulty preparation of a building pad, which resulted in subsequent structural damage to a building, did not constitute an "occurrence" under a general liability policy. *Liberty Mutual Fire Ins. Co. v. Kay & Kay Contracting,* 2013 WL 6084276 (6th Cir. Nov. 19, 2013).

As discussed in past Alerts, courts across jurisdictions have applied different approaches to determining whether and under what circumstances faulty workmanship constitutes an occurrence. *See* October and May 2013 Alerts, April 2010 Alert. In *Kay & Kay Contracting*, the policyholder argued that because its negligent preparation of the building site pad resulted in damage to the separately constructed building erected thereon, it constituted an "occurrence." A Kentucky federal district court agreed, and granted the subcontractor's summary judgment motion on the "occurrence" issue. The Sixth Circuit reversed.

Under Kentucky state case law, faulty workmanship, standing alone, does not constitute a covered occurrence. However, the Kentucky Supreme Court has not addressed whether faulty workmanship that causes damage to other property constitutes an occurrence. The Sixth Circuit declined to explicitly rule on the issue and instead relied on the concept of fortuity to find no "occurrence." The court held that where, as here, the damage is of a type that the contractor's work was supposed to prevent, the damage is within the "control" of the subcontractor and could not be considered fortuitous. Here, the subcontractor "was hired precisely to prevent the settling and resultant structural damage that occurred in this case." Therefore, the court explained, the element of fortuity was absent because "the possibility of the type of damage in this case was exactly what [the subcontractor] was hired to *control*."

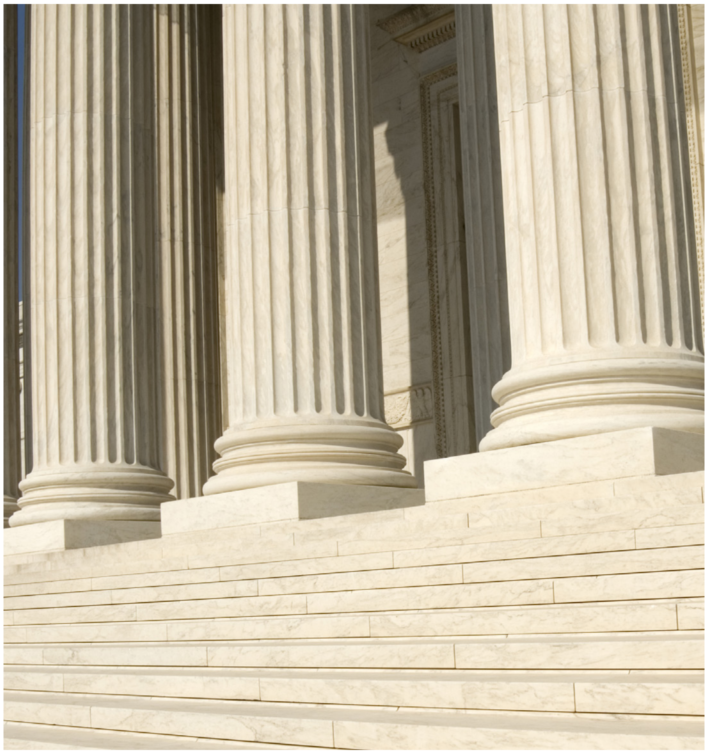
Under *Kay & Kay Contracting*, the occurrence analysis focuses on the contractor's "control" over the property damage (i.e., whether it was of the type that the contractor was specifically hired to prevent) rather than on whether separate property was damaged.



Proposed New Jersey Legislation Defines "Occurrence" To Encompass Construction Defect Claims

A New Jersey legislator introduced a bill that would require general liability policies issued to contractors or other "construction professionals" to include coverage for faulty workmanship. More specifically, the bill proposes a definition of "occurrence" that would provide coverage for "property damage or bodily injury resulting from faulty workmanship." N.J. Assembly, No. 4510 (Introduced Nov. 25, 2013). Significantly, the proposed legislation does not restrict an insurer's ability to include policy exclusions that may operate to bar coverage for such claims.

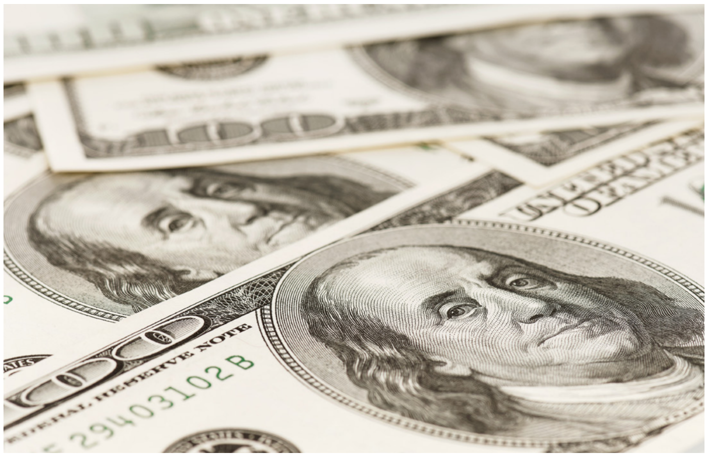
Although the bill was introduced to reduce purported confusion and inconsistency in this context, it is unclear whether passage of the bill will achieve this goal. Despite the enactment of similar legislation in several other states, including Hawaii, South Carolina, Colorado and Arkansas, construction defect coverage disputes continue to proliferate.



Subrogation Alert:

New York Court Applies Anti-Subrogation Rule to Bar Insurers' Claims Against Liable Party

A New York trial court interpreted a purchase agreement provision in a manner that assigned liability for lead paint-related claims to a particular entity, but rejected insurers' subrogation claims against that entity on the basis of the anti-subrogation doctrine. *Millennium Holdings LLC v. The Glidden Co.*, 2013 WL 6182552 (N.Y. Sup. Ct. New York Cnty. Nov. 25, 2013).



The coverage dispute arose from a complex corporate history involving numerous corporate purchases, transfers and takeovers. The series of transactions began with the original Glidden Company, a paint/pigment manufacturer. It culminated with the pigment business and the paint business being divided and separately owned by two entities. Akzo Nobel Paints ("ANP") is the successor company of the "paint" side of the business while Millennium is the successor company of the "pigment" side of the business. One transaction in Glidden's corporate evolution involved an agreement by ANP's predecessor to indemnify Millennium's predecessor.

Various London Insurers and Northern Assurance Company provided primary and excess coverage to one of Millennium's corporate predecessors. The insurers funded defense costs arising out of lead paint/pigment claims asserted against Millennium and ANP under those policies. In the present action, the insurers, as Millennium's subrogee, sought indemnification from ANP for the defense costs after litigation in Ohio state court had determined that ANP's predecessors were not insured under the policies issued to Millennium's predecessor. *See The Glidden Co. v. Lumbermens Mutual Casualty Co.*, 112 Ohio St.3d 470 (2006).

The court found that ANP had to indemnify Millennium under the predecessors' agreement but that the anti-subrogation doctrine precluded the insurers' subrogation claim against ANP. Under the anti-subrogation rule, "an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived." Even though the subject policies did not insure ANP (either by name or by operation of law), the court concluded that the anti-subrogation rule applied because the insurers sought "to recover for the very risk [they] insured when [they] originally issued the policies." More specifically, the court explained that the reimbursement the insurers sought from ANP–relating to defense costs for lead paint/pigment claims–was precisely the risk the insurers had agreed to cover under its policies to Millennium's predecessor. Therefore, the court granted summary judgment to ANP on its anti-subrogation affirmative defense and dismissed the insurers' claims with prejudice.

The ruling is a reminder that the anti-subrogation doctrine is equitable in nature and illustrates its potentially expansive scope. Although the anti-subrogation doctrine is commonly invoked in cases where an insurer seeks recovery against a named insured, an additional insured or an intended beneficiary of the policy, *Glidden* uniquely applies the doctrine to bar recovery where an insurer seeks recovery for claims that arose from "precisely the risk the insurer was covering."

Dissolved Policyholder Alert:

Delaware Supreme Court Rules That Unused Insurance Policies Constitute Property of a Dissolved Corporation

Reversing a Court of Chancery decision that barred the appointment of a receiver to pursue tort claims against a dissolved insulation company, the Delaware Supreme Court ruled that contingent contractual rights, such as unused insurance policies, are property of a dissolved corporation, so long as those rights are capable of vesting. *In re Krafft-Murphy Co., Inc.*, 2013 WL

6174485 (Del. Nov. 26, 2013).

Krafft-Murphy, a plastering company named as a defendant in hundreds of asbestos-related suits, was dissolved in 1999. At the time of dissolution, the company had no distributable assets. However, under the direction of its insurers, the company continued to defend asbestos claims that were filed within ten years of its dissolution. The company sought to dismiss any claims filed more than ten years after its dissolution on the basis that Delaware statutory law did not permit the filing of claims after such time. In response, asbestos claimants sought the appointment of a receiver. A Delaware Court of Chancery denied the petition. The court reasoned that with respect to

claims filed within the first ten years after dissolution, it was unnecessary to appoint a receiver because the insurers had represented that they would continue to litigate and defend all third-party claims. As to claims filed more than ten years after dissolution, the court reasoned that Krafft-Murphy held no assets (*i.e.*, "property") that would justify the appointment of a receiver. More specifically, the court reasoned that because the latter set of claims was time-barred under Delaware dissolution statutes, 8 Del. C. §§ 278-282, Krafft-Murphy faced no liability for those claims. Accordingly, its insurance policies could not be considered "undistributed assets" with respect to those claims. The Delaware Supreme Court reversed.

The Delaware Supreme Court ruled that contingent contractual rights, such as unexhausted liability insurance policies, are "property" within the meaning of Delaware statutory dissolution law, so long as they are capable of vesting. The court held that here, the policies could be vested because the latter set of claims was not time-barred by any applicable statutory provision. In this respect, the court ruled that a statute which provides that a dissolved corporation is not amenable to suit after the expiration of a three year period (8 Del. § 278) does not extinguish the corporation's underlying liability to third parties. The court explained, "[t]o the contrary, [statutory law governing the appointment of a receiver (8 Del. § 279)] enables a dissolved corporation to (through a receiver) 'sue and be sued' after the expiration of the [ ] three year period."

Having concluded that the policies constituted property of the dissolved corporation, the court ruled that the appointment of a receiver was permissible and appropriate. The court stated that as "a pure matter of statutory law, the Corporation presently lacks any authority to continue managing the winding-up of its business, which includes defending law suits brought against it. Only if a receiver is appointed can the Corporation lawfully obtain that authority."

Krafft-Murphy stands in contrast to an Ohio Supreme Court decision issued last year, *In re All Cases Against Sager Corp.*, 132 Ohio St. 3d 5 (Ohio 2012) (see April 2011 Alert) (discussing Ohio Supreme Court's grant of review in *Sager*). In *Sager,* the court ruled that because an applicable Illinois dissolution statute explicitly barred claims against a dissolved corporation filed more than five years after dissolution, the subject insurance policies had no value to claimants filing suit more than five years after dissolution. As such, the *Sager* court denied the petition to appoint a receiver.

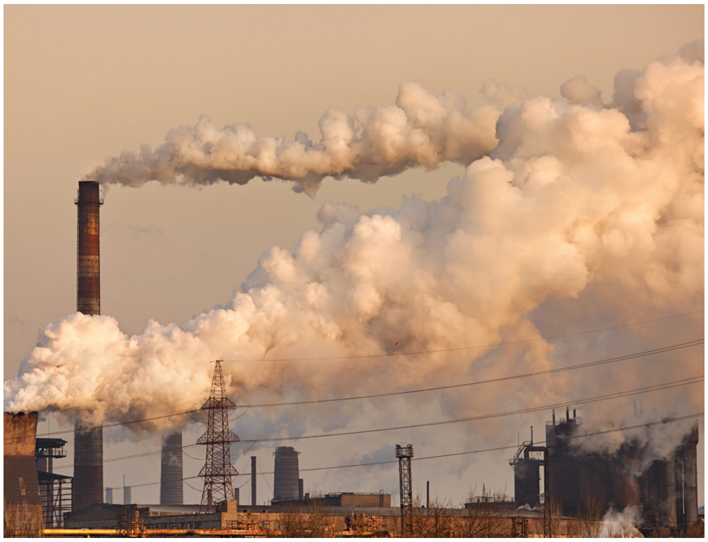
Pollution Exclusion Alert:
When Does A Pollution Exclusion Bar Coverage for Claims Arising Out of Fumes or Odors?

Last month, an Illinois appellate court ruled that a pollution exclusion does not bar coverage for claims based on the emanation of foul odors from a hog farm. *Country Mutual Ins. Co. v. Hilltop View, LLC*, No. 4-13-0124 (Ill. App. Ct. Nov. 13, 2013). Neighbors of the farm sued the farm's owner for nuisance and negligence based on the odors associated with the operation of the hog farm. Country Mutual, the hog farm's umbrella insurer, declined to defend on several bases, including the pollution exclusion, which barred coverage for "personal injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release, or escape of pollutants." An Illinois trial ruled that the exclusion did not encompass the odor-related claims and an appellate court affirmed.

The appellate court held that Illinois law limits application of the pollution exclusion to "only those hazards traditionally associated with environmental pollution" and that hog farm odors did not fall within this category. While purporting to endorse a bright-line standard, the decision may ultimately raise more questions than it answers. In addition, the ruling illustrates many of the conflicting analyses and factors utilized by courts in this context.

Is the substance "hazardous"? The court explained that "many materials can be hazardous to a body of water but beneficial to the land." More specifically, the court noted that the hog manure at issue was beneficial to land but would be harmful if deposited into a body of water and would arguably fall within the scope of a pollution exclusion in the latter context.

Is the substance "naturally occurring"? The *Country Mutual* court distinguished decisions that barred coverage under a pollution exclusion on the basis that those cases involved "nonnaturally occurring chemicals," implying that the origin of a substance may play a role in its classification as "traditional environmental pollution." However, numerous courts–some faced with odors arising from naturally-occurring substances–appear not to have considered this factor in barring coverage on the basis of a pollution exclusion. *See Travelers Prop. Cas. Co. of America v. Chubb Custom Ins. Co.*, 864 F. Supp. 2d 301 (E.D. Pa. 2012) (offensive and noxious odors emanating from pig farm fall within scope of pollution exclusions); *Hirschhorn v. Auto-Owners Ins. Co.*, 338 Wis.2d 761, 809 N.W.2d 529 (Wis. 2012) (property damage caused by pervasive foul odors emanating from bat guano fall within scope of pollution exclusion in homeowner's policy)



(discussed in April 2012 Alert); *Maxine Furs, Inc. v. Auto-Owners Ins. Co.*, 2013 WL 1197466 (11th Cir. Mar. 31, 2011) (restaurant curry odors constitute a contaminant within meaning of exclusion) (discussed in May 2011 Alert); *Wakefield Pork, Inc. v. RAM Mut. Ins. Co.*, 731 N.W.2d 154 (Minn App. Ct. 2007) (pollution exclusion bars coverage for claims arising from noxious and offensive odors released from pig farm).

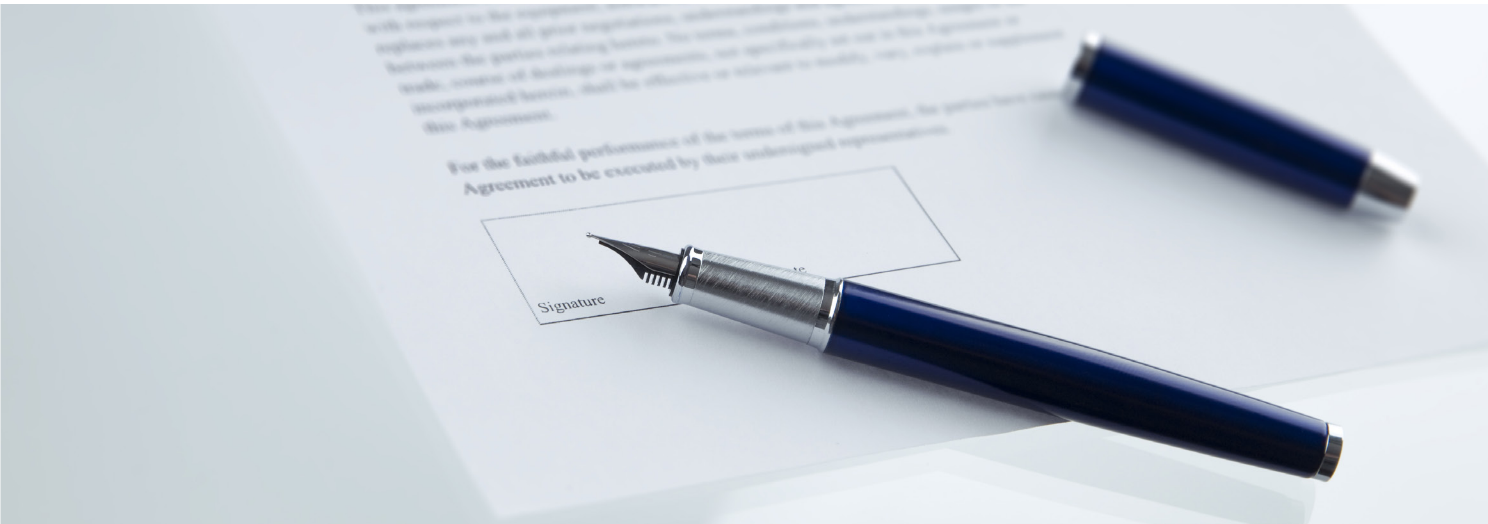
Is the alleged harm defined as pollution by an applicable statute? Illinois (and other) courts disagree as to the relevance of pollution-related statutes in determining whether claims allege "pollution" for purposes of applying a pollution exclusion. Here, the court rejected the insurer's argument that because the hog farm odors constituted pollution under the Illinois Environmental Protection Act (which defines "air pollution" as "the presence in the atmosphere of one or more contaminants … as to … unreasonably interfere with the enjoyment of life or property") (415 ILCS 5/3.115 (West 2010)), the odors must also be deemed pollution under the pollution exclusion. Another Illinois law decision similarly declined to consider Illinois EPA standards in evaluating applicability of a pollution exclusion. *See Scottsdale Indem. Co. v. Village of Crestwood*, 673 F.3d 715 (7th Cir. 2012) (rejecting argument that pollution should be determined by reference to environmental regulations) (discussed in April 2012 Alert). In contrast, an Illinois appellate court expressly relied on the Illinois EPA in finding that a pollution exclusion did not eliminate an insurer' duty to defend. In *Erie Ins. Exchange v. Imperial Marble Corp.*, 957 N.E.2d 1214 (Ill. Ct. App. 2011), the court reasoned that the pollution exclusion was ambiguous where the emission levels of the hazardous materials were permitted by the Illinois EPA.

What is the nature of the harm alleged? The *Country Mutual* decision appears to indicate that the nature of the alleged harm is relevant to a pollution exclusion analysis. In declining to find that hog farm odors constitute traditional environmental pollution, the court noted that the underlying plaintiffs alleged only a loss of enjoyment of property rather than bodily harm or physical injury. Although the nature of alleged injury may be relevant to the "personal injury" element of coverage, the *Country Mutual* decision seemed to utilize the presence (or absence) of bodily injury as an indicator of "traditional pollution."

Defense Cost Alert:

Insurer Entitled to Recoup Defense Costs for Uncovered Claim, Says New York Appellate Court

A New York appellate court ruled that an insurer was entitled to reimbursement of defense costs following a finding of no coverage where it had reserved its right to recoup such costs. *Certain Underwriters at Lloyd's London v. Lacher & Lovell-Taylor, P.C.*, 2013 WL 6284081 (N.Y. App. Div. 1st Dep't Dec. 5, 2013). Courts in other many other jurisdictions have similarly held that an insurer may recoup defense costs if it is subsequently determined that there is no coverage, provided that a reservation of rights specifically advised the policyholder of such intent. Several courts have reasoned that when a policyholder fails to object to a reservation of rights, it has implicitly agreed to its terms and an implied-in-fact contract is created.



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