SIMPSON THACHER

INSURANCE LAW ALERT

FEBRUARY 2010

This month's Alert reports on a host of recent court decisions, including a decision affirming the dismissal of a securities suit against a reinsurer based on post-catastrophe reserve setting; a state supreme court decision finding "bodily injury" coverage absent physical injury; and a "number of occurrences" decision in the product liability context. We also discuss recent consumer class certification decisions involving insurers. We hope you will continue to turn to our Alerts for information on developments in the insurance arena.

Securities Alert:

Second Circuit Affirms Dismissal of Hurricane-Related Securities Suit

On December 21, 2009, the United States Court of Appeals for the Second Circuit affirmed the dismissal of a federal securities fraud class action against PXRE Group Ltd., and several of the company's former officers. *Condra v. PXRE Group Ltd.*, No. 09-1370-cv, 2009 WL 4893719 (2d Cir. Dec. 21, 2009). PXRE is represented by Simpson Thacher partners Bruce D. Angiolillo and Jonathan K. Youngwood.

The case arose out of damage caused by Hurricanes Katrina, Rita and Wilma, which struck the United States in the summer and fall of 2005. PXRE, a Bermuda reinsurance company, held numerous policies directly affected by the hurricane-related property damage. The plaintiffs brought fraud claims under the Securities Exchange Act of 1934, alleging that PXRE and its officers, faced with financial ruin due to mounting exposure, knowingly understated PXRE's losses in the weeks immediately following the hurricanes in order to maintain its financial viability and raise additional funds. In February 2006, PXRE revised its initial loss reserves related to the storms and was subsequently downgraded by rating agencies. PXRE ceased writing new policies and its stock price dropped.

The Second Circuit affirmed the district court's ruling that the class action complaint failed to sufficiently plead scienter, as required to state a claim for securities fraud. The Second Circuit observed that while a plaintiff may establish a "strong inference" of scienter by alleging either (i) that the defendants had motive and opportunity to commit fraud, or (ii) strong circumstantial evidence of conscious misbehavior or recklessness, 2009 WL 4893719, at *1, the plaintiffs failed to adequately allege either. Consequently, the appellate court held that dismissal of the complaint was appropriate. A few weeks later, the district court dismissed certain hedge funds' claims based on the same set of facts and an allegedly false private placement memorandum. *Anegada Master Fund, Ltd. v. PXRE Group Ltd.*, No. 08 Civ. 10584, 2010 WL 299478 (S.D.N.Y. Jan. 26, 2010).

The Second Circuit's *PXRE* decision illustrates the continued willingness of courts to dismiss securities fraud actions prior to discovery where the plaintiffs fail to allege scienter with requisite specificity. *PXRE* sends a clear message to potential securities fraud plaintiffs: Allegations that an insurance or reinsurance company inflated credit ratings for the purpose of raising capital are insufficient to establish the requisite showing of "motive" under the heightened pleading standards. As the court stated, an allegation that a reinsurer has "rais[ed] capital as part of an amorphous

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scheme to stave off [its] collapse … does not suffice." *In re PXRE Group, Ltd. Sec. Litig.*, 600 F. Supp. 2d 510, 533 (S.D.N.Y. 2009). Similarly, allegations of recklessness in the preparation of loss estimate results will likely fail if a plaintiff is unable to point to *specific* information contemporaneously available to an insurer or reinsurer which indicated the inaccuracy of the disclosed estimates. *Id.* at 535-36. Equally important, the *PXRE* decision reflects a recognition that an insurer's setting of initial loss reserves in the wake of a natural disaster is not analogous to accounting practices that have formed the basis of securities claims against other companies: "[T]he understatement of *initial* loss *estimates* by PXRE in the wake of Hurricanes Katrina, Rita, and Wilma is not neatly analogized to a corporation understating losses in the regular course of its business …" *Id.* at 545. In short, the heavy burden that fraud plaintiffs face in satisfying the strict scienter requirements may prove to be particularly unattainable in suits against insurance entities based on allegedly improper loss estimate procedures and/or credit ratings.

Coverage Alerts:

Missouri Supreme Court Finds That "Bodily Injury" Coverage Includes Coverage for Emotional Distress Absent Physical Injury

In December 2009 the Supreme Court of Missouri ruled that an uninsured motorist statute (Missouri Section 379.203.1) requires coverage of all bodily injury, sickness or disease, including damages for emotional distress absent physical injury. *Derousse v. State Farm Mut. Auto. Ins. Co.*, 298 S.W.3d 891 (Mo. 2009). The matter arose out of an automobile accident, in which the insured was not physically injured, but suffered emotional distress as a result of participating in and witnessing the accident. Suing for coverage under her uninsured motorist policy, the plaintiff alleged that she suffered "injuries to her head, anxiety attacks, including nightmares, and severe emotional and mental distress." *Id.* at 893. The motorist policy defines "bodily injury" as "bodily injury to a person and sickness, disease or death which results from it." *Id.* at 894. The insurer, State Farm Mutual Automobile Ins. Co., denied coverage, claiming that because the insured conceded that she had suffered no physical injuries in the accident, she was not entitled to coverage under the policy. The trial court granted State Farm's motion for summary judgment, finding that the policy did not encompass coverage for "injuries solely of an emotional nature." *Id.* at 893.

On appeal, the Missouri Supreme Court framed the central issue as whether the policy contravened Section 379.203.1 by failing to provide uninsured motorist coverage for the insured's damages. Section 379.203.1 provides, in relevant part: "No automobile liability insurance … shall be delivered or issued … unless coverage is provided … to recover damages … because of bodily injury, sickness or disease, including death, resulting therefrom." *Id.* at 894. The court determined that because the statutory language provided a broader grant of coverage than the policy, the statutory language must control.

Because the statute does not specify whether the term "bodily" modifies only the word "injury" or whether it also modifies the phrase "sickness or disease," the court found it ambiguous. *Id.* at 895. Ultimately, the court determined that the term "bodily" modified only the word "injury," such that emotional distress damages unaccompanied by physical symptoms, such as those suffered by the insured, were covered by the statute. *Id.*

The *Derousse* decision appears to be a departure from the majority of court rulings nationwide holding that purely non-physical injuries do not constitute "bodily injury" as defined in most policies. Given the similarities between the "bodily injury" statutory language at issue in *Derousse* and that in standard CGL policies, policyholders may seek to extend *Derousse's* holding to disputes involving general liability policies. However, the decision in *Derousse* is not only against the weight of authority, but the court also noted that the plaintiff in that case did experience physical manifestations (such as headaches, backaches and vomiting, for which she sought medical attention) as a result of her emotional distress. *Id.* at 893 n.2. Although the *Derousse* court seemed not to give particular weight to this fact (perhaps due to the insured's failure to specify such manifestations in her petition), most courts addressing this issue have found the presence or absence of physical manifestations to be relevant in deciding whether "bodily injury" has been alleged. Similar issues relating to whether claims sufficiently allege "bodily injury" are likely to arise as litigation emerges in novel contexts, such as radiation-related injuries allegedly caused by cellular phone usage.

Insurer Need Not Defend Certain Product Liability Claims Based on Number of Occurrences, Says New York Federal Court

On December 28, 2009, a federal district court in New York granted Lexington Insurance Company's motion for summary judgment, substantially limiting coverage available to Bausch & Lomb Inc. for losses arising from thousands of personal injury claims related to Bausch & Lomb's contact lens solution product line. *Bausch & Lomb Inc. v. Lexington Ins. Co.*, No. 08-CV-6260T, 2009 WL 5214953 (W.D.N.Y. Dec. 28, 2009). The central issue before the court was whether the personal injury claims could be characterized as a single occurrence under the terms of the policies and applicable New York law.

Lexington issued three umbrella policies to Bausch & Lomb, all of which sat in excess of retained limits specified in the policies. Lexington acknowledged coverage for the personal injury claims against Bausch & Lomb, but argued that because each individual claim constituted a separate "occurrence," the policies' specified retained limits of liability had not been met. Bausch & Lomb, in contrast, contended that all of the claims resulted from a single occurrence.

The policies at issue contained standard "occurrence" definitions, as well as a grouping or "deemer" clause, which provided that all exposure to "substantially the same general conditions" may be deemed a single occurrence. *Id.* at *4. Finding the policy language unambiguous, the court held that Bausch & Lomb had "failed to establish that the [ ] claims are the result of a single occurrence as that term is used in the Lexington policies." *Id.* at *5. The court also rejected Bausch & Lomb's contention that formulation and manufacture of the lens solutions was the operative occurrence. Rather, the court held that each consumer's individual exposure to the product—which took place at thousands of different locations, at different times, with different resulting injuries—constituted the occurrences. The court rejected Bausch & Lomb's contention that the multiple exposures could be considered a single occurrence under the polices' grouping provisions. A grouping provision, the court observed, operates to ensure that repeated or continuous exposure to a single harmful condition will not be treated as separate occurrences. A grouping clause is not, however, "intended to group claims 'where there is no single incident that can be identified as the event resulting in injury to the numerous claimants.'" *Id.* at *9 (citing *Int'l Flavors & Fragrances, Inc. v. Royal Ins. Co. of Am.*, 844 N.Y.S.2d 257 (N.Y. App. Div. 2007)).

Although questions concerning the number of occurrences typically are dependent on the particular facts of each case, several New York decisions have rejected single-occurrence positions in connection with claims alleging exposure to a harmful product under varying circumstances and timeframes. *See, e.g., Appalachian Ins. Co. v. Gen. Elec. Co.*, 8 N.Y.3d 162 (2007)

(rejecting argument that thousands of asbestos-related losses constitute a single occurrence); *Int'l Flavors & Fragrances, Inc. v. Royal Ins. Co. of Am.*, 844 N.Y.S.2d 257 (N.Y. App. Div. 2007) (multiple injuries caused by exposure to toxic substance may not be deemed a single occurrence). In such circumstances, these courts have looked to the specific incident giving rise to liability rather than to "some point further back in the causal chain." 2009 WL 5214953, at *7 (citing *Appalachian*, 8 N.Y.3d at 169). New York has probably not, however, endorsed a strict "one-occurrence-per-injured-party approach." 8 N.Y.3d at 174. Rather, claims involving multiple exposures to allegedly harmful products must be examined individually, with reference to the specific policy language and the particular facts of each case.

Liquidation Alert:

New York Law Controls All Claims Against Estate of Midland Insurance Company

In 1986, insurer Midland Insurance Company was adjudged insolvent and placed in liquidation. The New York Superintendent of Insurance is Midland's statutory liquidator with responsibility for paying out claims for the liquidation estate. The issue brought before the New York Supreme Court was whether the Superintendent may apply New York law to all Midland insurance policies or whether an individualized choice-of-law analysis is required pursuant to *Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 36 A.D.3d 17 (N.Y. App. Div. 2006), *aff'd*, 9 NY.3d 928 (2007). The Supreme Court, Appellate Division reversed the trial court and held that New York law controls all claims under insurance policies issued by Midland. *In re Liquidation of Midland Ins. Co.*, 2010 WL 89525 (N.Y. App. Div. Jan. 12, 2010). Simpson Thacher partners Barry R. Ostrager and Mary Kay Vyskocil represented certain Swiss Re companies as reinsurers-appellants.

Class Action Alert:

Federal Judge Certifies Two Classes In Suit Against Insurer

On December 30, 2009, a federal court in Delaware certified two of three proposed plaintiff classes in claims against Geico Casualty Company. *Johnson v. Geico Cas. Co.*, No. 06-408-JJF, 2009 WL 5173486 (D. Del. Dec. 30, 2009). The suit alleges that Geico unreasonably refused to pay medical expenses related to automobile accidents. According to the complaint, Geico violated state law requirements that automobile insurers provide no fault medical benefit protection to customers injured in automobile accidents. The plaintiffs contended that class certification was warranted because Geico "perpetuat[ed] this wrongful conduct on thousands of Delaware claimants and wrongfully with[held] millions of dollars in benefits and penalties." *Id.* at *3.

Under the ruling, the court certified two separate plaintiff classes for purposes of alleging claims for consumer fraud, breach of the duty of fair dealing, and bad faith breach of contract. However, the judge found that class certification was inappropriate with respect to a common law fraud claim, and for a claim seeking a declaratory judgment. With respect to these two claims, the court held that the plaintiffs had not met their burden of establishing that members of the plaintiff classes shared common questions of law or fact. The judge also denied certification of a third class, finding that membership in the proposed class was not ascertainable based on objective criteria because it would require inquiry into the merits of the putative members' claims. *Id.* at *6.

Consumer class action suits against insurance-related entities appear to be on the rise, and given the

undeniable impact that class certification can have on both trial and settlement dynamics, motion practice regarding the certification of plaintiff classes takes on particular significance. Insurers defending against class actions typically have strong challenges to certification on multiple grounds, including but not limited to: (i) plaintiffs' failure to satisfy Federal Rule of Civil Procedure 23 (which includes requirements related to numerosity, commonality, typicality, superiority of a class action, and the predominance of common issues); (ii) the definition/scope of the putative class; (iii) the adequacy of the proposed class representative; (iv) the sufficiency of a measure of damages applicable to the entire class; (v) the presence of dispositive defenses that may be unique to individual claimants; and (vi) administrative concerns, such as the feasibility of notice to the class, discovery matters, and case management issues. In claims involving multi-state issues, such as where class members or other parties are located in multiple states, insurers should be alert to the possibility of different state laws applying to different claims, which weighs against class treatment.

In 2009, a number of courts ruled on class certification in insurance-related cases in a variety of contexts. For example, as a result of large numbers of homeowners seeking to refinance mortgages over recent years, class action litigation has ensued which relates to the conduct of title insurance companies participating in such refinances. Attempts to certify such actions have been met with mixed results:

- ***Hancock v. Chi. Title Ins. Co.***, No. 3:07-CV-1441-D, 2009 WL 4665343 (N.D. Tex. Dec. 9, 2009): In this breach of contract action against a title insurance company based on alleged failure to apply mandatory premium discounts, the court found that because individualized inquiries would predominate at trial, class certification was not appropriate.

- ***Chesner v. Stewart Title Guar. Co.***, No. 1:06CV00476, 2009 WL 585823 (N.D. Ohio Jan. 9, 2009): The court decertified a plaintiff class comprised of purchasers of title insurance during mortgage refinancing, finding that the subsequent development of facts and theories of liability revealed that certification was no longer appropriate.

- ***Perez v. First Am. Title Ins. Co.***, No. CV-08-1184-PHX-DGC, 2009 WL 2486003 (D. Ariz. Aug. 12, 2009): In a suit alleging claims of unfair discrimination and unjust enrichment based on the defendant's alleged failure to offer a discounted mortgage refinance rate to certain customers, the court modified the plaintiffs' proposed class definition, and certified the class, while recognizing that the class definition may be subject to refinement as the factual record develops.

- ***Mims v. Stewart Title Guar. Co.***, 590 F.3d 298 (5th Cir. 2009): In an action by mortgagors alleging that the title insurance company failed to issue mandated refinancing discounts for title insurance premiums, the court reversed certification as to federal statutory claims on the ground that the theory of liability for such claims required individualized inquiries, but affirmed class certification as to state law claims.

Additionally, policyholders and insurance beneficiaries appear to be better informed as to matters relating to the appraisal and/or denial of claims, as well as the termination of benefits. As such, class action litigation has proliferated regarding the procedures that insurance companies employ in appraising or denying submitted claims, and in terminating insurance benefits. As the cases below demonstrate, courts routinely redefine proposed classes to conform with federal class certification requirements.

- ***Kartman v. State Farm Mut. Auto. Ins. Co.***, No. 1:07-cv-474-WTL-TAB, 2009 WL 348909 (S.D. Ind. Feb. 6, 2009): A class of individuals holding property policies asserted tort and breach of contract claims against defendant insurers based on allegedly improper appraisal methods. The court declined to consider class certification with respect to the

plaintiffs' claims for damages. As to the request for injunctive relief, the court held that the plaintiffs' proposed class definition was "unworkable." However, the court modified the class definition, and held that the plaintiffs had satisfied the Rule 23 requirements for class certification.

- ***Artie's Auto Body, Inc. v. Hartford Fire Ins. Co.***, No. X08CV0301961415, 2009 WL 3087209 (Conn. Super. Ct. Aug. 26, 2009): A class of Connecticut auto body shops who had performed repairs paid for by Hartford (as a result of automobile insurance policies issued by Hartford) alleged that Hartford engaged in a pattern of unfair and deceptive acts and practices. The court had initially certified the plaintiff class, but continued to monitor the matter to ensure that certification remained appropriate. Upon review of the record, the court modified the certified class definition and certified a sub-class of plaintiffs.

- ***Van Horn v. Nationwide Prop. & Cas. Ins. Co.***, No. 1:08-cv-605, 2009 WL 347758 (N.D. Ohio Feb. 10, 2009): The plaintiffs brought a motion to certify a class of individuals allegedly harmed by Nationwide's policy of prematurely terminating car rental benefits. The court determined that the plaintiffs' proposed class definition was overbroad, and invoked its discretion to redefine the class. Having narrowed the defined class, the court concluded that the requirements of Rule 23 had been met and that class certification was appropriate.

Similarly, as consumers become more knowledgeable about issues relating to premium costs and entitlements, plaintiffs have sought to certify class actions against insurance entities based on allegedly improper business practices. The trend for such premium-related litigation appears to be toward a denial of class certification. Based on the decisions below, courts appear to agree that claims relating to the refunding or price setting of premiums necessarily entail individualized inquiries, and are thus not suitable for class certification.

- ***Avritt v. ReliaStar Life Ins. Co.***, No. 07-1817, 2009 WL 455808 (D. Minn. Feb. 23, 2009): A putative plaintiff class, consisting of California public school employees, alleged that the defendant insurer engaged in improper practices for crediting interest on premiums with respect to the plaintiffs' fixed deferred annuity policies. The court found that the plaintiffs failed to meet their burden of establishing that common questions predominate over individual issues, as required by Rule 23. The plaintiffs likewise failed to demonstrate the "superiority of a class action," as set forth in Rule 23. Accordingly, class certification was denied.

- ***Bishop's Prop. & Invs., LLC v. Protective Life Ins. Co.***, 255 F.R.D. 619 (M.D. Ga. 2009): The plaintiffs sought certification of a class allegedly harmed by the defendant insurer's failure to refund unearned credit insurance premiums upon satisfaction of the underlying loans prior to the loan termination date. Under the factual circumstances presented, the court concluded that common issues of fact or law did not predominate, and thus that certification was inappropriate.

- ***Adams v. Monumental Gen. Cas. Co.***, No. 4:05-CV-132, 2009 WL 383625 (M.D. Ga. Feb. 12, 2009): Presented with a fact pattern analogous to that in *Bishop's*, the court similarly held that individualized inquires would predominate over common ones at trial, making class certification inappropriate.

- ***Spagnola v. Chubb Corp.***, Nos. 06 Civ. 9960, 08 Civ. 193, 2010 WL 46017 (S.D.N.Y. Jan. 7, 2010): In a breach of contract claim based on an insurer's alleged failure to increase premiums and coverage in accordance with "current costs and values," the court found that the plaintiffs satisfied Rule 23(a) requirements of commonality and typicality, "if only barely." *Id.* at *14. The plaintiffs' failure to demonstrate the adequacy of the proposed class representatives, however, required a denial of class certification.

Whether 2010 will follow a growing trend of insurance-related class action suits is uncertain. The unique and often complicated aspects of the business of insurance will undoubtedly pose difficult and novel legal questions for courts faced with class certification motions in the insurance context. Simpson Thacher continues to monitor the development of this caselaw, and the potential effect any future rulings may have on the methods utilized by insurance companies in their routine business operations.

Discovery Alert:

Plaintiffs Sanctioned For Failure To Preserve And Produce Documents

On January 15, 2010, Judge Shira A. Scheindlin of the Southern District of New York issued a scathing opinion in which she detailed the plaintiffs' overall failure to comply with discovery requests, and their "careless and indifferent collection efforts after the duty to preserve arose." *The Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, No. 05 Civ. 9016, 2010 WL 184312, at *2 (S.D.N.Y. Jan. 15, 2010). The decision has been widely publicized and will likely be widely cited in motion practice relating to future discovery disputes. The lawsuit was initiated by plaintiff investors seeking to recover losses incurred as a result of the liquidation of two hedge funds. A number of parties to the action settled, leaving Citco Group Limited and its parent company and officers (collectively, "Citco") as the primary remaining defendant. Citco filed a motion for sanctions based on discovery misconduct after finding substantial gaps in certain document productions by the plaintiffs. In particular, Citco alleged that certain plaintiffs "failed to preserve and produce documents—including those stored electronically—and submitted false and misleading declarations regarding their document collection and preservation efforts." *Id.* at *1.

The Pension Committee decision sends a strong message. Even when discovery may be complex, expensive and laborious, including in insurance-related litigation, judges may nonetheless "expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed and produced to the opposing party." *Id.* at *1. To the extent that a party fails to comply with the well-established duties of discovery, the consequences may be severe, and in certain egregious instances, case-dispositive. Undoubtedly, inquiries as to the propriety of conduct during discovery will be made on a case-by-case basis, with results depending on a multitude of factors—pertaining not only to the facts of the case, but to state law precedent and subjective judicial discretion as well. Despite such variables, all parties to litigation should be on notice that they must "anticipate and undertake document preservation with the most serious and thorough care," and that discovery misconduct, whether willful or merely negligent, may result in the imposition of monetary and equitable sanctions. *Id.* at *7.

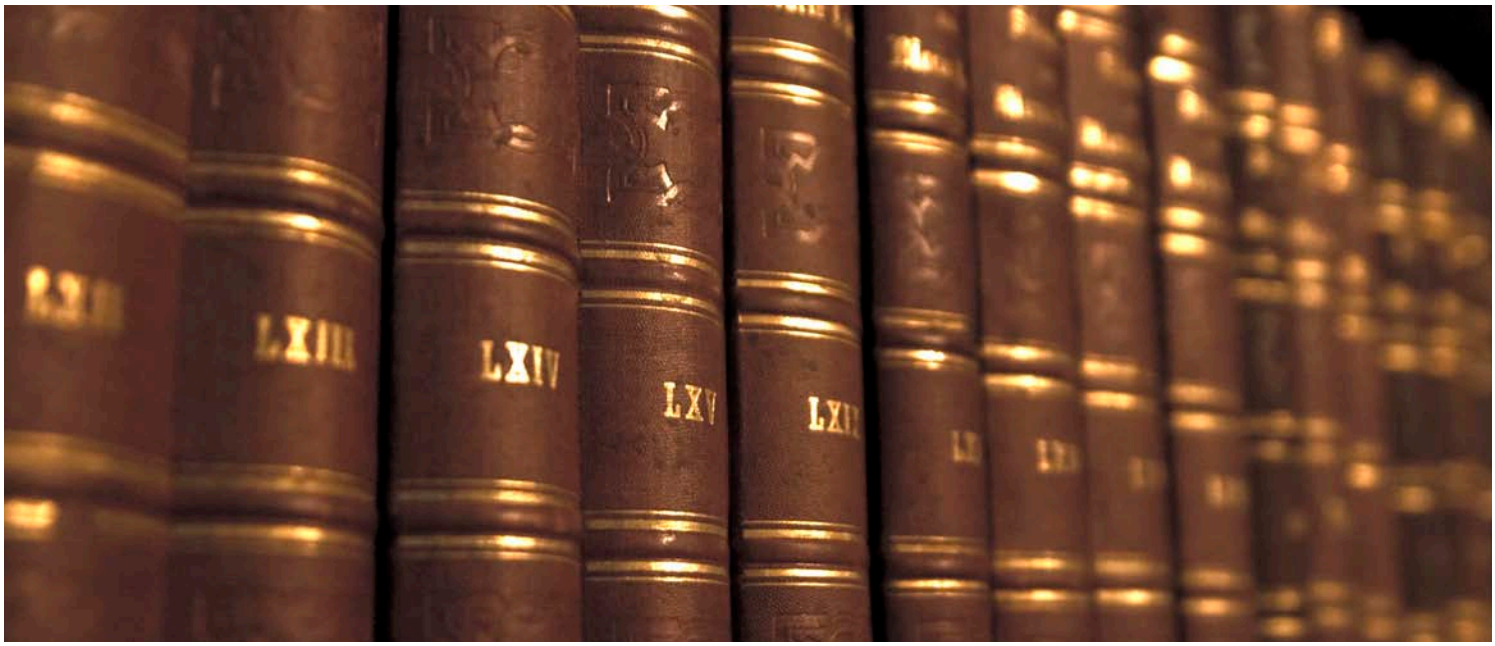
The Pension Committee case is certainly distinguishable from run-of-the-mill discovery disputes inasmuch as the facts were extreme. The court detailed the procedures (or lack thereof) utilized by each of the thirteen plaintiffs in complying with discovery requests and court orders. Finding countless examples of misconduct and failures to comply with well established principles of discovery, the court concluded that six of the plaintiffs acted in a grossly negligent manner and that seven other plaintiffs acted with negligence. In particular, the court highlighted the plaintiffs' failures to (i) preserve, collect and produce electronic documents; (ii) communicate with and obtain documents from important witnesses; (iii) implement a "timely written litigation hold" to ensure that relevant documents would not be destroyed as a part of routine document retention policies; and (iv) monitor and/or supervise the document collection process in any meaningful way. Moreover, the court found that during the investigation of these failures, certain plaintiffs submitted false and/or misleading declarations.

As a result, the court assessed monetary sanctions against all plaintiffs in an amount reflecting the costs and attorneys' fees incurred in connection with the investigation of the plaintiffs' misconduct, and the filing of the sanctions motion. Additionally, the court held that an adverse jury instruction would be issued with respect to the six plaintiffs found guilty of gross negligence. This instruction, pertaining to the spoliation of evidence, will allow the jury to presume that evidence lost as a result of the plaintiffs' gross negligence was relevant and would have been favorable to Citco. *Id.* at *23.

Publication Announcements

Simpson Thacher is proud to announce the publication of the Sixth Edition of *McLaughlin on Class Actions: Law and Practice*, a two-volume treatise authored by litigation partner Joseph M. McLaughlin. The treatise, frequently cited by courts across the country, has been described as "the best synthesis of the law of class actions in years."

Simpson Thacher is also pleased to report that Los Angeles-based senior litigation associate Deb Stein has become an insurance columnist for the *Los Angeles and San Francisco Daily Journals*. Her recent columns have discussed Ponzi-scheme-related coverage issues and disputes arising from insurance covering the film industry.



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