SIMPSON THACHER

INSURANCE LAW ALERT

APRIL 2010

This month's Alert highlights an interesting mix of recent court decisions, including Louisiana and Virginia decisions addressing coverage for Chinese drywall claims; a Southern District of Texas ruling on when an insurer may file an interlocutory appeal of a duty to defend decision; New York and Connecticut federal court rulings on the disqualification of party-appointed arbitrators; and decisions from the Sixth and Eighth Circuits addressing the cooperation clause. We also review a New York appellate court ruling on an insurer's duty to indemnify Enron-related losses, a Mississippi Supreme Court decision holding that a subcontractor's faulty construction may constitute an "occurrence," and a California appellate ruling on the threshold requirements for a contribution claim. On the class action front, we discuss a Washington appellate court decision reinstating a diminished value class action against an automobile insurer. Finally, we address a recent Court of International Trade decision dismissing certain claims against sureties. We hope you will continue to turn to the Alert for the latest developments in insurance and reinsurance law.

Chinese Drywall Alert:

Two Rulings Reach Divergent Outcomes As To Whether Coverage Is Available For Chinese Drywall Claims

In the past few weeks, two courts have issued decisions addressing the availability of insurance coverage for claims arising from the installation of allegedly defective "Chinese drywall." The decisions are the first to analyze insurance coverage issues in the Chinese drywall context, and they are a mixed bag for insurers.

On March 22, 2010, in *Finger v. Audubon Ins. Co.*, No. 09-8071 (La. Civ. Dist. Ct. Mar. 22, 2010), a state court in Louisiana granted a homeowner's motion to strike Audubon Insurance Company's affirmative defenses, which set forth three policy exclusions that Audubon had relied upon to deny the homeowner's insurance claim. The court held that the "Pollution or Contamination" exclusion does not, and was never intended to, apply to residential homeowners' claims for damages caused by substandard building materials. Reasons for Judgment ¶ 19. Likewise, the court held that the "Gradual or Sudden Loss" exclusion did not apply because the homeowner's damages were caused by sulphurous gases emitting from the Chinese drywall, not from wear, tear and/or gradual deterioration. *Id.* at ¶ 23. Finally, the court ruled that the "Faulty, Inadequate or Defective Planning" exclusion was inapplicable because the Chinese drywall "defect" (i.e., the emission of gases) was not one that rendered the drywall unable to perform the purpose of drywall. *Id.* at ¶ 28. Audubon's litigation counsel indicated in press reports that Audubon is likely to appeal the state court's ruling.

On March 24, 2010, in *Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, No. 2:09-cv-00185 (E.D. Va.

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March 24, 2010), a federal court in Virginia handed the insurer a victory, holding that Builders Mutual was not obligated to indemnify Dragas for costs expended in connection with Dragas' remediation efforts. Builders Mutual had initiated the lawsuit, seeking a declaration that it had no duty to defend or indemnify Dragas in lawsuits arising out of Dragas' installation of purportedly harmful Chinese drywall in dozens of homes. The court found that based on the facts alleged in the complaint, Builders Mutual had no coverage obligation because Dragas had made voluntary payments by remediating homes containing drywall where Dragas was under no legal obligation to do so. The court stated: "While this court may agree that Dragas made an appropriate and well-conceived decision to remediate from a business, public relations and moral standpoint, this court is not free to rewrite the [] policies to further those ends." Slip op. at 15. In light of this ruling, the court also dismissed Dragas' claim against Builders Mutual for breach of the duty of good faith and fair dealing. The court concluded that dismissal of the bad faith claim was justified because Builders Mutual had agreed to defend under a reservation of rights, and because the policies did not provide coverage for the remediation in any event. *Id.* at 17-18. Significantly, the court granted Dragas leave to amend its complaint. Thus, while the dismissal represents a preliminary victory for insurers, it remains to be seen whether the court will address the widely-anticipated legal question as to whether the pollution exclusion bars coverage for Chinese drywall-related losses.

Procedural Alert:

Insurers May Not File Interlocutory Appeal of Duty to Defend Ruling, Texas Court Rules

On March 4, 2010, a federal court in Texas denied an insurer's motion to file an interlocutory appeal of a ruling requiring the payment of defense costs. *Endurance American Specialty Ins. Co. v. Brown, Miclette & Britt, Inc.*, 2010 WL 816710 (S.D. Tex. March 4, 2010). Previously, the court had held that Endurance had a duty to defend Brown, Miclette & Britt, Inc. ("BMB") in a number of underlying lawsuits alleging securities law violations. The court found that the duty to defend was implicated despite the fact that the Endurance policy specifically excludes claims based on federal or state securities law because, in addition to the securities claims, the underlying plaintiffs alleged claims sounding in negligence. Endurance sought certification for interlocutory appeal of this ruling.

A court has the discretion to certify an interlocutory appeal under 28 U.S.C. § 1292(b) if the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The court held that this standard was not met because well established Texas law controls an insurer's defense obligations and the case failed to present a legal question as to which there was "substantial ground for difference of opinion." *Id.* at *2.

Interestingly, the decision leaves open the possibility of an immediate appeal on a different basis. In a footnote, the court acknowledged that the Eleventh Circuit has held that an order requiring an insurer to pay defense costs is immediately appealable because it has the effect of an injunction. This reasoning has also been endorsed by the Ninth Circuit and most recently by the Sixth Circuit in *Abercrombie & Fitch Co. v. Federal Ins. Co.*, 2010 WL 841174 (6th Cir. March 11, 2010). The Third Circuit, however, has rejected this reasoning. Endurance

appears to be pursuing an appeal on this legal basis, but a ruling on the viability of such an appeal has yet to be determined.

Arbitration Alert:

Additional Courts Weigh In On Arbitrator Disinterestedness Standards

In the wake of a number of recent decisions relating to the disqualification of arbitrators, federal courts in Connecticut and New York have weighed in, reaching differing conclusions as to the disqualification of party-appointed arbitrators.

In *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 2010 WL 653481 (S.D.N.Y. Feb. 23, 2010), Judge Shira Scheindlin granted a reinsurer's petition to vacate an arbitration award where two members of the arbitration panel had failed to disclose their simultaneous participation in another arbitration involving a common witness and a party with significant business ties to one of the parties in the instant arbitration. The arbitration award considered by Judge Scheindlin was issued in connection with an arbitration between Scandinavian Reinsurance and St. Paul. That dispute involved questions about the amount of risk ceded to Scandinavian Reinsurance pursuant to the parties' retrocessional agreements. Following the parties' appointment of arbitrators, the arbitrators jointly appointed the umpire. Thereafter, the arbitrators completed questionnaires relating to potential conflicts of interest. In their questionnaires, neither St. Paul's arbitrator nor the umpire mentioned their service on another arbitration panel involving Platinum Underwriters Bermuda, Ltd., a St. Paul affiliate. As the proceeding progressed, neither arbitrator disclosed that a witness testifying in the Scandinavian Reinsurance arbitration had testified (less than three months earlier) in the Platinum arbitration. Ultimately, an unnamed majority of the Scandinavian Reinsurance panel ruled in St. Paul's favor.

In turn, Scandinavian Reinsurance challenged the arbitration award, arguing that it should be vacated because two of the arbitrators exhibited evident partiality by failing to disclose their simultaneous involvement in the Platinum arbitration. Judge Scheindlin granted the motion to vacate, finding that the arbitrators had a conflict of interest. Specifically, Judge Scheindlin explained that

> [b]y participating in both the Scandinavian Re Arbitration and the Platinum [ ] Arbitration, [the two arbitrators] placed themselves in a position where they could receive *ex parte* information about the kind of reinsurance business at issue … , be influenced by recent credibility determinations … , and influence each other's thinking on issues relevant to the Scandinavian Re Arbitration. By failing to disclose their participation in the Platinum [ ] arbitration, [they] deprived Scandinavian Re of an opportunity to object to their service on both arbitration panels and/or adjust their arbitration strategy.

Slip op. at *8. Further, Judge Scheindlin determined that the arbitrators' nondisclosures were not excusable even if they believed in good faith that they could remain impartial in both arbitrations. And it mattered not, the court noted, that the arbitrators had

neither a financial interest in the outcome nor a direct relationship with a party to the arbitration.

In contrast, in *Arrowood Indem. Co. v. Trustmark Ins. Co.*, No. 3:03-CV-1000 (D. Conn. Feb. 2, 2010), Judge Peter Dorsey employed a less draconian approach to conflicts of interest in denying a motion for expedited

discovery and to stay an arbitration based on an umpire's participation in other arbitrations to which Arrowood was party. In disclosures made during an arbitration between Trustmark and Arrowood, the umpire indicated that he had no relationship with Arrowood or its attorneys. However, discovery revealed that the umpire had been selected by Arrowood to serve as its party-appointed arbitrator at least six times over the past several years, and that fees generated by these appointments accounted for approximately 12 to 17.5% of the umpire's income. Based on these facts, Trustmark asserted that the umpire had a "significant financial relationship" with Arrowood and therefore could not function as a neutral arbitrator. Judge Dorsey rejected this argument, finding that the umpire's service as Arrowood's party-appointed arbitrator in unrelated matters did not evidence bias or an improper relationship. Rather, the court observed, because arbitrators are selected due to their industry expertise, "[e]xperienced arbitrators often have professional relationships with the parties. … Such a professional relationship does not constitute 'evident partiality' under the Federal Arbitration Act … " Slip op. at 3.

The rules of arbitrator disqualification are in flux and outcomes of motions to disqualify or vacate vary depending on the factual scenarios presented. A key issue for the *Scandinavian* Court, and perhaps an outcome determinative issue in other disqualification motions, appears to be the degree and timeliness of arbitrator disclosures. Given the focus on disclosure (or lack thereof) in recent caselaw, parties to arbitrations are well advised to seek comprehensive and detailed arbitrator disclosures in connection with panel appointments.

Coverage Alerts:

New York Appellate Court Affirms Insurer's Duty To Indemnify For Enron-Related Losses

On March 18, 2010, the New York Appellate Division affirmed that Twin City Fire Insurance Company is obligated to indemnify JPMorgan Chase & Co., JPMorgan Chase Bank and J.P. Morgan Securities, Inc. (collectively, "JPMC") in the amount of $22.5 million for losses incurred in connection with underlying class actions arising out of Enron's financial collapse. *JPMorgan Chase & Co. v. Travelers Indem. Co.*, 2010 WL 960020 (N.Y. App. Div. 1st Dep't March 18, 2010).

A Twin City "claims-made" policy afforded coverage for both claims made during the policy period, as well as claims made after the policy period, provided that JPMC gave notice during the policy period of any wrongful acts that might subsequently give rise to a claim. Pursuant to this notice requirement, JPMC notified Twin City, hours before the expiration of the policy, as to the possibility of claims arising out of the then-evolving Enron matter. According to Twin City, JPMC's notice was deficient in that it was based on conjecture and failed to identify any specific wrongful act that might be covered under the policy. Rejecting this contention, the court observed: "It is clear from the record that there was heightened

awareness, by both JPMC and its insurers … of the impending implosion of JPMC's client Enron, which awareness led to the last minute filing of the notice of potential claims encompassing wide-ranging legal and financial issues that were almost certain to arise." *Id*. at *6. JPMC's notice adequately served the purpose of a notice provision, the court held, because it made Twin City aware of possible claims arising out of specifically-enumerated acts which might be subject to coverage under the expiring policy.

Because the reporting of a claim (or a wrongful act giving rise to a claim) is an essential feature of a "claims-made" policy, courts generally enforce the notice-related requirements of such policies quite strictly. Thus, while deficiencies in notice may not result in the forfeiture of coverage under an occurrence-based policy under certain circumstances, courts routinely nullify coverage under a "claims-made" policy due to an insured's failure to comply with notice requirements. Certain aspects of the notice requirement under a "claims-made" policy are clear cut, such as the termination date of the policy. Other aspects, however, such as the sufficiency of detail provided in the notice communication, can be inherently susceptible to judicial interpretation. *JPMorgan Chase* clearly involved evaluation of the latter, and under the facts presented, the court was willing to find JPMC's notice sufficient to invoke coverage under Twin City's "claims-made" policy.

Subcontractor's Faulty Construction May Constitute an "Occurrence," Says Mississippi Supreme Court

The Mississippi Supreme Court recently ruled that an insured's intentional hiring of an allegedly negligent subcontractor does not necessarily negate coverage under a CLG policy's "occurrence" requirement. Although the term "occurrence" requires an accidental event, the court found that where unexpected or unintended property damage results from the negligent acts of a subcontractor, coverage obligations may be triggered, despite the insured's intentional act of hiring the subcontractor. *Architex Assoc., Inc. v. Scottsdale Ins. Co.*, 2010 WL 457236 (Miss. Feb. 11, 2010).

The insured, a builder, alleged that an unintended construction defect by a subcontractor constituted an "occurrence" that triggered coverage under its CGL insurance policy issued by Scottsdale Insurance. The intermediate court granted summary judgment in favor of Scottsdale Insurance, reasoning that the operative event was the insured's intentional hiring of the subcontractor, which under the terms of the policy, could not be deemed an "occurrence." The Mississippi Supreme Court reversed, noting the circuit court's failure to consider whether "the underlying acts or conduct of the insured or the subcontractors proximately caus[ed] 'property damage.'" *Id*. at *9. Although the insured's intentional hiring of the subcontractor might have "set in motion" the series of events leading to the property damage, factual evidence might establish the "unexpected intervention of [a] third person or extrinsic force" as a proximate cause of the damage, the court noted. *Id*. Given the insufficient factual record as to this matter, the court reversed the summary judgment ruling and remanded the case for further proceedings.

Seemingly central to the *Architex* decision is the fact that the insured's conduct was limited to the hiring of the allegedly negligent subcontractor. The court was careful to distinguish this case from precedent in which the insured itself engaged in intentional or tortious acts leading directly to the damage at issue. Additionally, the *Architex* court took the opportunity to weigh in on the now frequently-litigated issue of whether, and under what circumstances, faulty workmanship constitutes an "occurrence" under CGL polices. Courts nationwide are split on this issue, with the majority finding that where faulty workmanship by a contractor or subcontractor results only in property damage to the faulty work itself, there is no "occurrence." As a general matter, these courts have reasoned that negligent or substandard workmanship is not an "accident" but rather akin to a breach of contract. However, a number of courts (including the highest courts of South Carolina, New Hampshire, Tennessee, North Dakota, Nebraska, Kansas, Texas, Wisconsin and Florida) have found that, under the specific factual record presented, faulty workmanship and/or the damage resulting therefrom constitutes an "occurrence." Adopting the reasoning employed by some of the aforementioned courts, the *Architex* court explained that a reading of the CGL policy as a whole supports the notion that negligent workmanship falls within the "occurrence" definition. The court explained: The existence of the "your work" exclusion and its subcontractor exception "lend[] insight into the baseline definition of "occurrence" from which parties and the courts interpreting CGL policies should operate. If the definition of 'occurrence' cannot be understood to include an insured's faulty workmanship, an exclusion that exempts from coverage any damage the insured's faulty workmanship causes to its own work is nugatory." *Id*. at *10.

Contribution Alert:

Insurer Seeking Contribution From Co-Insurer Must Establish Payment Exceeding Its "Fair Share," Says California Appellate Court

On March 10, 2010, a California appellate court reversed a lower court's ruling which held that Century Surety owed Scottsdale Insurance damages in the amount of half of all defense and indemnity payments that Scottsdale made to a mutual insured. The appellate court ruled that this result was in conflict with the principle that "in order to be entitled to equitable contribution a party must have first paid more than its fair share of the loss and it bears the burden of proving such circumstance." *Scottsdale Ins. Co. v. Century Sur. Co.*, 182 Cal. App. 4th 1023, 2010 WL 797189, at *1 (Cal. App. 2d Dist. 2010). Furthermore, the court held, an insurer cannot recover equitable contribution from a co-insurer if such payment would result in the first insurer paying less than its "fair share," even that results in the otherwise liable co-insurer paying nothing. *Id*. at *2.

Scottsdale and Century were co-insurers for a substantial number of insureds. Several hundred actions were filed against these mutual insureds, for which Scottsdale provided a defense and indemnity. Other participating co-insurers shared defense costs

with Scottsdale on an equal shares basis, and divided indemnity expenses with Scottsdale on a pro-rata basis. Century, however, declined to participate in the defense or indemnity, relying on a policy exclusion. As a result, Scottsdale sued Century, seeking equitable contribution relating to approximately 300 actions involving 17 common insureds. *Id.* at *2. The trial court concluded that Scottsdale was entitled to equitable contribution for approximately 80 of the actions, and awarded Scottsdale half of all defense and indemnity payments it made in connection with those actions.

The appellate court ruled that in order to meet its burden of proof on the equitable contribution claim, Scottsdale must do more than demonstrate that it fulfilled its payment obligations and that Century did not. Rather, Scottsdale must establish that "some of the amount it paid was allocable to Century's fair share." *Id.* at *16. Turning to the allocation employed by the trial court, the appellate court held that the damage award in the amount of one half of the sums paid by Scottsdale constituted an abuse of discretion. The court noted that the allocation schemes among Scottsdale and the other participating co-insurers had already been established and agreed upon. Scottsdale is bound by those choices, the court reasoned. It cannot "agree to one method of allocation with every other insurer on the risk, but obtain a different method of allocation of its allocated share, when seeking equitable contribution" from Century. *Id.* at *17. Scottsdale is entitled to recover only if it paid more than its fair share *under the allocation agreements* it made with the participating co-insurers. *Id.* at *17. Along similar lines, the court held, Scottsdale cannot recover an amount from Century that would result in Scottsdale paying less than its fair share under the established allocation agreements. Ultimately, the court remanded the matter in order to recalculate damages and determine what amount (if any) of Scottsdale's overpayments were attributable to Century's failure to participate.

The *Scottsdale* ruling is noteworthy in several respects. First, the appellate court relied on non-insurance precedent in setting forth the law on equitable contribution, despite acknowledging that such law had not, heretofore, been applied in the insurance context. Although there is no lack of insurance-based caselaw relating to equitable contribution, the court found it significant that insurance-based authority did not involve the specific scenario presented here—namely, a dispute in which the specific amounts paid by all participating co-insurers was not before the court. Second, although the trial court's decision was grounded in principles of equity, which involves judicial discretion to which appellate courts often defer, the appellate court reversed under an "abuse of discretion" standard. This reversal is particularly striking given the trial court's reference to Century's questionable claims handling techniques—conduct that the trial court suspected as a means of discouraging co-insurers from pursuing equitable contribution rights against it. Finally, the *Scottsdale* decision highlights the burden that a participating insurer carries in order to recoup defense and/or indemnity payments from a non-participating co-insurer. Notwithstanding the "equitable" nature of such contribution actions, *Scottsdale* makes clear that even complete non-payment by a responsible co-insurer is insufficient without a specific showing that the participating insurer has overpaid.

Cooperation Alerts:

Eighth Circuit Holds That Insured's Invocation of Fifth Amendment Rights Violates Policy's Cooperation Clause

In an interesting ruling raising constitutional issues, the Eighth Circuit Court of Appeals has affirmed a lower court ruling that a policyholder's invocation of his Fifth Amendment rights in connection with two malpractice actions violated the cooperation clause of his medical malpractice policy,

thereby forfeiting his right to indemnity. *Medical Protective Company v. Bubenik*, 594 F.3d 1047 (8th Cir. 2010). The policy's cooperation clause provided that "[t]he Insured shall at all times fully cooperate with the Company in any claim hereunder and shall attend and assist in the preparation and trial of any such claim." *Id*. at 1050.

During the underlying litigations, the insured repeatedly asserted his Fifth Amendment privilege against self incrimination and refused to answer interrogatories, produce relevant documentary evidence and provide deposition or trial testimony. Additionally, the insured was unwilling to discuss defense strategies with his insurer. In turn, the insurer issued several letters relating to the insured's failure to comply with the policy's cooperation clause and ultimately sought a declaratory judgment that it was not liable to fund any judgment in the underlying malpractice actions. The federal district court granted the insurer's motion, finding that it had no duty to indemnify due to the breach of the cooperation clause.

The Eighth Circuit affirmed the ruling, finding that the insurer was entitled to deny liability because it had established that a material breach had resulted in substantial prejudice. Establishing prejudice did not require a showing that the insurer would have won the underlying case with the insured's cooperation, the court observed. Rather, the insurer need only prove that the lack of cooperation substantially prejudiced the insurer's ability to defend the malpractice claims—a burden easily met in light of the insured's refusal to share pertinent information solely within his possession. Additionally, the court found that by virtue of its numerous phone calls and letters, the insurer had exercised reasonable diligence in attempting to secure the insured's cooperation. *Id*. at 1053. The court flatly rejected the insured's contention that the cooperation clause was ambiguous and/or unenforceable. The court also found unpersuasive the insured's argument that the insurer had waived its right to deny coverage because it continued to provide a defense without

immediately issuing a reservation of rights, even after learning that the insured was invoking his Fifth Amendment rights. The court held that the insurer's conduct did not indicate an intent to waive its right to deny coverage for non-cooperation. Instead, the insurer's continued defense and persistent attempts to secure cooperation satisfied its own duties under the terms of the policy.

MPC joins a number of decisions which have held that an insured may breach the cooperation clause by invoking Fifth Amendment privileges. The decision also sheds light on what circumstances will suffice to establish prejudice in jurisdictions in which such a showing is necessary in order to avoid coverage based on a lack of cooperation. *MPC* clarifies that an insurer need not demonstrate the likelihood of a different outcome but for the insured's non-cooperation. "Even if it were unlikely that [the insured]'s cooperation would have led to a defense verdict," an insured's refusal to provide information material to his defense constitutes a prejudicial breach of the policy. *Id*.

Sixth Circuit Rules That Cooperation Clause Does Not Bar Insured From Changing Co-Insurance From Primary to Excess

In *Abercrombie & Fitch Co. v. Federal Ins. Co.*, 2010 WL 841174 (6th Cir. March 11, 2010), the Sixth Circuit rejected an argument that by renegotiating insurance

coverage with National Union (which had previously been a co-primary insurer) such that National Union's coverage became excess, Abercrombie violated its duty to cooperate with Federal, the sole remaining primary insurer. Federal argued that by shifting the entire burden of primary coverage to Federal, Abercrombie prejudiced Federal's right to recover from National Union. The court did not credit this argument, finding that the cooperation provision applies only to conduct in connection with the defense and settlement of claims. The clause does not regulate Abercrombie's ability to negotiate coverage with other carriers, the court held. The court observed: "There is nothing about [the cooperation provision] that prevents Abercrombie from making fiscally driven business decisions about its insurance coverage, even if such a decision is unanticipated by an existing or past insurer." *Id*. at *7.

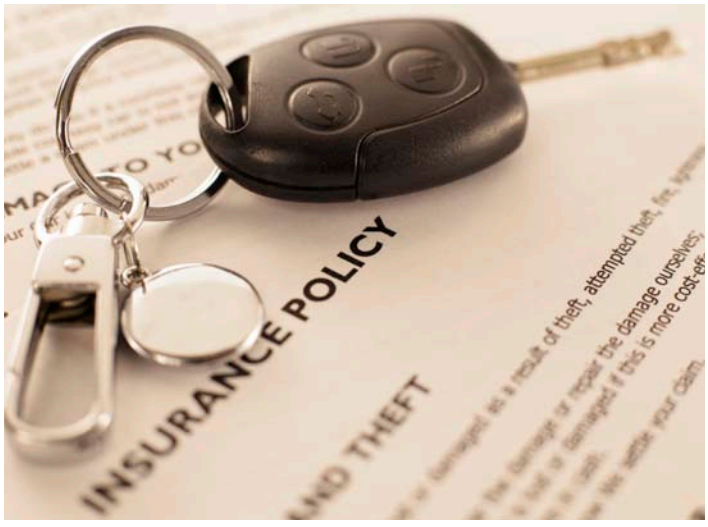
Class Action Alert:

Washington Court Reinstates Diminished Value Class Action Against Automobile Insurer

On March 16, 2010, a Washington appellate court affirmed a lower court's certification of a plaintiff class alleging breach of contract, bad faith and state statutory violations against Farmers Insurance, but reversed the lower court's grant of summary judgment in favor of Farmers on those claims. *Moeller v. Farmers Ins. Co. of Washington*, 2010 WL 927989 (Wash. App. Div. 2 March 16, 2010).

The action arose out of an automobile accident, in which the insured's automobile sustained significant damage. Farmers paid the full cost of repairs (less a deductible), but refused to reimburse the diminished value of the vehicle. As a result, the insured filed a class action complaint on behalf of himself and all others similarly situated, alleging that Farmers' failure to restore his vehicle to its "pre-loss condition though payment of the difference in the value between the vehicle's pre-loss value and its value after it was damaged, properly repaired and returned" constituted a bad faith breach of contract and a violation of state consumer statutes. *Id*. at *1. The trial court certified the plaintiff class, finding that common issues of law and fact predominated the dispute, and that given the *de minimus* value of each claim, individual policyholders would not likely pursue separate actions. Applying an "abuse of discretion" standard, the appellate court affirmed the class certification. The court found that "tenable reasons" supported the trial court's certification decision, and that the potential existence of management problems did not preclude class certification.

With respect to the substantive claims against Farmers, the trial court granted summary judgment in favor of Farmers, finding that the policy at issue did not cover diminished value, and that Farmers' denial of coverage on this basis was reasonable, thus barring the bad faith and state statutory claims. The appellate court reversed, reasoning that Farmers' policy language provided coverage for diminished value loss. The coverage clause states that Farmers "will pay for loss to your Insured car caused by collision … ." The policy defines "loss" as the "direct and accidental loss of or damage to your Insured car, including its equipment." *Id*. at *3. The court reasoned that "[a]bsent an intervening cause, diminished value is a loss proximately caused by the collision and thus



is covered." *Id*. at *4. Additionally, the court found that policy's "limits of liability" clause did not preclude recovery for diminished value. Again, the court relied on the specific policy language, which states that Farmers' costs would not exceed "[t]he amount which it would cost to repair or replace damaged … property with other of like kind and quality." *Id*. According to the court, a reasonable interpretation of the clause "like kind and quality" includes payment for any loss in "capacity and value" following post-accident repair. In light of the reinstatement of the breach of contract claim, the appellate court remanded the statutory consumer protection claims.

The appellate court emphasized its ruling as limited to the policy before the court, rather than a pronouncement of a general rule of law regarding first party benefits under automobile policies. *Id*. at *3 n.4. Indeed, the court distinguished cases involving language absent from the Farmers' policy—language which expressly limits liability to the lesser of the vehicle's actual cash value or the cost of repair or replacement. The court noted that such language, which would preclude an insured from seeking both repairs and monetary compensation, has led other courts to deny recovery for diminished value.

Surety Alert:

Court of International Trade Dismisses Third-Parties' Common Law Claims Against Sureties Arising Out Of Customs Bonds Securing Payment of Anti-dumping Duties

On March 26, 2010, the United States Court of International Trade dismissed with prejudice claims brought by domestic producers of honey, mushrooms, crawfish and garlic against various sureties arising out of customs bonds the sureties wrote securing payment of anti-dumping duties assessed by the United States on "dumped" products exported from China. The suit was brought on behalf of a putative class of all domestic producers and sought up to a billion dollars in damages. Claims against the United States remain pending.

On April 7, 2009, domestic producers of honey, mushrooms, crawfish and garlic filed a putative class action in the United States Court of International Trade against the United States, the Department of Commerce, U.S. Customs and Border Protection, and a number of large sureties. The complaint alleged that the sureties issued single-transaction customs bonds guaranteeing the payment of anti-dumping duties assessed on imports of honey, mushrooms, crawfish and garlic that were allegedly imported by thinly capitalized Chinese "new shippers." According to the complaint, the importers had defaulted on payment of anti-dumping duties and the sureties were wrongfully refusing to pay the government under the bonds. Plaintiffs contended that they had a statutory right to recoup from the government unpaid antidumping duties payable under the customs bonds and were therefore intended third-party beneficiaries of those bonds with standing to sue the sureties directly. The complaint included claims for breach of contract, negligence and unjust enrichment, and sought monetary damages and equitable relief.

Simpson Thacher, representing Washington International Insurance Company, an affiliate of Swiss Re that is a writer of customs bonds in the industry, moved to dismiss. In granting the motion to dismiss, Judge Timothy Stanceu found that, because the anti-dumping statutes and implementing regulations do not "make[] plaintiffs intended third-party beneficiaries of the customs bonds that they seek to place at issue in this case," plaintiffs lacked standing to assert contractual rights under the bonds. *Sioux Honey Assoc., et al., v. Hartford Fire Ins. Co. et al.*, Case 1:09-cv-00141, Dkt # 106, at *29 (Ct. Int'l Trade March 26, 2010) In addition, Judge Stanceu found that sureties do not owe a duty of care to unknown domestic producers when issuing bonds and dismissed plaintiffs' claim for negligent underwriting.

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