SIMPSON THACHER

INSURANCE LAW ALERT

JULY/AUGUST 2010

In this Alert, we discuss a recent ruling by the Delaware Supreme Court relating to the "number of occurrences" under an excess liability policy. We also report on a game-changing procedural development in the *Comer* climate change lawsuit which had been slated for rehearing by an en banc panel of the Fifth Circuit. This Alert also summarizes a Third Circuit ruling that overrules previous precedent relating to the definition of a "claim" in the bankruptcy context. Other decisions of interest highlighted in this report include a California Supreme Court decision relating to the interplay between an intentional acts exclusion and a separation-of-insureds provision in a liability policy; a Virginia district court ruling applying a pollution exclusion and other policy exclusions to bar coverage for Chinese drywall-related claims; the Judicial Panel on Multidistrict Litigation's refusal to transfer Chinese drywall insurance coverage disputes to multidistrict litigation where the underlying cases were pending; two reinsurance decisions, one issued by the Third Circuit and the other by a New York state court, relating to application of the "follow the settlements" doctrine; a Wisconsin Supreme Court ruling that an excess insurer's duty to defend is not conditioned upon exhaustion of policy limits; and a New York federal court decision regarding a party's forfeiture of its right to dispute attorneys' fees pursuant to the "account stated" doctrine.

Occurrence Alert:

Delaware High Court Rules That Thousands of Claims Against DuPont Constitute a Single Occurrence Under Excess Policies

On June 3, 2010, the Delaware Supreme Court ruled that hundreds of thousands of property damage claims asserted against E.I. du Pont de Nemours and Company arose from a single occurrence under excess liability policies issued by Stonewall Insurance Company. *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 2010 WL 2197549 (Del. June 3, 2010).

DuPont's manufacture of a faulty plumbing product during the 1980s led to a tide of tort claims against DuPont. DuPont ultimately settled with fifteen insurers regarding coverage for these claims. These settlements left Stonewall as the sole insurer from which DuPont sought indemnification. Stonewall, in turn, denied coverage, arguing that each of the 469,000 incidents of property damage (degradation of plumbing product) constituted a separate occurrence, thereby requiring DuPont to pay nearly $24 trillion in self-insured retentions ($50 million per occurrence) before receiving coverage under Stonewall's policies. Stonewall additionally claimed that a non-cumulation clause negated its coverage obligation.

The court rejected Stonewall's arguments. Interpreting standard CGL "occurrence" language, the court employed a cause-oriented test under Delaware law. Under this test, "a single event, process

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or condition" that results in multiple injuries is deemed a single occurrence, even though "the injuries may be widespread in both time and place and may affect a multitude of individuals." *Id.* at *3 (citations omitted). Applying this standard, the court concluded that the production and dispersal of DuPont's faulty product was one occurrence for insurance purposes even though each claim involved a separate building in which the plumbing system failed and where damage occurred. In issuing its decision, the court noted that Stonewall's "interpretation would produce an absurd, unacceptable result that would render meaningless the excess insurance purchased by DuPont and deprive DuPont of the protection for which it paid." *Id.*

As to the non-cumulation clause, the court ruled that the lower court applied the unambiguous clause correctly to reduce part, but not all, of Stonewall's liabilities. Because amounts payable to DuPont by other policies covered only part of the loss, Stonewall's coverage applied to the remaining portion.

On a final note, the court ruled in favor of Stonewall with respect to when pre-judgment interest should accrue. As a general rule, interest accumulates from the date payment was due a party. Where the date payment was demanded is difficult to determine to a reasonable degree of certainty, courts often rely on the date of the insured's filing of the complaint. Here, the lower court had awarded prejudgment interest from the 1999 filing of DuPont's complaint. The Delaware Supreme Court overturned that ruling because DuPont had amended its claims, settled with numerous insurers, and then altered its legal strategy against remaining insurers. Accordingly, Stonewall's refusal to pay did not occur, for pre-judgment interest accrual purposes, until August 4, 2006, when DuPont sent Stonewall a demand letter.

The *DuPont* decision reinforces Delaware's application of the "cause test" for a number of occurrences analysis, the test utilized by a majority of jurisdictions. *See, e.g., Westchester Surplus Lines Ins. Co. v. Maverick Tube Corp.*, 2010 WL 2635623 (S.D. Tex. June 28, 2010) (under cause-oriented test followed by Texas and Missouri, four separate claims of property damage at different locations arose from a single occurrence—the defective manufacture of the installed product).

Climate Change Alert:
Fifth Circuit Vacates Widely-Anticipated En Banc Rehearing in Comer *Class Action*

Last fall, a three-judge appellate panel of the Fifth Circuit gave the green light to a global warming nuisance class action suit against oil and energy companies alleging harm caused by greenhouse gas emissions, reversing the district court's dismissal of the lawsuit. The panel ruled that private plaintiffs had standing to pursue claims relating to the defendants' emission of greenhouse gases, and that the claims did not present non-justiciable political questions. *See Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009). As discussed in our March 2010 Alert, the Fifth Circuit subsequently voted to rehear the case en banc, which vacated the ruling of the three-judge panel. Although en banc determinations in the Fifth Circuit are ordinarily made by the full court of sixteen judges, only nine judges voted on whether the case should be reheard en banc because seven

judges had recused themselves from hearing the case. *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010). The court subsequently set a briefing schedule for the filing of supplemental briefs and set oral argument for May 24, 2010.

In April 2010, new circumstances arose that caused the disqualification and recusal of one of the nine remaining judges hearing the case. This left the court without a quorum to hear the en banc case. Because the court is not authorized to act absent a quorum, the Fifth Circuit dismissed the appeal. *Comer v. Murphy Oil USA*, 2010 WL 2136658 (5th Cir. May 28, 2010). The dismissal restored the district court's dismissal of the class action as the operative ruling. The Fifth Circuit explicitly declined to reinstate the previous three-judge panel ruling that had reversed the district court's dismissal of the lawsuit, stating: "[t]here is no rule that gives this court authority to reinstate the panel opinion, which has been vacated … The parties, of course, now have the right to petition the Supreme Court of the United States." *Id*. at *4.

This procedural morass heightens the unsettled state of law in the climate change context. Two other federal circuit courts have been called upon to review analogous global warming tort actions. In *Connecticut v. Am. Electric Power*, 582 F.3d 309 (2d Cir. 2009), the Second Circuit revived two complaints brought by eight states, the City of New York and three private plaintiffs against six electric utility companies. In March 2010, the Second Circuit denied petitions to rehear the matter en banc. The deadline for a petition of certiorari to the United States Supreme Court in that matter was recently extended to August 2, 2010. And the Ninth Circuit is poised to rule on the appeal in *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp.2d 863 (N.D. Cal. 2009), a case in whcih the district court dismissed global warming claims based on lack of standing and the political question doctrine.

Chinese Drywall Alerts:

Virginia Federal Court Rules That Pollution Exclusion Precludes Coverage for Damages Allegedly Caused by Defective Drywall

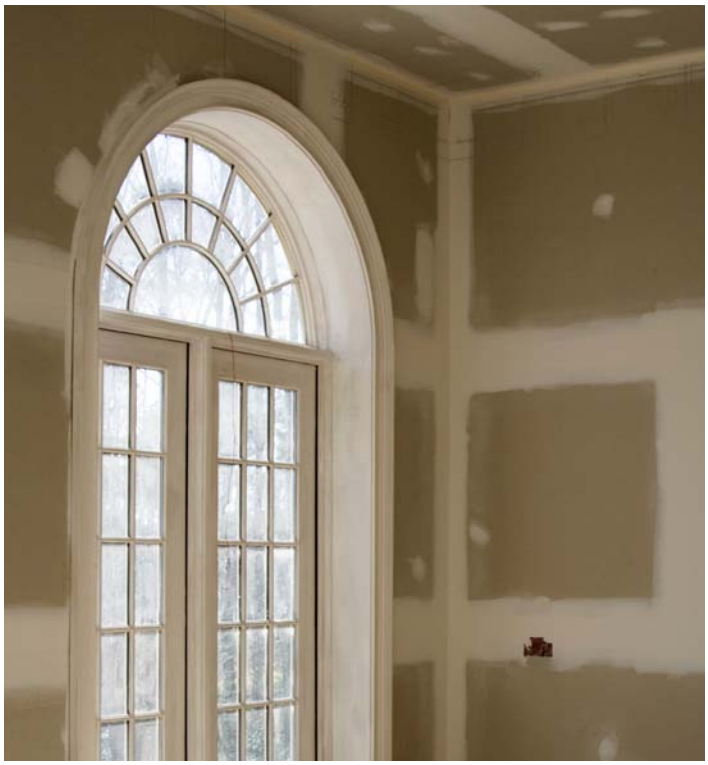
On June 3, 2010, a federal court in Virginia weighed in on the closely-followed issue of whether a pollution exclusion bars coverage for claims arising out of Chinese drywall. *Travco Ins. Co. v. Ward*, 2010 WL 2222255 (E.D. Va. June 3, 2010). In *Travco*, the court ruled that a pollution exclusion in a homeowner's policy relieved the insurer of its coverage obligations, and that three other exclusions in the policy (latent defect, faulty materials and corrosion) also operated to nullify coverage for losses otherwise covered under the policy.

According to the homeowner's complaint against several development and supply companies, his residence was constructed with defective Chinese drywall which, over time, released sulfuric gas into the residence. The homeowner alleged that this "off-gassing" created noxious odors, resulting in both property damage as well as potential health problems. Prior to this lawsuit, which is part of a multidistrict litigation in the Eastern District

of Louisiana, the homeowner had filed a claim against his homeowner insurer, Travco Insurance Company, seeking coverage for the damages related to the Chinese drywall. Travco, in turn, filed this action seeking a declaration that it has no coverage obligations for the losses claimed by the homeowner.

With respect to the pollution exclusion, the homeowner argued that the exclusion was inapplicable because the Chinese drywall is not a recognized environmental pollutant and the gases in question were not widely released into the environment. Acknowledging the jurisdictional split as to whether pollution exclusions should be limited to traditional environmental pollution or, instead, should apply to any pollutants that fit within the definition of "pollutants" in the policy, the court concluded that Virginia falls within the latter camp. Virginia precedent holds that the plain language of the pollution exclusion applies to any "pollutants" even non-traditional "indoor pollution." *Id*. at *17. In the present case, "it is obvious that the relevant dispersal or discharge … is the discharge and dispersal of sulfuric gas from the Drywall." *Id*. at *18. And while the drywall itself might not be a contaminant, the gases it releases are, the court held, noting that numerous state and federal authorities have classified sulfuric gases as pollutants.

The court also ruled that the losses from defective drywall "fit squarely" within the "latent defect" exclusion because, as acknowledged by the homeowner' complaint, defects in the chemical composition of the drywall damaged other parts of the residence. *Id*. at *11-*13. In so ruling, the court rejected the notion that the latent defect exclusion did not apply because the drywall itself was not actually damaged. There is an "inherent contradiction in arguing that property has suffered a 'direct physical loss' while simultaneously maintaining that the property is not damaged," the court noted. *Id*. at *12. Along similar lines, the court ruled that the "faulty materials" exclusion precluded coverage for damages resulting from the drywall. The fact that the drywall had not actually collapsed or otherwise physically



deteriorated, and continued to serve its "intended purpose" is not determinative, the court held. *Id*. at *13. Because the drywall has created an unlivable residence, it necessarily follows that the product was "faulty." With respect to the corrosion exclusion, the court concluded that the claimed damages fell within the exclusion for loss caused by corrosion. The homeowner's allegations explicitly pled as much.

To date, only a handful of courts have issued coverage decisions in the drywall context. One such decision, *Finger v. Audubon Ins. Co.*, 2010 WL 1222273 (La. Civ. Dist. Ct. Mar. 22, 2010) (discussed in our April 2010 Alert), refused to apply the pollution and faulty or defective planning exclusions under facts nearly identical to that presented in *Travco*. The *Travco* court expressly criticized the *Finger* decision, noting that it cited no authority and stands against the clear weight of authority on the exclusionary issues. Given the dearth of decisions in this closely-followed and emerging area of coverage litigation, the *Travco* court's opinion signals an early victory for insurers who may be called upon to provide coverage for drywall-related losses.

Judicial Panel Declines to Transfer Chinese Drywall Coverage Actions to Multidistrict Litigation

The United States Judicial Panel on Multidistrict Litigation denied requests to transfer three declaratory judgment actions relating to insurance coverage of Chinese drywall claims to a pending multidistrict litigation involving the underlying liability proceedings. *In re: Chinese-Manufactured Drywall Products Liability Litigation*, MDL-2047 (J.P.M.L. June 15, 2010). In all three motions, entities with potential liability exposure arising from Chinese drywall claims sought to transfer their corresponding insurance coverage litigation to the same multidistrict litigation proceeding, pursuant to 28 U.S.C. § 1407(c). All of the insurance companies involved in the coverage litigations opposed the transfer.

In denying the motions, the panel cited the fact that the insurance coverage actions would not involve the same discovery as the underlying tort actions. Furthermore, although the coverage cases share a "common factual backdrop involving the general circumstances of imported Chinese drywall and the damage it is alleged to have caused," the coverage cases present strictly legal questions which require little or no centralized discovery. Slip op. at 2. Rather, each of the coverage disputes will require a comparison of the underlying complaint to the applicable insurance policy language under controlling state law. As a final matter, the panel noted that although transfer of the insurance disputes might facilitate settlement, the settlement of cases is a "sometime by-product, not a statutory rationale" for transfer under Section 1407.

Policy Construction Alert:

California Supreme Court Finds Ambiguity in Policy Containing Severability Clause and Intentional Acts Exclusion

On June 17, 2010, the California Supreme Court, answering a question certified by the Ninth Circuit, ruled that a policy exclusion barring coverage for intentional acts did not bar coverage for negligently failing to prevent another insured's intentional acts, where the policy applied "separately to each insured." *Minkler v. Safeco Ins. Co. of America*, 2010 WL 240973 (Cal. June 17, 2010).

In this case, the insured sought coverage under her homeowner's policy after being sued in a suit alleging that the homeowner's son (an additional insured under the policy) had committed intentional acts of molestation. The complaint also asserted a single cause of action for negligent supervision against the homeowner herself. Safeco, the homeowner's insurer, denied coverage as to both insureds based on an intentional acts exclusion. That exclusion provided that coverage does not apply for injury or damage "which is expected or intended by an insured or which is the foreseeable result of an act or omission intended by an insured." *Id*. at *2.

The victim of the molestation obtained a default judgment against the homeowner, who then assigned

her claims against Safeco to him in exchange for a covenant not to execute on the judgment. In his suit against Safeco, he argued that in light of the policy's separate insurance clause—which provides that "[t]his insurance applies separately to each insured"—the intentional acts exclusion did not bar coverage for the homeowner herself.

The district court granted Safeco's motion to dismiss, finding that the intentional acts exclusion barred coverage for the claim against the homeowner. On appeal, the Ninth Circuit requested guidance from the California Supreme Court in answering the following outcome-determinative question:

> Where a contract of liability insurance covering multiple insureds contains a severability clause, does an exclusion barring coverage for injuries arising out of the intentional acts of "an insured" bar coverage for claims that one insured negligently failed to prevent the intentional acts of another insured?

Id. at *3. The California Supreme Court answered the question in the negative, stating that under California law, when a policy excludes intentional conduct by "an" or "any" insured (as opposed to "the" insured), the exclusion is generally deemed to apply collectively, so that if one insured has committed acts that fall within the exclusion, the exclusion applies to all insureds on claims arising from the same occurrence. *Id*. at *1, *4. However, where a policy also contains a "separate insurance" clause that provides that "[t]his insurance applies separately to each insured," a question arises as to whether an exception to the above rule is created, such that an insured is barred from coverage only if his or her *own* conduct falls within the exclusion. *Id*. at *5. The court concluded that the interplay of these two provisions creates an ambiguity which must be resolved in favor of coverage.

There is a split among state courts on the issue addressed by the California Supreme Court. Indeed, the *Minkler* court cites some authority consistent with its own holding, but expressly recognizes that a "greater number of cases … have taken the opposite view, concluding that a severability clause does not alter the collective application of an exclusion for intentional, criminal, or fraudulent acts by 'an' or 'any' insured." *Id*. at *10. Many of these courts employed the reasoning proffered by Safeco—namely, that the severability clause is intended to apply only to extend policy limits, and does not trump a clear exclusion of coverage to "any" insured. In any event, the long term effect of *Minkler* on future policy construction disputes is uncertain because the court explicitly stressed that the "reasoning and conclusion under the specific circumstances of this case … does not mean a severability clause necessarily affects *all* exclusions framed in terms of 'an' or 'any' insured." *Id*. at *10 n.5. In some cases, the court observed, "the collective application of an exclusion that refers to 'an' or 'any' insured may be so clear in context that the presence of a severability clause could neither create, nor resolve an ambiguity." *Id*. In fact, the court highlighted a number of scenarios which might have resulted in a different outcome, including, for example, a situation where the only tort was the intentional act of one insured, such that the liability of a second insured was merely vicarious. The court also distinguished cases in which application of a severability clause to one insured might negate the operation of the exclusion altogether.

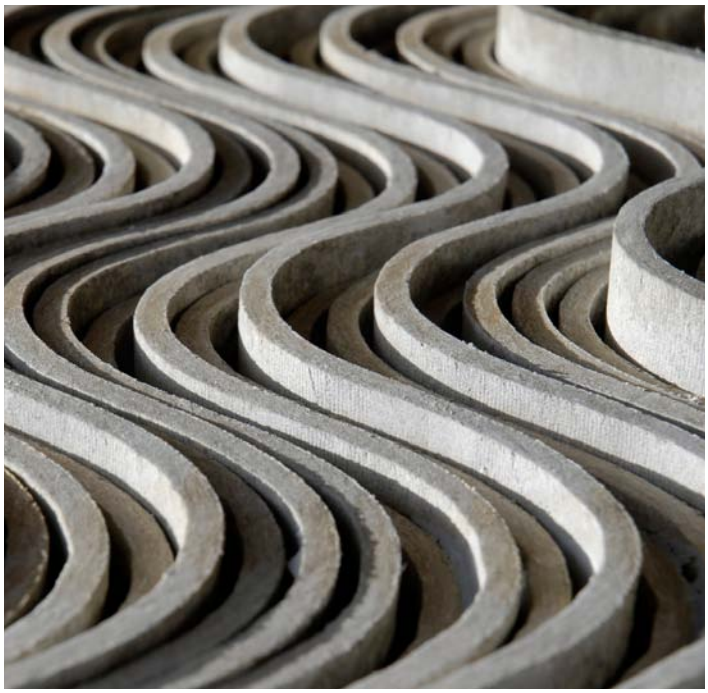
Bankruptcy Alert:

Third Circuit Overrules Widely-Criticized Precedent and Adopts New Standard for Defining a "Claim" in Bankruptcy Context

An en banc panel of the Third Circuit recently held that for bankruptcy purposes, an asbestos-related claim arises "when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a 'right to payment' under the Bankruptcy Code," even if the claim had not yet accrued under state law. *JELD-WEN, Inc. v. Van Brunt*, No. 09-1563, at 18 (3d Cir. June 2, 2010). The court overruled its much-criticized "accrual test" (set forth in *Avellino & Bienes v. M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984)), which held that the existence of a "claim" for bankruptcy purposes depended on (1) whether the claimant possessed a right to payment, and (2) when that right arose, as determined by reference to applicable state law.

In *JELD-WEN*, Mary Van Brunt purchased products that allegedly contained asbestos. The store from which she purchased these products later filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Code. The Chapter 11 Plan of Reorganization purported to discharge all claims that arose before the Plan's effective date, December 1997. Van Brunt did not file a proof of claim prior to the Plan because at that time, she was unaware of any "claim" that she might have against the store. However, in 2006, Van Brunt began to manifest symptoms of mesothelioma, and was diagnosed with the disease shortly thereafter. Van Brunt then filed an action in New York against JELD-WEN, the successor-in-interest to the store, alleging tort and breach of warranty claims. JELD-WEN moved to reopen the Chapter 11 matter, seeking a ruling that Van Brunt's claims were discharged by the Plan. At the time of its initial bankruptcy filing, the store did not have any asbestos-related lawsuits pending against it and the bankruptcy did not involve 11 U.S.C. § 524(g), the provision specifically dealing with asbestos-related bankruptcies.

Applying the "accrual test" set forth in *Frenville*, the bankruptcy court held that Van Brunt's asbestos claims were not discharged because they arose after the effective date of the Plan. The bankruptcy court explained that New York law provides that a cause of action for asbestos-related injury does not accrue until the injury manifests itself. Therefore, Van Brunt had no "claim" subject to discharge in 1997, and her cause of action did not accrue until 2006. The district court affirmed the bankruptcy court in virtually all respects. (The district court reversed only the bankruptcy court's ruling that the breach of warranty claim arose post-petition—a determination that was not before the Third Circuit on appeal).



The Third Circuit took this opportunity to re-evaluate the "accrual test", a standard that has been "universally rejected" and "characterized as one of the most criticized and least followed precedents decided under the current Bankruptcy Code." Slip op. at 8-9. Because the "accrual test" conflicts with the Bankruptcy Code's expansive treatment of the term "claim," the "accrual test" must be overruled, the

court held. Instead, the court set forth the following standard, endorsed by "something approaching a consensus among the courts": "[A] 'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a 'right to payment' under the Bankruptcy Code." *Id.* at 18. Applied to the present case, the court concluded that Van Brunt's claims arose in 1997, the year in which she was allegedly exposed to the asbestos-containing products. The court further noted, however, that although Van Brunt has established a "claim," it does not necessarily follow that Van Brunt's claim was discharged by the Plan of Reorganization. Fundamental due process requirements must also be met in order for a discharge to be effective. In particular, Van Brunt must have been afforded notice and a "meaningful opportunity" to protect her claim. *Id.* at 18-19. The question of whether Van Brunt's claims have been discharged (*i.e.*, whether the discharge comported with due process) is a matter that should be addressed by the bankruptcy court in the first instance, the Third Circuit held. Remanding the matter, the Third Circuit offered the following guidance:

> In determining whether an asbestos claim has been discharged, the court may wish to consider, inter alia, the circumstances of the initial exposure to asbestos, whether and/or when the claimants were aware of their vulnerability to asbestos, whether the notice of the claims bar date came to their attention, whether the claimants were known or unknown creditors, whether the claimants had a colorable claim at the time of the bar date, and other circumstances specific to the parties, including whether it was reasonable or possible for the debtor to establish a trust for future claimants as provided by § 524(g).

Id. at 22.

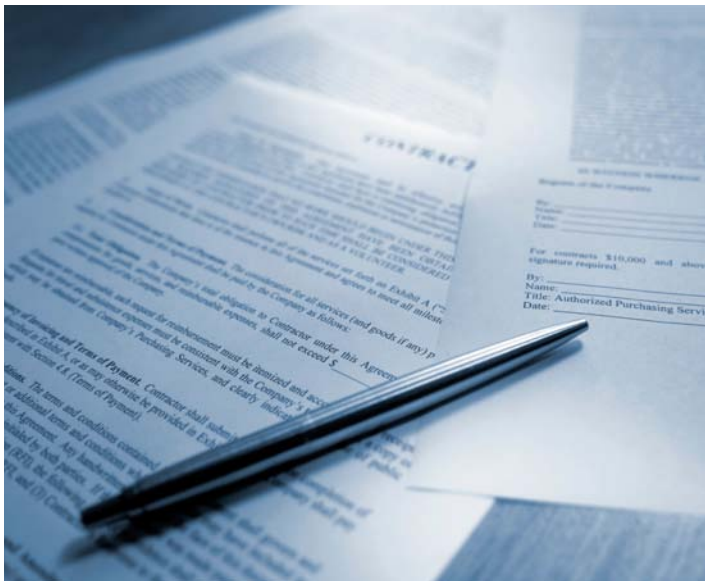
The impact of *JELD-WEN* in other asbestos-related bankruptcies may be limited. First, the court was careful to distinguish the case from other bankruptcies involving Section 524(g), which permits the establishment of a trust from which asbestos-related claims are paid and sets forth specific procedural requirements that ensure compliance with due process. Although those safeguards were of no help in this case because the bankruptcy had not been confirmed pursuant to Section 524(g), the majority of asbestos-driven bankruptcies does seek to take advantage of Section 524(g), and will thus inherently satisfy the due process concerns raised in *JELD-WEN*. Second, *JELD-WEN* may have little impact outside the Third Circuit given that the majority of other circuits have already endorsed a "claim" analysis similar to that set forth in *JELD-WEN*. Nonetheless, depending on how the courts apply the due process analysis—a question the Third Circuit left for the bankruptcy court to resolve in the first instance—the case may yet prove to be significant particularly on issues relating to the limits of bankruptcy courts to deal with claims in the mass tort context.

Reinsurance Alert:

Two Courts Address Scope of the "Follow the Settlements" Doctrine

Two courts recently addressed application of the "follow the settlements" doctrine (also referred to as "follow the fortunes") to settlements between insurers and their reinsurers. In both cases, the reinsurers sought to side step the "follow the settlements" doctrine in order to avoid paying reinsurance claims. In one case the reinsurer was successful, while the reinsurer was required to follow its cedent's settlement in the other.

In *American Home Assurance Co. v. American Re-Insurance Co.*, No. 602485/06 (N.Y. Sup. Ct. New York County May 27, 2010), AIG entered into a settlement



with its insured, Monsanto Company, and thereafter sought indemnification from its reinsurers. The reinsurers refused to pay on the ground that AIG's settlement payments did not fall within the terms of coverage provided by the underlying policies. The court observed that, under the "follow the settlements" doctrine, a reinsurer is bound by a insurer's good faith settlement so long as it is "reasonably within the terms of the original policy, even if technically not covered by it." *Id.* at 8 (citations omitted). The court further held, however, that the doctrine does not require a reinsurer to reimburse "ex gratia" payments or payments in excess of the reinsurer's agreed-to exposure. *Id.* at 9. After reviewing certain internal AIG documents, the court concluded that a "sizable portion" of the settlement monies paid to Monsanto was designed to reimburse Monsanto for a potential punitive damages award and for gradual environmental contamination damages, both of which were explicitly excluded from coverage under AIG's policies. *Id.* at 13. Accordingly, the reinsurers were not obligated to follow AIG's settlement.

The matter of *Travelers Cas. and Sur. Co. v. Ins. Co. of North America*, 2010 WL 2293208 (3d Cir. June 9, 2010) presented a different scenario. There, the central issue was whether Travelers manipulated its post-settlement allocation so as to unreasonably maximize the amount allocated to policies which were reinsured by the Insurance Company of North America ("INA"). The court held that: (i) the "follow the settlements" doctrine applies to post-settlement allocations; (ii) Travelers was under no duty to minimize its reinsurance recovery; and (iii) Travelers' allocation of the settlement to reach reinsured lawyers of coverage was "reasonable" as a matter of law. However, the court affirmed the district court's ruling that one specific aspect of Travelers' post-settlement allocation, its decision to treat the per-occurrence limits of the two three-year policies reinsured by INA as applying separately to each policy year, operated to enlarge the limits of the INA policies beyond what INA had agreed to reinsure. Accordingly, the "follow the settlements" doctrine did not apply to this aspect of Travelers' allocation.

The issue addressed by the *Travelers* court, and one that has arisen with increasing frequency in the reinsurance context, is whether the "follow the settlements" doctrine applies to post-settlement allocations. This question often arises where, as in the *Travelers* matter, the "allocation decisions being challenged were not the product of active bargaining between the insurer and the insured." *Id.* at *9. The *Travelers* court, consistent with holdings by other courts, held that the doctrine does apply to post-settlement allocations. *See, e.g., Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of America*, 419 F.3d 181 (2d Cir. 2005); *North River Ins. Co. v. ACE American Reinsurance o.*, 361 F.3d 134 (2d Cir. 2004); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. American Re-Insurance Co.*, 441 F. Supp. 2d 646 (S.D.N.Y. 2006).

Defense Alerts:

Wisconsin Supreme Court Rules That Excess Insurer's Duty to Defend is Not Conditioned Upon Exhaustion of Primary Policy Limits

On June 24, 2010, the Wisconsin Supreme Court, addressing a matter of first impression, ruled that an excess liability policy contained a duty to defend, and that the duty to defend was not conditioned upon exhaustion of primary policy limits. *Johnson Controls, Inc. v. London Market*, 2010 WL 2520941 (Wis. June 24, 2010).

Johnson Controls obtained umbrella excess coverage from London Market, which "sat atop" three successive policies issued by Travelers Indemnity Company. Following a series of rulings and a settlement between Johnson Controls and Travelers, London Market moved for partial summary judgment, asserting that its policy was an indemnity-only excess policy that contained no promise of defense. Alternatively, London Market sought a declaration that if it did have a duty to defend, the duty would not arise unless and until the underlying Travelers policies have been exhausted.

The Wisconsin Supreme Court disagreed on both counts. Relying on the policy language at issue, the court concluded that despite its status as an excess insurer, London Market had a duty to defend. Although the excess policy did not specifically include a duty to defend provision, it contained a "follow form" provision: "[the London Market policy] is subject to the same terms, definitions, exclusions and conditions (except … as otherwise provided herein) as are contained in or as may be added to the Underlying [Travelers policies] …." *Id*. at *5-*6. The court explained that because the Travelers policy contained a duty to defend, and because London Market's policy did not expressly disclaim this duty, the defense obligation was incorporated into London Market's policy via the "follow form" provision.

Additionally, the court held that London Market's duty to defend was not conditional upon the exhaustion of the underlying Travelers policies. Rather, London Market's duty to defend was triggered when Travelers denied primary liability under its policy. The court relied on the "other insurance" clause contained in the Travelers policies, which provided that if another insurer denied primary liability under its policy, Travelers "will respond under this policy as though such other insurance were not available." *Id*. at *10. This clause was incorporated into the London Market policy by virtue of the "follow form" provision, the court reasoned. Therefore, London Market's policy obligations were triggered by Travelers' denial of liability under its own policy. The court held that the "limits of liability" provision in London Market's policy, which states that liability attaches only after Travelers has paid or been held liable to pay its limits, did not dictate a different conclusion. The "limits of liability" provision addressed London Market's *liability* obligations, not its duty to defend, the court explained. Therefore, "[e]ven if London Market's duty to indemnify does not attach until exhaustion of the underlying policies, that does not mean that its duty to defend requires exhaustion to attach." *Id*. at *11.

Significantly, the *Johnson Controls* court explicitly acknowledged that "[a]n excess insurer usually is not required to contribute to the defense of the insured so long as the primary insurer is required to defend." *Id*. at *9 (citations omitted). However, "this does not establish an immutable rule of law requiring exhaustion of all primary policies before an excess insurer's duty to defend can be triggered." *Id*.

Failure to Timely Object to Attorneys' Defense Bills Results in Forfeiture of Right to Dispute Remaining Amount Owed

A New York federal district court ruled that Ocean Risk Retention Group was obligated to pay Camacho Mauro Mulholland LLP, a law firm retained to represent Ocean Risk's insureds in local litigations, approximately $173,000 on account of outstanding legal fees. *Camacho Mauro Mulholland LLP v. Ocean Risk Retention Group Inc.*, 2010 WL 2159200 (S.D.N.Y. May 26, 2010).

Ocean Risk used a third-party administrator to handle claims arising from its taxi cab program. The third-party administrator retained Camacho to represent Ocean Risk's insured taxi companies and drivers in New Jersey and Pennsylvania litigations. The central issue before the court was whether Camacho, whose legal fees were not paid in full, had established a claim for "account stated" against Ocean Risk. The court answered this question in the affirmative, finding that under the facts presented, there existed an implied "account stated" between Camacho and Ocean Risk. In particular, the court relied on the fact that Ocean Risk received account statements from Camacho (albeit indirectly, through the third-party account administrator), and did not object to those statements. And Ocean Risk's partial payment of sixteen outstanding invoices, following a five month hiatus of paying any legal fees, reinforced the court's decision. "[P]artial payment is considered acknowledgement of the validity of the account," the court stated. *Id.* at *5.

The message of *Camacho* is clear: the lack of direct contact, or even a direct contractual relationship is not necessarily fatal to an "account stated" claim. The court was unmoved by the contention that Ocean Risk never actually retained Camacho and that Camacho was instead hired by the third-party administrator. Likewise, that Camacho submitted its legal invoices directly to the administrator, who then issued payment from an account funded by Ocean Risk, was irrelevant for "account stated" purposes. Moreover, the fact that Camacho allegedly failed to satisfy billing guidelines set forth by third-party administrator did not change the analysis in the court's view. Rather, the fact that Ocean Risk had the "power to request and review invoices held by [the third-party administrator] and to direct the distribution of the money from the account Ocean Risk funded for that purpose," was outcome-determinative for the court. *Id.* at *4.

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