SIMPSON THACHER

# INSURANCE LAW ALERT

SEPTEMBER 2010

This Alert addresses case decisions of the summer of 2010 and adds a new feature that allows you to "click through" to stories of interest. We hope you will continue to turn to the Alert for the latest developments in insurance and reinsurance law.

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- ***Seventh Circuit Rules No Duty to Defend Baby Bottle Manufacturer***
  The Seventh Circuit ruled that class action suits alleging that baby bottles and related accessories are contaminated with BPA did not seek damages for "bodily injury" within the meaning of general liability policies. Therefore, the insurers have no duty to defend. *Medmarc Cas. Ins. Co. v. Avent America, Inc.*, 2010 WL 2780190 (7th Cir. July 15, 2010). *Click here for full article*.

- ***Circuit Split Creates Uncertainty as to Whether a Trial Court Must Stay Proceedings Pending an Appeal of a Denial of Motion to Compel Arbitration***
  Following Ninth Circuit precedent, a California court exercised its discretion to grant a stay pending an appeal of the denial of a motion to compel arbitration. Circuit courts are split as to whether and under what circumstances a stay is warranted when a party appeals a motion to compel arbitration. *McArdle v. A&T Mobility LLC*, 2010 WL 2867305 (N.D. Cal. July 20, 2010). *Click here for full article*.

- ***Eleventh Circuit Limits Class Action Fairness Act Jurisdiction by Holding That Minimum Individual Amount in Controversy Requirement Remains in Effect***
  Addressing the jurisdictional requirements of CAFA on a putative class action, the Eleventh Circuit ruled that CAFA actions require at least one class member to allege an individual amount in controversy over $75,000, a requirement set forth in the general diversity statute. *Cappuccitti v. DirecTV, Inc.*, 2010 WL 2803093 (11th Cir. July 19, 2010). *Click here for full article*.

- ***Two Courts Weigh in on Whether Insurer May Recoup Defense Costs***
  Two more courts have weighed in on the frequently litigated issue of whether an insurer is entitled to reimbursement of defense costs expended under a reservation of rights, following a judicial determination that the insurer is not obligated to defend and/or indemnify. *American & Foreign Ins. Co. v. Jerry's Sports Center*, 2010 WL 3222404 (Pa. Aug. 17, 2010); *Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, No. 09-1251 (10th Cir. Aug. 16, 2010). *Click here for full article*.

- ***California Court Rules That Each Asbestos Claim is a Separate Occurrence***
  A California court rejected a policyholder's argument that thousands of exposures to asbestos under a wide range of circumstances at a variety of locations could constitute a single event. *Deere & Co. v. Allstate Ins. Co.*, No. CGC-03-420927 (Cal. Super. San Francisco County July 6, 2010). *Click here for full article*.

- ***Virginia Court Gives Policyholder Another Opportunity to Seek Coverage for Drywall Losses***

  After allowing a policyholder to amend claims for reimbursement of expenses incurred in remediating allegedly defective Chinese drywall, a Virginia court denied an insurer's motion to dismiss, finding that the policyholder had sufficiently alleged that he was "legally obligated" to remediate, and that the damage at issue was caused by an "occurrence." *Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, 2010 WL 2813397 (E.D. Va. July 15, 2010). *Click here for full article*.

- ***D.C. Circuit Limits Reach of* Textron*, Holding That Disclosure of Documents to Auditor Does Not Waive Privilege***

  The Court of Appeals for the District of Columbia addressed the scope of work-product privilege in the context of company-auditor communications, and interpreted the First Circuit's much-discussed *Textron* ruling as one limited to its facts. *United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010). *Click here for full article*.

- ***West Virginia Court Rules That Policyholder Waived Attorney-Client Privilege by Inadvertently Producing Document to Insurer***

  A West Virginia court ruled that a policyholder's accidental production of hundreds of allegedly privileged documents to its insurer during e-discovery likely constituted a waiver of the privilege with respect to those documents. *Felman Production, Inc. v. Industrial Risk Insurers*, 2010 WL 2944777 (S.D. W. Va. July 23, 2010). *Click here for full article*.

- ***New Jersey Fee-Shifting Statute Applies to Illinois Coverage Action***

  Where a policyholder succeeded in a coverage action in New Jersey, it was entitled to attorneys' fees pursuant to a New Jersey fee-shifting statute, for an action in Illinois that arose from the same controversy. *Myron Corp. v. Atlantic Mut. Ins. Corp.*, 2010 WL 2898970 (N.J. July 27, 2010). *Click here for full article*.

- ***RAND Institute Issues Report on Asbestos Bankruptcy Trusts***

  The RAND Institute for Civil Justice recently issued a report on asbestos bankruptcy trusts which provides an overview of the creation, organization and governance of asbestos personal injury trusts. *Click here for full article*.

# Coverage Alert:

## *Seventh Circuit Rules No Duty to Defend Baby Bottle Manufacturer*

The Seventh Circuit ruled that class action suits alleging that baby bottles and related accessories were contaminated with a toxic chemical did not seek damages for "bodily injury" within the meaning of general liability insurance policies. Therefore, the insurers have no duty to defend. *Medmarc Cas. Ins. Co. v. Avent America, Inc.*, 2010 WL 2780190 (7th Cir. July 15, 2010).

Several suits were filed by purchasers of Avent America, Inc.'s baby bottle products alleging that Avent misrepresented and/or otherwise failed to warn consumers that the products were manufactured with BPA, a known toxin. The complaints included allegations detailing the potentially harmful effects of BPA. However, plaintiffs did not allege the manifestation of any adverse health effects. Rather, the injury for which plaintiffs sought damages was the purchase of an unusable product.

Avent and its liability insurers both sought declarations regarding the insurers' duty to defend. The central issue before the court was whether the complaints alleged "bodily injury" within the meaning of the general liability policies. The policies defined "bodily injury" as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." According to Avent, because the underlying complaints assert claims for "damages due to Avent's creation and sale of products that cause bodily injury," they fall within coverage provided by the policies. *Id.* at *6. The court disagreed. The complaints alleged that due to the risk of potential bodily harm from BPA exposure, the products were unusable, and thus plaintiffs did not receive the full benefit of their bargain. The economic damages sought by plaintiffs arise out of the loss of use of the product, not out of bodily injury. The court stated: "The theory of relief in the underlying complaint is that the plaintiffs would not have purchased the products had Avent made certain information known to the customers and therefore the plaintiffs have been economically injured." *Id.* at *8. As such, the court declared inapposite cases seeking monetary or medical monitoring relief as a result of exposure to harmful products. Even under the expansive duty to defend standard, plaintiffs' claims did not raise the potential for coverage under the insurers' general liability policies.

*Avent* illustrates that the mere presence of allegations relating to current or future physical injury may not satisfy the "bodily injury" trigger for insurance coverage purposes if the complaint fundamentally relates to something other than bodily harm. As the court explained, "claims that BPA can cause physical harm only explain and support the claims of the actual harm complained of; the economic loss to the purchasers of the products due to the alleged false advertising and failure to warn." *Avent*, at *9. *See also HPF, L.L.C. v. General Star Indem. Co.*, 338 Ill. App. 3d 912, 788 N.E.2d 753 (Ill. App. Ct. 2003) (essence of underlying complaint was that company violated a standard of care in the manufacture or distribution of its product; therefore, there is no "bodily injury" for insurance purposes). The *Avent* decision also highlights the sometimes irreconcilable tension between putative class action suits seeking damages for exposure to allegedly harmful products and the possibility of general liability insurance coverage

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for the manufacturers named as defendants in those lawsuits. As a matter of strategy, putative class action complaints often exclude from class membership any person with claims for personal injuries because such claims generally require individualized inquiry that may be fatal to class certification. Therefore, class action complaints, such as those in *Avent*, may be intentionally drafted in a manner that all but eliminates a policyholder argument that the claims arise from "bodily injury." This "pleading ploy" has been duly noted by other courts. *See Steadfast Ins. Co. v. Purdue Federick Co.*, 2006 WL 1149202, at *2 n. 1 (Conn. Super. Ct. Apr. 10, 2006); *Motorola v. Assoc. Indem. Corp.*, 878 So. 2d 824, 834 (La. Ct. App. 2004).

## ARBITRATION ALERT:

### *Circuit Split Creates Uncertainty as to Whether a Trial Court Must Stay Proceedings Pending an Appeal of a Denial of a Motion to Compel Arbitration*

In *McArdle v. AT&T Mobility LLC*, 2010 WL 2867305 (N.D. Cal. July 20, 2010), a customer of AT&T alleged, on behalf of a consumer class, that the company engaged in false advertising and unfair business practices. However, plaintiff's service agreement with AT&T included an arbitration provision that required arbitration of all disputes between the parties and prohibited the pursuit of class actions in arbitration. AT&T moved to compel arbitration of plaintiff's claims. The court denied the motion, finding that the class action waiver provision in the service agreement was unconscionable under California law. In so ruling, the court rejected the argument that the Federal Arbitration Act preempted state law regarding unconscionability. AT&T appealed the arbitration ruling and sought to stay the action pending the appeal. The court initially denied the motion, but upon reconsideration issued a stay. The court concluded that a stay was justified in light of the United States Supreme Court's grant of certiorari in a matter involving similar legal issues. Because the outcome of the pending Supreme Court case could directly impact the arbitrability issue in *McArdle*, the court ruled that a stay of the proceedings was warranted.

The question of whether a trial court must stay proceedings while a denial of a motion to compel arbitration is appealed is not directly addressed by the FAA, and federal circuit courts are split on the issue. As noted in *McArdle*, the Ninth Circuit considers a stay to be a matter within the discretion of the trial court to be decided by reference to a multi-factor test. *See Britton v. Co-op Banking Grp.*, 916 F.2d 1405 (9th Cir. 1990). However, the majority view (endorsed by the Third, District of Columbia, Seventh, Tenth and Eleventh Circuits) is that a trial court must stay proceedings pending appellate review of a motion, provided that the appeal is not frivolous. *See Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007); *Bombardier Corp. v. National Railroad Passenger Corp.*, 2010 WL 31818924 (D.C. Cir. Dec. 12, 2002); *Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504 (7th Cir. 1997); *McCauley v. Halliburton Energy Svs., Inc.*, 413 F.3d 1158 (10th Cir. 2005); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249 (11th Cir. 2004). Courts endorsing this view reason that the filing of a notice of an appeal divests the district court of jurisdiction as to the issues raised on appeal, and confers jurisdiction of those matters on the court of appeal. The rule in other circuits is less clear.

The First Circuit has not squarely ruled on the issue, and two district courts within the First Circuit have reached differing conclusions. *Compare Combined Energies v. CCI, Inc.*, 495 F. Supp. 2d 142 (D. Me. 2007) (endorsing majority view and holding that an appeal divests the district court of the power to proceed with the aspects of the case that are at issue on the appeal, and as such, justifies the imposition of a stay) *with Narragansett Elec. Co. v. Constellation Energy Commodities Grp., Inc.*, 563 F. Supp. 2d 325 (D.R.I. 2008) (citing favorably the reasoning of *Combined Energies*, but finding that facts at issue did not warrant a stay). Decisions in the Second Circuit are also mixed. *Compare Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004) *and In re Salomon Inc. Shareholders' Derivative Litig.*, 68 F.3d 554 (2d Cir. 1995) (declining to stay district court proceeding pending appeal of arbitrability issue) *with Satcom Int'l Grp. PLC v. Orbcomm Int'l Partners*, 55 F. Supp. 2d 231 (S.D.N.Y. 1999), *aff'd*, 205 F.3d 1324 (2d Cir. 1999) (distinguishing *In re Salomon* and granting motion to stay pending appeal of arbitrability). The Fourth Circuit has not yet considered the issue. *See In re White Mountain Mining Co.*, 403 F.3d 164 (4th Cir. 2005).

## JURISDICTION ALERT:

### *Eleventh Circuit Limits Class Action Fairness Act Jurisdiction by Holding That Minimum Individual Amount in Controversy Requirement Remains In Effect*

In *Cappuccitti v. DirecTV, Inc.*, 2010 WL 2803093 (11th Cir. July 19, 2010), the Eleventh Circuit considered the jurisdictional requirements of the Class Action Fairness Act of 2005 ("CAFA") on a putative class action originally filed in federal court. CAFA sets forth two explicit jurisdictional requirements for CAFA actions originally filed in federal court: (i) a total amount in controversy exceeding $5,000,000; and (ii) minimal diversity of citizenship. CAFA is silent, however, as


to whether at least one class member must allege an amount in controversy in excess of $75,000, a requirement set forth in the general diversity jurisdiction statute, 28 U.S.C. §1332(a). Noting that no other federal circuit has addressed this issue, the Eleventh Circuit held that CAFA actions require at least one class member to allege an individual amount in controversy over $75,000. The Eleventh Circuit believed its ruling avoided "transform[ing] federal courts hearing originally-filed CAFA cases into small claims courts where plaintiffs could bring five-dollar claims by alleging gargantuan class sizes to meet the $5,000,000 aggregate amount requirement." *Id.* at *3.

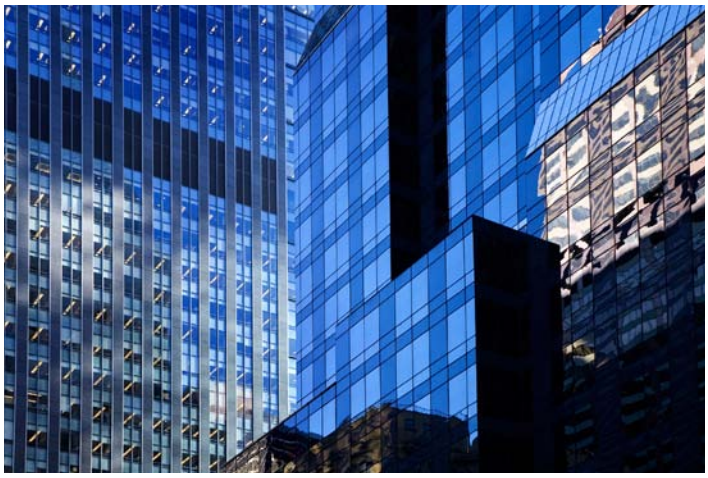
With insurance-related class actions involving small amounts for individual class members common, the requirements pertaining to federal court diversity over class action disputes are significant. State courts have traditionally been perceived as "overly friendly" toward class certification, *see Id.* at *1. Accordingly, federal court jurisdiction over class action disputes provides an important tool for defendants in putative class actions. In what appears to be the first ruling defining the jurisdictional requirements of CAFA actions originally filed in federal court, *Cappuccitti* may limit federal court jurisdiction under CAFA by applying the requirements set forth in the general diversity statute §1332(a).

# Defense Alert:

## *Two Courts Weigh in on Whether Insurer May Recoup Defense Costs*

Whether an insurer is entitled to reimbursement of defense costs expended under a reservation of rights, following a judicial determination that the insurer is not obligated to defend and/or indemnify is a frequent subject of litigation. A number of courts reject reimbursement claims outright, reasoning that under the broad defense provisions in a general liability policy, a policyholder is entitled to the benefit of a defense for claims arguably covered by the policy at the time of tender, even if subsequent factual development results in a finding to the contrary. Other jurisdictions, however, rely on theories of unjust enrichment or implied contract to find that an insurer may reserve the right to seek reimbursement of defense costs if it is later determined that the policy does not cover the claims at issue. Last month, two more courts weighed in on the nationwide split, reaching different conclusions.

In *American & Foreign Ins. Co. v. Jerry's Sports Center*, 2010 WL 3222404 (Pa. Aug. 17, 2010), the Pennsylvania Supreme Court ruled that absent an express policy provision, an insurer has no right to reimbursement for non-covered claims. Citing to "a growing number of courts," the court reasoned that an insurer's unilateral reservation of rights cannot create an entitlement where no such right was contained in the policy itself. *Id.* at *9 n. 13. Furthermore, although a court's subsequent resolution of the coverage question relieves the insurer of future defense obligations, it does not "retroactively eliminate the insurer's duty to defend the insured during the period of uncertainty." *Id.* at *13. In contrast, in *Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, No. 09-1251 (10th Cir. Aug. 16, 2010), the Tenth Circuit ruled that Colorado law would recognize an insurer's entitlement to reimbursement of defense costs in the event it is later determined that the insurer did not have a duty to defend. The court relied on state law precedent indicating that Colorado would endorse such a right to reimbursement, even where the insurance policy is silent on the issue. Siding with the insurers on a related issue, the court also ruled that there were no material issues of fact as to the amount of reimbursable defense costs. Absent specific evidence demonstrating the unreasonableness of the expenses, the insurers were entitled to the amount sought.

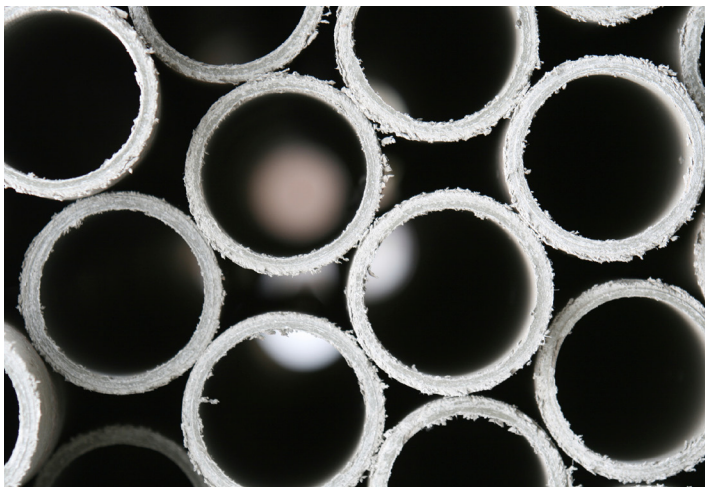


# Occurrences Alert:

## *California Court Rules That Each Asbestos Claim is a Separate Occurrence*

In *Deere & Co. v. Allstate Ins. Co.*, No. CGC-03-420927 (Cal. Super. San Francisco County July 6, 2010), the court addressed a "number of occurrences" dispute under a variety of excess policies, each with differing "occurrence" language. The court ruled that none of the policies' language supported the position advanced by Deere & Co—namely, that thousands of exposures to asbestos under a wide range of circumstances at a variety of locations could constitute a single event. In one set of policies, covering a 25 year span of coverage, the term "occurrence" was defined as "an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposures to substantially the same conditions existing at or emanating from one premises

location shall be deemed one occurrence." *Id.* at 2. The court interpreted this language (as well as similar language in a second set of policies) to mean that an occurrence is "all exposure of a single claimant during the policy period." *Id.* at 21. This conclusion contrasts with that of the Delaware Supreme Court in *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254 (Del. 2010), discussed in our July/August Alert. Faced with identical policy language, the *DuPont* court ruled that hundreds of thousands of asbestos-related property damage claims arose from a single occurrence. The *Deere* court rejected the notion that a company's long-term manufacture and distribution of asbestos-containing products could constitute a single "event" or "a continuous exposure to conditions" as those terms were intended to apply in an insurance policy.



## Chinese Drywall Alert:

### *Virginia Court Gives Policyholder Another Opportunity to Seek Coverage for Drywall Losses*

Our April 2010 Alert reported a Virginia ruling denying a policyholder's claim for reimbursement of expenses incurred in remediating allegedly defective Chinese drywall. *Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, 2010 WL 1257298 (E.D. Va. March 24, 2010). The court held that the expenses were outside the scope of CGL coverage because Dragas, the policyholder, was not "legally obligated" to remediate the drywall. In particular, Dragas had not established the threat of litigation or the existence of specific demands that provided factual support for a legal obligation to remediate.

Following the March 24th ruling, Dragas filed an amended complaint. This time around, the complaint alleged specific threats of litigation against Dragas by individual homeowners. The court concluded that these threats, coupled with detailed accounts of verbal and written demands of homeowners (many of whom were represented by counsel), were sufficient to survive the insurer's motion to dismiss. Although the court was "unwilling to find that the threat of litigation is itself sufficient to support a 'legal obligation' to pay sums 'as damages,'" the court concluded that the totality of the allegations were sufficient for the purposes of a motion to dismiss. 2010 WL 2813397, at *4 (E.D. Va. July 15, 2010).

The court also sided with Dragas on two additional issues. First, the court ruled that the amended claims alleged an "occurrence" sufficient to withstand a motion to dismiss. Although courts nationwide disagree as to whether allegations of faulty workmanship constitute an "occurrence" for insurance coverage purposes, the Fourth Circuit has endorsed the view that faulty workmanship that causes damage to other property can constitute an occurrence. Accordingly, Dragas's allegation that the installation of faulty drywall caused damage to various structural systems within the affected homes was adequate, at this stage in the litigation, to satisfy the "occurrence" requirement. Second, the court concluded that coverage was not necessarily barred by the policy's "voluntary payment" and "no action" provisions. Although compliance with these provisions is ordinarily a pre-condition to coverage, the court said that under Virginia law the insurer's denial of coverage waived its right to assert the consent requirements of the policy.

The *Dragas* matter is one of an increasing number of coverage disputes involving Chinese drywall.

However, *Dragas* involved the unique situation in which the policyholder engaged in remediation efforts prior to being sued in formal litigation. As such, the court's ruling as to the "legally obligated to pay" provision may not have widespread implications outside this particular context. The court's "occurrence" ruling is perhaps more noteworthy. The question of whether, and under what circumstances, a contractor's faulty workmanship can constitute an "occurrence" for insurance purposes is a frequently-litigated issue. This issue, along with questions relating to the pollution exclusion, may take center stage in future drywall-related insurance coverage disputes.

## PRIVILEGE ALERTS:

### *D.C. Circuit Limits Reach of* Textron, *Holding That Disclosure of Documents to Auditor Does Not Waive Privilege*

The Court of Appeals for the District of Columbia addressed the scope of work-product protection in the context of company-auditor communications in *United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010). The court issued the following rulings, reinforcing the protection afforded by the work-product doctrine:

- **The fact that an auditor, rather than a corporation, drafted a document does not exclude the possibility of work-product protection.** Work product protection extends not only to documents prepared by or for another party or its representative, but also to intangible things, such as an attorney's mental impressions. The pertinent issue is "whether the document contains work product—the thoughts and opinions of counsel developed in anticipation of litigation." *Id*. at 136.

- **That a document was generated as part of an audit process does not exclude the possibility that it contains protected work-product information.** In the D.C. Circuit, work-product protection turns on whether the document was created "because of" anticipated litigation. A document may be generated in anticipation of litigation, but may also be used for ordinary business purposes without losing its protected status. *Id*. at 138. Although the First Circuit's much-discussed ruling in *United States v. Textron Inc*., 577 F.3d 21 (1st Cir. 2009) (highlighted in our January 2010 Alert) arguably reaches a contrary conclusion under the "because of" standard, the *Deloitte* court interpreted *Textron* as a decision limited to its facts. *Textron* does not exclude the possibility that documents prepared during the audit process might, in some instances, warrant work product protection.

- **A corporation does not waive work-product protection by disclosing documents to an independent auditor.** Unlike attorney-client privilege, which is waived by voluntary disclosure, work-product protection is waived only when disclosure is made to an adversary or through a conduit to an adversary. An independent auditor's "power to issue an adverse opinion, while significant, does not make it the sort of litigation adversary contemplated by the waiver standard." *Deloitte*, at 140. Furthermore, in evaluating the adversary issue, the pertinent question is not whether the auditor could be the company's adversary in "any conceivable future litigation," but whether the auditor could be the company's adversary "in the sort of litigation the [documents at issue] address." *Id*.

*Deloitte* sends a message that companies can engage in open communications with their auditors without risking prejudice in pending litigation. *Textron* may be viewed as a decision limited to its particular facts.

## *West Virginia Court Rules That Policyholder Waived Attorney-Client Privilege by Inadvertently Producing Document to Insurer*

A West Virginia court ruled that a policyholder's accidental production of hundreds of allegedly privileged documents to its insurer during e-discovery likely constituted a waiver of the privilege with respect to those documents. *Felman Production, Inc. v. Industrial Risk Insurers*, 2010 WL 2944777 (S.D. W. Va. July 23, 2010). During discovery, Felman produced more than one million pages of electronically-stored information ("ESI"), thirty percent of which were concededly irrelevant. Nearly one thousand of the documents produced by Felman were subject to attorney-client privilege. Felman attempted to claw back several hundred of these documents pursuant to a discovery stipulation which allowed a party to recover an inadvertently produced document. The focus of the privilege dispute was a single email communication from Felman to its counsel, which discussed one of the central issues in the coverage dispute. The Magistrate Judge overseeing the dispute concluded that although the disclosure of the email was inadvertent, Felman waived its attorney-client privilege based upon its failure to take reasonable precautions to prevent inadvertent disclosure prior to production. The federal court affirmed the ruling as to the email, and further held that "insofar as any waiver of the privilege applied to any of the additional 377 documents Felman seeks to claw back is based on the same factual conclusions, as those [regarding the email communication], waiver likely also occurred." *Id.* at 9.

Federal Rule of Evidence 502 provides that inadvertent disclosure does not waive privilege if the holder of the privilege took reasonable steps to prevent disclosure and to rectify the error post-production. Courts generally consider the following factors to determine whether the inadvertent production of attorney-client privileged materials operates to waive the privilege: (1) the reasonableness of the precautions taken to prevent accidental disclosure; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) any delay in measures taken to rectify the disclosure; and (5) overriding interest in justice. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259 (D. Md. 2008). Affirming the Magistrate Judge's findings, the court concluded that the "ridiculously high number of irrelevant materials and the large volume of privileged communications produced demonstrate a lack of reasonableness." *Feldman*, at 6. Significantly, the court also ruled that the insurer's post-production conduct was irrelevant to the waiver analysis. Upon discovering the significant privileged document, the insurer did not notify Felman (as required by Rule 502 and by the parties' stipulation), but instead filed a motion to amend its answer and add counterclaims for fraud and breach of contract, attaching the privileged document to the motion. While the insurer's conduct might violate the Rules of Professional Conduct, it does not alter the fact that the privileged status of the document had already been waived.

*Felman* illustrates that notwithstanding courts' increasing sensitivity to the burdens of collecting and producing ESI, parties must dedicate significant resources to document productions in order to avoid privilege waivers. Questions relating to how much and what kinds of due diligence are necessary to satisfy the "reasonableness" requirement of Rule 502 will undoubtedly be answered on a case-by-case basis. The Magistrate Judge overseeing discovery in *Felman* detailed a list of more than 20 measures taken by Felman (together with Felman's counsel and retained ESI collection vendors) in order to prevent the disclosure of privileged materials, yet still concluded that the precautions taken were not reasonable. *Mt. Hawley Ins. Co. v. Felman Production, Inc.*, 2010 WL 1990555 (S.D. W. Va. May 18, 2010).

# ATTORNEYS' FEES ALERT:

## *New Jersey Fee-Shifting Statute Applies to Illinois Coverage Action*

Where a policyholder succeeded in a coverage action in New Jersey, it was entitled to attorneys' fees pursuant to a New Jersey fee-shifting statute, for an action in Illinois that arose from the same controversy. *Myron Corp. v. Atlantic Mut. Ins. Corp.*, 2010 WL 2898970 (N.J. July 27, 2010). Myron Corp., a New Jersey-based business, was sued in an Illinois class action alleging violations of the Telephone Consumer Protection Act ("TCPA") and Illinois statutory and common law. Atlantic Mutual, Myron's general liability insurer, agreed to defend under a reservation of rights. Additional TCPA actions were subsequently filed against Myron in other states, including New Jersey. Following this development, a forum fight ensued. Atlantic Mutual favored Illinois federal court, whereas Myron sought relief in New Jersey state court. After a substantial amount of procedural wrangling, it was ultimately determined that New Jersey (the state in which the insurance policy was issued) was a more appropriate forum in which to litigate the coverage issues. The New Jersey court reserved ruling on the indemnification issue, but ruled in favor of Myron with respect to Atlantic Mutual's duty to defend. Ultimately, the parties settled Myron's attorneys' fee claims in connection with both the underlying action and the New Jersey coverage action. The settlement did not resolve Myron's claims for attorneys' fees in the Illinois litigation.

The New Jersey Superior Court denied Myron's motion for an award of attorneys' fees, reasoning that it would be improper to apply New Jersey's fee-shifting provision, New Jersey Court Rule 4:42-9(a)(6), extra-territorially to fees arising from the Illinois action. The appellate court reversed. Myron's right to attorneys' fees in the Illinois actions stemmed from its success in the New Jersey action. "Put another way, the Illinois litigation was an integral part of the entire controversy over coverage, and can fairly be characterized for purposes of Rule 4:42-9(a)(6) as part of the same 'action' in which Myron prevailed." *Myron Corp. v. Atlantic Mut. Ins. Corp.*, 407 N.J. Super. 302, 312, 970 A.2d 1083, 1089 (N.J. Super. Ct. App. Div. 2009). The court reasoned that this conclusion serves the purposes of the rule—to protect a policyholder's rights to obtain the benefits of an insurance policy without having to pay litigation expenses to establish coverage. The New Jersey Supreme Court affirmed.

Based on *Myron*, a policyholder that succeeds in a New Jersey coverage dispute may be entitled to fees arising from an action filed by its insurer in another forum, if that action is part of the same controversy. However, the policyholder's victory in *Myron* might have been driven largely by the particular facts at issue. Atlantic Mutual's strategic attempt to take advantage of a favorable Seventh Circuit ruling on coverage imposed costs on Myron to "fight its way out of what the Illinois court found was an inappropriate forum, and to get the case back into an appropriate venue." *Id.* Applying New Jersey's fee-shifting statute to the Illinois action "*in this situation*" was necessary to prevent an insurer from "wear[ing] down the insured financially through forum-shopping." *Id.* Arguably, cases presenting different factual scenarios would not justify the application of New Jersey's fee-shifting statute to out-of-state litigation expenses.

## ASBESTOS ALERT:

### *RAND Institute Issues Report on Asbestos Bankruptcy Trusts*

The RAND Institute for Civil Justice, a non-profit research institution, recently issued a report on asbestos bankruptcy trusts which provides an overview of the creation, organization and governance of asbestos personal injury trusts. The report "compiles publicly available data on the assay, outlays, claim-approval criteria, and governing boards of the leading trusts." Although the report does not evaluate the performance of asbestos trusts, it reports on a wide-range of information relating to the performance of the overall asbestos compensation system and the economic impact of asbestos litigation on litigants, as well as the legal community in general.

## SIMPSON THACHER NEWS ALERTS:

STB partner Mary Kay Vyskocil will be speaking at the Fall Conference and Annual Meeting of ARIAS, scheduled for November 4-5, 2010 in New York City. She serves on the Board of Directors of ARIAS, and chairs the Education Committee.

STB partners Mary Beth Forshaw and Bryce Friedman and senior counsel Elisa Alcabes authored an article entitled "Tiny Particles, Big Coverage Issues?" The article, which summarizes insurance coverage issues related to the emerging field of nanotechnology, appeared in the August 6, 2010 edition of Law360.

STB partner Michael Kibler authored an article entitled "The Era of Increased Federal Regulation: A 'New Deal' for the Insurance Industry?" which was featured in the April 5, 2010 Bloomberg Insurance Law Report.

Simpson Thacher has been an international leader in the practice of insurance and reinsurance law for a quarter of a century. Our insurance litigation team practices worldwide.

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