SIMPSON THACHER

INSURANCE LAW ALERT

MARCH 2011

This Alert addresses decisions relating to interpretation of a pollution exclusion, an insurance broker's duty to disclose its compensation under New York common law, the annualization of aggregate limits under a multi-year excess policy, and the nontransferability of insurance coverage to a successor property owner by "operation of law." It also discusses several important rulings related to discovery, including two decisions interpreting the Freedom of Information Act and a ruling addressing the scope of the "common interest" privilege. Please "click through" to view articles of interest.

- ***Louisiana District Court Dismisses Fraud Claims Against Insurers in Qui Tam Action***
  A federal court in Louisiana dismissed claims that several insurers improperly shifted billions of dollars in Hurricane Katrina losses from their own policies to the National Flood Insurance Program. *United States of America ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, No. 06-4091 (E.D. La. Jan. 24, 2011). *Click here for full article*.

- ***Fifth Circuit Rules that Pollution Exclusion Unambiguously Bars Coverage for Silica Exposure***
  The Fifth Circuit affirmed that an umbrella insurer had no duty to defend or indemnify a company in a suit alleging that the company was grossly negligent in allowing an employee to be exposed to silica dust, reasoning that the absolute pollution exclusion barred coverage for the claims. *RLI Insurance Co. v. Gonzalez*, 2011 WL 69085 (5th Cir. Jan. 7, 2011). *Click here for full article*.

- ***New York Court of Appeals Finds that Brokers Have No Duty to Disclose Incentive Agreements to Customers***
  New York's highest court affirmed that insurance brokers do not have a common law fiduciary duty to disclose contingent commission agreements with insurance companies to customers. *People v. Wells Fargo Insurance Services, Inc.*, 2011 WL 534198 (N.Y. Feb. 17, 2011). *Click here for full article*.

- ***New York Court of Appeals Holds that Multi-Year Excess Policy's Aggregate Limits Were Renewed Annually***
  The New York Court of Appeals ruled that aggregate limits in excess insurance policies should apply annually, rather than over the three-year span of the policies, even though the policies did not use the term "annual aggregate." *Union Carbide Corp. v. Affiliated FM Insurance Co.*, 2011 WL 588470 (N.Y. Feb. 22, 2011). *Click here for full article*.

- ***Ohio District Court Rejects Argument that Insurance Policies Issued to Predecessor Property Owner Provide Coverage to Current Property Owner "By Operation of Law"***

  An Ohio federal court rejected the argument that an owner of contaminated property which is strictly liable under CERCLA is entitled to coverage under general liability policies issued to the property's former owner and operator. *Lockheed Martin Corp. v. Goodyear Tire and Rubber Co.*, No. 5:10 CV 673 (N.D. Ohio Feb. 11, 2011). *Click here for full article*.

- ***New York Appellate Court Grants Insurer's Motion to Compel Discovery, Rejecting Privilege Claim Based on "Common Interest" Between Policyholder and Asbestos Claimants***

  A New York appellate court rejected a policyholder's attempt to withhold documents from its insurer on the basis of the "common interest" privilege, finding no factual evidence to support the insured's claims of privilege. *Mt. McKinley Ins. Co. v. Corning Inc.*, No. 602454/02 (N.Y. App. Div. 1st Dep't Feb. 15, 2011). *Click here for full article*.

- ***Unanimous Supreme Court Rules that "Personal Privacy" FOIA Exemption Does Not Apply to Corporations***

  The United States Supreme Court held that the "personal privacy" FOIA exemption, which prevents disclosure of law enforcement records in order to protect against unwarranted invasions of privacy, does not apply to corporations. *Federal Communications Commission v. AT&T Inc.*, 2011 WL 691243 (U.S. Mar. 1, 2011). *Click here for full article*.

- ***New York District Court Provides Guidance on FOIA Requests***

  A New York federal court recently provided guidance on the format in which a governmental agency is required to produce electronic information in response to a FOIA request. *National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency*, No. 10 Civ. 3488 (S.D.N.Y. Feb. 7, 2011). *Click here for full article*.

- ***Seventh Circuit Reverses District Court's Disqualification of Arbitrator, Ordering Parties to Resume Arbitration***

  The Seventh Circuit held that a district court erred in enjoining arbitration on the ground that an arbitrator was not "disinterested." *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, No. 09-3682 (7th Cir. Jan. 31, 2011). *Click here for full article*.

- ***Adversary Proceeding Filed by Asbestos Trusts Dismissed for Lack of Subject Matter Jurisdiction***

  A Delaware Bankruptcy Court dismissed for lack of subject matter jurisdiction an adversary action filed by multiple asbestos trusts seeking to prevent discovery of claims information in several pending bankruptcy cases. *In re ACandS, Inc.*, Adversary Case Nos. 10-54719, 10-53720, 10-53712 (Bankr. D. Del. Feb. 22, 2011). *Click here for full article*.

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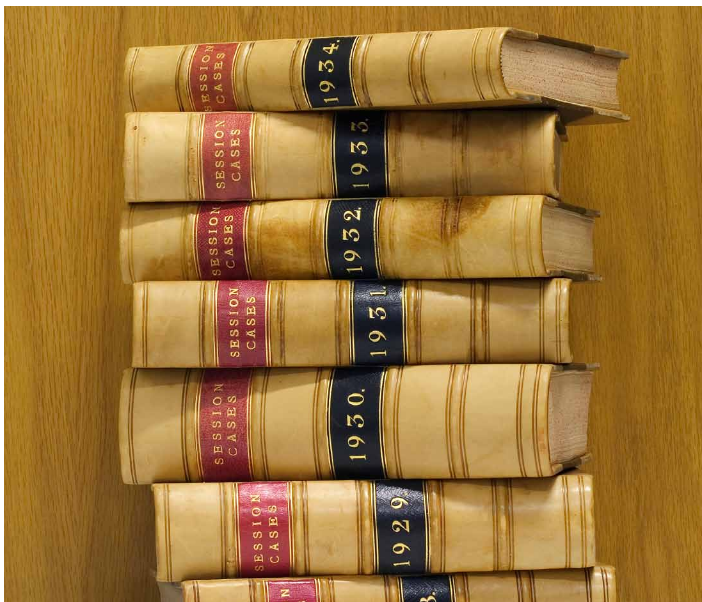
Flood Insurance Alert:
Louisiana District Court Dismisses Fraud Claims Against Insurers in Qui Tam Action

A federal court in Louisiana dismissed claims that several insurers improperly shifted billions of dollars in Hurricane Katrina losses from their own policies to the National Flood Insurance Program. *United States of America ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, No. 06-4091 (E.D. La. Jan. 24, 2011). In a *qui tam* ("whistleblower") action, the plaintiff alleged that the defendant insurance companies engaged in fraudulent loss-shifting by falsely attributing losses to flooding (which were covered by the National Flood Insurance Program) rather than to wind or rain (which may have been covered by the defendant insurers' policies). The plaintiff also asserted an "inflated revenue" claim, alleging that the insurers overstated the amount of flood damage in order to maximize the fees to which they were entitled for participating in the National Flood Insurance Program. The court dismissed the case in its entirety. Claims against one insurer were dismissed without prejudice under the "first-to-file" doctrine, given that a False Claims Act case making substantially similar allegations had already been filed and dismissed against that insurer. Claims against all other defendants were dismissed on the basis that the plaintiff was not an "original source" of the publicly disclosed allegations against the insurers, a jurisdictional requirement for claims under the False Claims Act. The court ruled that the evidence failed to establish that the plaintiff had direct and independent knowledge of facts supporting the allegations at the time it initially contacted the government about the alleged fraudulent activities. STB partner Bryce L. Friedman was lead trial counsel for Standard Fire Insurance Company, one of the defendant insurers in this action.



Pollution Exclusion Alert:
Fifth Circuit Rules that Pollution Exclusion Unambiguously Bars Coverage for Silica Exposure

The Fifth Circuit affirmed that an umbrella insurer had no duty to defend or indemnify a company in a suit alleging that the company was grossly negligent in allowing an employee to be exposed to silica dust, resulting in his death. *RLI Insurance Co. v. Gonzalez*, 2011 WL 69085 (5th Cir. Jan. 7, 2011). The court ruled that the absolute pollution exclusion in the umbrella policy barred coverage for the claims, reasoning that silica dust falls squarely within the definition of "pollutants"

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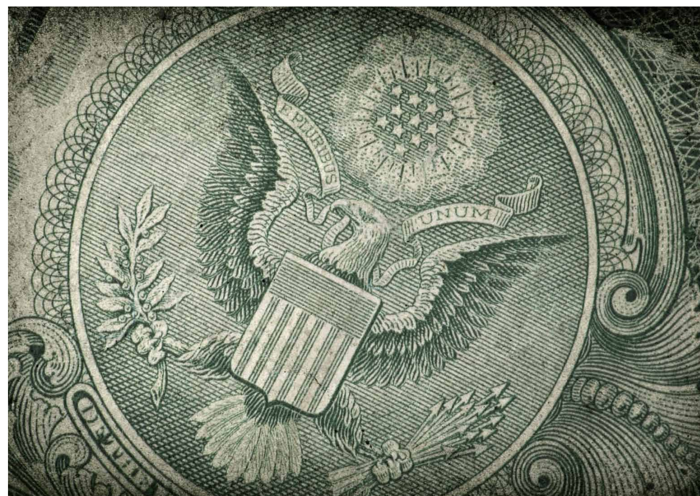
as "smoke, vapors, soot, fumes, acids, sounds, alkalis, chemicals, liquids, solids, gases, waste, … and all other irritants and contaminants." Significantly, the *Gonzalez* court explicitly rejected the argument that the pollution exclusion was ambiguously over broad—a position endorsed by some courts in cases involving small scale or non-traditional environmental contamination. *Compare Union Ins. Co. v. Mendoza*, 2010 WL 5065116 (10th Cir. Dec. 13, 2010) (rejecting argument that pollution exclusion is ambiguously over broad) *and Devcon International Corp. v. Reliance Ins. Co.*, 609 F.3d 214 (3d Cir. 2010) (rejecting argument that pollution exclusion is ambiguous because "if read literally, would remove coverage for a large number of harms that do not implicate the environmental catastrophes that the exclusion was supposedly intended to address") *with NGM Ins. Co. v. Carolina's Power Wash & Painting, LLC*, 2010 WL 146482 (D.S.C. Jan. 12, 2010) (pollution exclusion is ambiguous because it can be "infinitely enlarged") (citations omitted) *and In re Idleaire Technologies Corp.*, 2009 WL 413117 (Bankr. D. Del. Feb. 18, 2009) (pollution exclusion is latently ambiguous because it can apply in a limitless number of situations).

Broker Alert:
New York Court of Appeals Finds that Brokers Have No Duty to Disclose Incentive Agreements to Customers

On February 17, 2011, New York's highest court affirmed that insurance brokers do not have a common law fiduciary duty to disclose contingent commission agreements with insurance companies to customers. *People v. Wells Fargo Insurance Services, Inc.*, 2011 WL 534198 (N.Y. Feb. 17, 2011). Continuing a litigation path cut by former New York Attorney General Eliot Spitzer, the state argued that Wells Fargo committed fraud and breached its fiduciary duty based on the failure to disclose its involvement in programs under which Wells Fargo received cash compensation from certain insurance companies based on the volume of business that Wells Fargo brought to them. According to the complaint, Wells Fargo "steered" its customers to participating insurance companies and away from insurers that did not have such arrangements



with the brokerage firm. The trial court dismissed the complaint, citing the absence of allegations of affirmative misrepresentations or of any demonstrable harm to the customers. The Appellate Division and the Court of Appeals both affirmed.

The Court of Appeals noted that although insurance brokers owe a duty of loyalty to the principals on whose behalf they act, the facts in the complaint did not comprise a breach of that duty. The court held that a failure to disclose the existence of incentive agreements does not generally constitute a violation of the duty of loyalty. While *Wells Fargo* sets clear common law precedent that insurance brokers are not obligated to disclose their participation in incentive agreements, the effect of this holding may be limited by recently-enacted state statutory law. Effective January 1, 2011, 11 NYCRR § 30.3[a][2] requires brokers to disclose to a purchaser of insurance whether the broker "will receive compensation from the selling insurer … based in whole or in part on the insurance contract" that the broker sells. In dismissing the complaint in *Wells Fargo*, the court declined to create a common law rule which would have applied this requirement retroactively.

Excess Insurance Alert:

New York Court of Appeals Holds that Multi-Year Excess Policy's Aggregate Limits Were Renewed Annually

On February 22, 2011, the New York Court of Appeals ruled that aggregate limits in excess insurance policies should apply annually, rather than over the three-year span of the policies, even though the policies did not use the term "annual aggregate." *Union Carbide Corp. v. Affiliated FM Insurance Co.*, 2011 WL 588470 (N.Y. Feb. 22, 2011). In reaching this holding, the court relied primarily on the "follow the form" clause in the excess policies, which provided that the excess policies were to follow all terms, definitions and conditions of the underlying policy, subject to contrary terms contained in the excess policies. Here, the underlying policy (which also had a three-year duration) unambiguously stated that the policy limits were to be renewed annually. As such, the court held that the excess policies' limits must be treated in the same manner. The court rejected the excess insurers' contention that because the excess policies used the term "aggregate" rather than "annual aggregate," the underwriters intended to deviate from the terms of the underlying policy and to provide a single aggregate limit available for the three-year period. Such a reading was inconsistent with the overall structure of the insurance program and with industry custom and practice, the court observed. Although the court sided with Union Carbide on the aggregation issue, it acknowledged that other courts interpreting similar policy language have reached contrary decisions.

The court also addressed the question of whether a two-month extension of one of the excess policies created a new "year" of coverage for policy limit purposes. Although Union Carbide had proffered some evidence that the extension period was intended to make available an additional annual period for aggregate limit purposes, the court held that the issue could not be decided on a motion for summary judgment. The court noted that this issue is one that has troubled courts and resulted in conflicting decisions. We will continue to monitor developments in this context.

Coverage Alert:

Ohio District Court Rejects Argument that Insurance Policies Issued to Predecessor Property Owner Provide Coverage to Current Property Owner "By Operation of Law"

An Ohio federal court rejected the argument that an owner of contaminated property which is strictly liable under CERCLA is entitled to coverage under general liability policies issued to the property's former owner and operator. *Lockheed Martin Corp. v. Goodyear Tire and Rubber Co.*, No. 5:10 CV 673 (N.D. Ohio Feb. 11, 2011). Through a series of corporate transactions, the property at issue was transferred from its original owner, Goodyear, to its current owner, Lockheed Martin. After acquiring ownership of the property, Lockheed Martin discovered environmental contamination. Pursuant to CERCLA,

Lockheed Martin was strictly liable for remediation. Lockheed Martin sought coverage under numerous policies issued to Goodyear, claiming that they provided coverage for the CERCLA response costs. The insurers moved to dismiss the claims for coverage, arguing that Lockheed Martin was not a party to the insurance policies and was therefore not entitled to coverage. The court agreed, finding that insurance coverage issued to a predecessor in title to real estate does not transfer "by operation of law." The court adopted the insurer's argument, which stated:

> In the CERCLA context, adopting [the] notion that insurance automatically transfers by "operation of law" to any successor owners of the property simply by virtue of their becoming liable for its environmental liabilities would create an absurd regime in which an insurer who issued a general liability policy to the property owner many years ago automatically becomes the insurer for every single subsequent buyer of the property. Without a crystal ball, how could an insurer underwrite such a risk and what premium could the insurer possibly charge? General liability insurance policies simply do not "run with the land."

The court also denied Lockheed Martin's motion to certify the "by operation of law" question to the Ohio Supreme Court. Although the Ohio Supreme Court has rejected the transfer of insurance coverage "by operation of law" where liability was assumed by contract, it appeared to leave open the possibility of transfer "by operation of law" in cases involving the transfer of liability by law (such as CERCLA). *Pilkington North America, Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121 (Ohio 2006). The court's ruling in *Lockheed Martin* appears to foreclose this possibility.

Privilege Alert:
New York Appellate Court Grants Insurer's Motion to Compel Discovery, Rejecting Privilege Claim Based on "Common Interest" Between Policyholder and Asbestos Claimants

On February 15, 2011, a New York appellate court rejected a policyholder's attempt to withhold documents from its insurer on the basis of the "common interest" privilege. The appellate court affirmed the lower court's decision on the insurer's motion to compel, finding no factual evidence to support the insured's claims of privilege. *Mt. McKinley Ins. Co. v. Corning Inc.*, No. 602454/02 (N.Y. App. Div. 1st Dep't Feb. 15, 2011).

This declaratory judgment action was initiated to determine the insurer's defense and indemnity obligations with respect to thousands of asbestos claims filed against several entities related to Corning Inc. During the course of the coverage action, one of the Corning-related companies entered bankruptcy. In connection with the bankruptcy proceeding, Corning initiated negotiations with counsel for the asbestos claimants regarding a possible settlement by which Corning would abandon its asbestos defenses and make a payment to the trust in exchange for a release from asbestos-related liability. In the coverage litigation, the insurer pursued discovery of documents relating to these negotiations. Corning withheld production, asserting "common-interest" privilege.

The trial court ordered production of the documents, holding that the "common interest" privilege requires more than the mutual support of a bankruptcy reorganization plan. Although Corning argued that the documents at issue were "'generated in furtherance of a common legal interest' between itself and the committees in the bankruptcy action and that the documents included communications evincing strategy and preparation for an upcoming confirmation hearing," the court found no factual evidence to

support these assertions. Equally problematic was Corning's failure to demonstrate (or even allege) a reasonable expectation of confidentiality—an essential element of the "common interest" privilege. The appellate division affirmed the ruling.

Corning is at odds with the decision in *In re Leslie Controls*, 437 B.R. 493 (Bankr. D. Del. 2010), in which a Delaware bankruptcy court held that certain communications between the debtors and asbestos committees were protected by the "common interest" privilege because the parties had a shared legal interest against their "common enemy," the insurers.

Freedom of Information Act ("FOIA") Alerts:

Unanimous Supreme Court Rules that "Personal Privacy" FOIA Exemption Does Not Apply to Corporations

On March 1, 2011, the United States Supreme Court held that the "personal privacy" FOIA exemption, which prevents disclosure of law enforcement records in order to protect against unwarranted invasions of privacy, does not apply to corporations. *Federal Communications Commission v. AT&T Inc.*, 2011 WL 691243 (U.S. Mar. 1, 2011).

CompTel, an association consisting of several AT&T competitors, made a FOIA request to the FCC seeking documents relating to an investigation of certain AT&T billing practices. AT&T opposed the request, relying in part on the "personal privacy" exemption. AT&T argued that because federal law defines the term "person" to include corporations, the term "personal" (in the context of "personal privacy") should likewise encompass corporations. The Court disagreed, concluding that the "personal privacy" exemption applies only to individuals. The Court reasoned that regardless of how the term "person" may elsewhere be defined, the term "personal" ordinarily refers to individuals, particularly where a right to privacy is referenced. The Court explicitly declined to rule on the scope of a corporation's right to privacy in a constitutional or common law context. Rather, the Court's holding was limited to the term "personal privacy" as set forth in the FOIA exemption. The decision does not affect a corporation's right to object to the disclosure of information pursuant to a separate FOIA exemption, which protects against the disclosure of proprietary information.

New York District Court Provides Guidance on FOIA Requests

Insurers sometimes make FOIA requests to governmental entities in order to collect information relevant to claims against their policyholders. A federal court recently provided guidance on the format in which a governmental agency is required to produce electronic information in response to a FOIA request.

In *National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency*, No. 10 Civ. 3488 (S.D.N.Y. Feb. 7, 2011), plaintiffs disputed the format in which the U.S. Immigration and Customs Enforcement Agency and several other agencies produced certain FOIA records. Plaintiffs asserted three specific complaints: (1) the data was produced in an unsearchable PDF format; (2) electronic records were stripped of all metadata; and (3) paper and electronic records were indiscriminately merged together in one

PDF file. The court agreed that the manner in which the agencies responded to the FOIA request failed to satisfy their statutory obligations. Although no federal court has yet expressly held that metadata is part of a public record as defined in FOIA, several state courts have ruled that metadata is a part of public records that must be disclosed pursuant to state freedom of information laws. Here, the court aligned itself with the state court rulings, issuing the following qualified holding: "Metadata *maintained* by the agency *as a part of an electronic record* is *presumptively* producible under FOIA, unless the agency demonstrates that such metadata is not 'readily producible.'" This standard necessitates a case-by-case evaluation of the type of electronic records at issue and the method and format in which the agency maintains its records. Despite this case-specific approach, the court made one global observation: regardless of whether metadata is specifically requested, "the production of a collection of static images without any means of permitting the use of electronic search tools is an inappropriate downgrading of the ESI." Legal holdings regarding FOIA obligations aside, the *National Day Laborer Organizing Network* court issued a stern reminder that parties should make concerted efforts to meet and confer early on in the discovery process in order to avoid time consuming and costly disputes over the particulars of electronic discovery production, including the format in which ESI should/must be produced.

Arbitration Alert:

Seventh Circuit Reverses District Court's Disqualification of Arbitrator, Ordering Parties to Resume Arbitration

Previous Alerts have highlighted cases discussing the standards for arbitrator disqualification, including *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, 2010 WL 337670 (N.D. Ill. Jan. 21, 2010) (discussed in our March 2010 Alert), in which a federal district court enjoined the continuation of arbitration proceedings because an arbitrator was not "disinterested." The court found that the arbitrator had participated in a prior arbitration involving the same parties and that his involvement in a second arbitration breached the confidentiality agreement that protected the prior proceeding. As such, the court ruled that the arbitrator was no longer disinterested and that the second arbitration should be enjoined.

On January 31, 2011, the Seventh Circuit reversed the district court's ruling. *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, No. 09-3682 (7th Cir. Jan. 31, 2011). As a preliminary matter, the court held that consideration of the arbitrator's disinterestedness should have not have been resolved by the district court prior to the issuance of a final arbitration award. The court further held that there was no evidence that the arbitrator was, in fact, disinterested: he had no financial or personal stake in the outcome of the proceedings and his familiarity with the dispute by virtue of his participation in a prior related arbitration did not create impermissible "interest" in the matter.

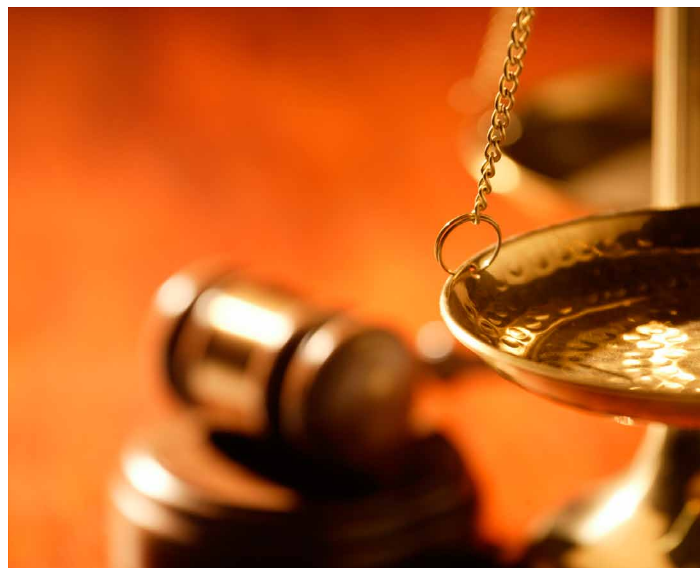
The Seventh Circuit's *Trustmark* opinion illustrates courts' reluctance to interfere with ongoing arbitration proceedings. It also underscores that arbitrators and parties to arbitration should pay close attention to arbitrator conflict disclosures in order to avoid collateral disputes about panel formation.

BANKRUPTCY ALERT:

Adversary Proceeding Filed by Asbestos Trusts Dismissed for Lack of Subject Matter Jurisdiction

In recent Alerts, we have reported on several ongoing disputes involving asbestos bankruptcy trusts, including the matter of *ACandS Inc. v. Hartford Accident and Indem. Co.*, Adversary Case No. 10-53702 (Bankr. D. Del.), in which multiple trusts brought an adversary proceeding seeking interpretation of Plans of Reorganization as well as declaratory and injunctive relief aimed at preventing discovery of claims information in several pending bankruptcy cases. Recently, the court dismissed this action with respect to all plaintiff trusts except one, finding a lack of subject matter jurisdiction. *In re ACandS, Inc.*, Adversary Case Nos. 10-54719, 10-53720, 10-53712 (Bankr. D. Del. Feb. 22, 2011).

For a bankruptcy court to have subject matter jurisdiction over an adversary proceeding, the dispute must "arise in" or be "related to" the bankruptcy in question. To meet the "arising in" standard, the claims must, by their nature, be claims that "could only arise in the context of a bankruptcy case." Here, the court concluded that the discovery disputes at issue—centered primarily on subpoenas issued against the trusts or agents of the trusts—"could routinely occur in any type of litigation" and thus cannot be said to "arise only in the bankruptcy context." Along similar lines, the discovery disputes did not "relate to" the bankruptcies under the "close nexus" standard applicable to post-confirmation disputes. Although the discovery disputes involved interpretation of the confidentiality of the Trust Distribution Procedures, they did not involve interpretation or effectuation of the Plans and thus did not "approach the level necessary to establish a close nexus to the bankruptcy proceedings…." The sole possible exception to this ruling related to two subpoenas issued by Hartford Accident and Indemnity Company and by National Union Fire Insurance Company and American Home



Assurance Company upon an agent of the ACandS trust. With respect to those subpoenas, the court scheduled a conference to determine its authority over the dispute. The court's dismissal of the complaint and request for injunctive relief by all other trusts represents a clear defeat for the asbestos trusts' attempt to obtain universal "one size fits all" rules relating to the discoverability of claims data.

In some cases, however, the dismissal of the adversary proceeding does not mean the end of discovery. Judge Judith K. Fitzgerald has been hearing significant discovery disputes in Delaware bankruptcy cases regarding the extent to which a debtor in one bankruptcy case may obtain claimant-related discovery and discovery regarding trust claims in other bankruptcy cases, including some that have been dismissed or confirmed. These disputes are still pending. Hearings before Judge Fitzgerald to date suggest that the court may be willing to grant such debtors access to claimant data that would otherwise be publicly available via other means (*e.g.*, work history information in filed complaints) but may deny access to highly confidential claimant data that is not otherwise publicly available (*e.g.*, claimant medical history) and not relevant to the proceeding at hand. We will continue to monitor these discovery disputes and keep you apprised of developing trends in this context.

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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