SIMPSON THACHER

INSURANCE LAW ALERT

APRIL 2011

This Alert addresses decisions relating to contingent business interruption coverage in the wake of natural disasters, the impact of "other insurance" clauses in two policies issued to a mutual insured, and the invalidity of a class action waiver in an arbitration clause. It also discusses rulings on subrogation, the non-transferability of insurance coverage, and coverage for CERCLA costs and faulty workmanship under general liability policies. This month, we also present a legal commentary regarding important insurance-related issues raised by a case currently on appeal to the Ohio Supreme Court concerning an attempt to "revive" a dissolved corporation for purposes of accessing alleged insurance coverage.

- ***Fifth Circuit Affirms that Insurer Does Not Owe Coverage for Losses Stemming from Hurricane-Related Evacuation***

  The Fifth Circuit ruled that Lexington Insurance Co. had no duty to indemnify losses incurred by a business owner as a result of a mandatory evacuation of New Orleans. *Dickie Brennan & Co., Inc. v. Lexington Ins. Co.*, 2011 WL 996193 (5th Cir. Mar. 22, 2011). *Click here for full article*.

- ***New York Court of Appeals Rules that "Other Insurance" Clauses Require CGL Insurer to Assume Defense Even Though D&O Policy Likely Covers Most of Claims***

  The New York Court of Appeals held that "other insurance" clauses in policies issued by two insurers to a mutual insured required a general liability insurer to provide primary coverage and a directors and officers insurer to provide excess coverage. Therefore, the court held, only the CGL insurer was required to defend two underlying actions against the insured, even though most of the underlying claims would be covered by the D&O policy. *Fieldston Prop. Owners Assoc., Inc. v. Hermitage Ins. Co., Inc.*, 2011 WL 649812 (N.Y. Feb. 24, 2011). *Click here for full article*.

- ***After Recent Supreme Court Ruling, Second Circuit Reaffirms Invalidity of Class Action Waiver in Arbitration Clause***

  The Second Circuit affirmed its prior holding that a mandatory arbitration clause that includes a class action waiver is unenforceable as against public policy where the plaintiff establishes that the practical effect of the waiver would be to preclude the plaintiff from obtaining recovery. *In re American Express Merchs.' Litig.*, 2011 WL 781698 (2d Cir. Mar. 8, 2011). *Click here for full article*.

- ***Fifth Circuit Rejects Transfer of Insurance Coverage "By Operation of Law"***

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- ***CGL Policy Does Not Provide Coverage for CERCLA Remediation Costs, Says Fourth Circuit***

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- ***Georgia Supreme Court Rules that Faulty Workmanship is a Covered "Occurrence" under CGL Policy***

  The Georgia Supreme Court ruled that faulty workmanship that causes "unforeseen or unexpected damage to other property" constitutes an "occurrence" under a general liability policy. *Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., Inc.*, 2011 WL 768117 (Ga. Mar. 7, 2011). *Click here for full article*.

- ***Connecticut District Court Rules that "Made Whole" Doctrine Bars Insurer's Contractual Subrogation Rights***

  A Connecticut district court ruled that a policyholder did not impair an insurer's subrogation rights by entering into a settlement with a joint tortfeasor without prior notification to or consent from the insurer. *ACSTAR Ins. Co. v. Clean Harbors, Inc.*, 2011 WL 830553 (D. Conn. Mar. 2, 2011). *Click here for full article*.

- ***Bankruptcy Court Denies Debtor's Request for Asbestos Claims Data***

  A North Carolina bankruptcy court denied a debtor's request for production of individual claimant settlement data from 70 law firms relating to claimants' prior tort and trust recoveries. *In re Garlock Sealing Technologies LLC*, No. 10-31607 (Bankr. W.D.N.C. Mar. 4, 2011). *Click here for full article*.

- ***Ohio Supreme Court to Address Whether Dissolved Out-of-State Corporations Can be Resurrected by Plaintiffs for Purposes of Obtaining Insurance Coverage***

  The Ohio Supreme Court agreed to review a ruling involving an attempt by asbestos personal injury and wrongful death claimants to appoint a receiver for a dissolved corporation for purposes of seeking alleged insurance coverage. *In re All Cases Against Sager Corp.*, No. 2010-1705 (Sup. Ct. Ohio). The pending appeal presents important issues of comity and a host of corollary coverage issues. *Click here for full article*.

Business Interruption Alert:

Fifth Circuit Affirms that Insurer Does Not Owe Coverage for Losses Stemming from Hurricane-Related Evacuation

On March 22, 2011, the Fifth Circuit ruled that Lexington Insurance Co. had no duty to indemnify losses incurred by a business owner as a result of a mandatory evacuation of New Orleans. *Dickie Brennan & Co., Inc. v. Lexington Ins. Co.*, 2011 WL 996193 (5th Cir. Mar. 22, 2011). As Hurricane Gustav approached Louisiana in 2008, the City of New Orleans issued a mandatory evacuation order. In compliance with this order, the policyholder closed its New Orleans restaurants, resulting in a loss of revenue. The policyholder sought coverage for its business losses from Lexington. Lexington's policy provided coverage for business interruption losses sustained as a result of "action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, *other than at the described premises*." The policyholder argued that the damage caused by the hurricane in the Caribbean satisfied this provision. The Louisiana district court disagreed and denied coverage. The Fifth Circuit affirmed.

The Fifth Circuit ruled that the aforementioned contingent business interruption provision applies only where there is a nexus between the physical damage to the other property and the issuance of the civil authority action (*i.e.*, the evacuation order). Here, the New Orleans evacuation order did not mention the earlier property damage in the Caribbean, but rather cited to the future possibility of high winds and flooding in New Orleans as the basis for the evacuation. As such, the court concluded, there is no "causal link between [the] prior damage and [the] civil authority action," and thus no coverage under the policy.

Claims for lost revenue or contingent business interruption losses often arise in the wake of natural disasters (*see* May 2010 and October 2010 Alerts, discussing business interruption losses in wake of Hurricane Katrina; November 2010 Alert, discussing lost revenue claims in wake of September 11th terrorist attack). The recent devastation in Japan is likely to be no exception. Given the central role that Japan plays in the production of goods in numerous industries, manufacturers around the world who rely on Japanese suppliers may turn to their insurers for coverage for losses stemming from the interruption or loss of business. The availability of business interruption coverage in this context will depend on several factors, including the judicial interpretation of key terms in applicable insurance policies. For a fuller discussion of issues relating to contingent business interruption coverage for Japan-related losses, please click here (*The Japan Quake: How Should Insurers Respond When Cracks in the Supply Chain Lead to Contingent Business Interruption Claims?*).

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DEFENSE ALERT:

New York Court of Appeals Rules that "Other Insurance" Clauses Require CGL Insurer to Assume Defense Even Though D&O Policy Likely Covers Most of Claims

Reversing an intermediate appellate court decision, the New York Court of Appeals held that "other insurance" clauses in policies issued by two insurers to a mutual insured required a general liability insurer to provide primary coverage and a directors and officers insurer to provide excess coverage. Therefore, the court held, only the CGL insurer was required to defend two underlying actions against the insured, even though most of the underlying claims would be covered by the D&O policy. *Fieldston Prop. Owners Assoc., Inc. v. Hermitage Ins. Co., Inc.*, 2011 WL 649812 (N.Y. Feb. 24, 2011).

Hermitage and Federal both issued insurance policies to Fieldston Property Owners Association. Hermitage provided CGL coverage for a one-year term, whereas Federal issued a claims-made D&O policy covering a three-year period. Both policies contained "other insurance" clauses which addressed the order in which insurance coverage was to be implicated in the event of mutually-covered claims.

Fieldston was sued in two related actions alleging numerous fraud-related claims. Some of the events alleged in the complaints occurred during the D&O policy period but not the CGL policy period. Furthermore, several causes of action appeared to trigger coverage under Federal's D&O policy but not Hermitage's CGL policy. Only one cause of action (for injurious falsehood) appeared to trigger the duty to defend under Hermitage's CGL policy. Nonetheless, Federal denied coverage and refused to provide a defense, arguing that its D&O policy was excess to Hermitage's CGL policy. Hermitage provided a defense under a reservation of rights, and subsequently filed a declaratory judgment action seeking to establish the respective defense obligations of the two insurers.

The Court of Appeals ruled that, based on the language in the policies' "other insurance" clauses, the Hermitage CGL policy was primary and the Federal D&O policy was excess. The more difficult question, however, was whether Hermitage's primary duty to defend, which was triggered only by the single injurious falsehood claim in each complaint, required Hermitage to defend all of the remaining causes of action in the two actions, thus relieving Federal of any defense obligation. The court found that it did. "Based on the broad duty to defend, and upon the conceded possibility that Hermitage's CGL policy covers at least one cause of action in each of the two underlying complaints, Hermitage has a duty to provide a defense to the entirety of both complaints." And because Federal's "other insurance" clause created excess coverage, Federal had no obligation to contribute to the defense "notwithstanding the fact that Federal would appear to have an obligation to indemnify Fieldston for a greater proportion of the causes of action, if successfully prosecuted."

Fieldston illustrates the significant impact of "other insurance" clauses in litigation involving multiple insurers which provide overlapping coverage. As the *Fieldston* court observed, although requiring Hermitage to defend actions in which it may ultimately have little or no coverage liability may seem inequitable, the result was dictated by the applicable policy language.

CLASS ACTION/ ARBITRATION ALERT:

After Recent Supreme Court Ruling, Second Circuit Reaffirms Invalidity of Class Action Waiver in Arbitration Clause

On March 8, 2011, a two-judge panel of the Second Circuit affirmed its prior holding that a mandatory arbitration clause that includes a class action waiver is unenforceable as against public policy where the plaintiff establishes that the practical effect of the waiver would be to preclude the plaintiff from obtaining recovery. *In re American Express Merchs.' Litig.*, 2011 WL 781698 (2d Cir. Mar. 8, 2011). The Second Circuit had already issued a ruling to that effect in 2009, but was instructed by the United States Supreme Court to reconsider the decision in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). (For a comprehensive discussion of *Stolt-Nielson*, click here (*The Supreme Court Vacates Arbitrators' Decision Allowing Class Arbitration Based Solely on Arbitrators' Own Policy Views*)). On remand, the Second Circuit concluded that *Stolt-Nielson* did not change the analysis or the ruling in *In re American Express Merchs.' Litig.*

Two sets of plaintiffs had filed suit against American Express, alleging that certain provisions in their merchant agreements violated federal antitrust laws. The American Express merchant agreements precluded the filing of class action lawsuits and required individual arbitration of any claims against American Express. The Second Circuit rejected American Express' efforts to enforce this arbitration provision, finding that the class action waiver was unenforceable. The court reasoned that the class action waiver "effectively strip[ped] plaintiffs of their ability to prosecute alleged antitrust violations" because "the cost of plaintiffs' individually arbitrating their dispute with [American Express] would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Stolt-Nielson* did not alter this conclusion, the Second Circuit held. The Second Circuit interpreted *Stolt-Nielson* to hold simply that a party may not be compelled to submit to class arbitration absent a contractual agreement to do so. The Second Circuit held that it did not follow from this narrow holding that an arbitration clause barring class arbitration is *per se* enforceable. Although *Stolt-Nielson* "plainly rejects using public policy as a means for divining the parties' intent, nothing in *Stolt-Nielson* bars a court from using public policy to find contractual language void." The Second Circuit cautioned that its decision did not represent a *per se* ruling on the unenforceability of class action waivers in arbitration agreements, noting that the enforceability of class action waivers must be decided on a case-by-case basis.

The Second Circuit's ruling in *American Express* is in accord with the Ninth Circuit's decision in *Concepcion v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009). There, the Ninth Circuit held that an arbitration agreement containing a class action waiver was unconscionable under California state law, and that the Federal Arbitration Act did not preempt state unconscionability law. The Supreme Court granted certiorari in *Concepcion*, 130 S. Ct. 3322 (2010), and will likely address some of the issues raised in *American Express*. *Concepcion* was argued in November 2010 and a decision will likely issue by June. (For a comprehensive discussion on *Concepcion*, click here (*The Supreme Court Considers Whether the FAA Preempts State Court Decision Holding Class Arbitration Waiver Unenforceable*)). Given the

unusually high reversal rate in the Supreme Court for cases emanating from the Ninth Circuit—over 80% of all Ninth Circuit cases reviewed by the Supreme Court have been reversed over the past decade—American Express is likely to seek reconsideration or reargument and/or certiorari to prevent the mandate from issuing before the Supreme Court's anticipated *Concepcion* ruling. We will continue to monitor developments in this context and keep you apprised of noteworthy rulings.

Coverage Alerts:

Fifth Circuit Rejects Transfer of Insurance Coverage "By Operation of Law"

In our March 2011 Alert, we discussed an Ohio district court decision holding that insurance coverage issued to a predecessor in title to real estate did not transfer "by operation of law" to a successor owner. *Lockheed Martin Corp. v. Goodyear Tire and Rubber Co.*, 2011 WL 611662 (N.D. Ohio Feb. 11, 2011). Addressing a similar argument regarding the transferability of insurance coverage for asbestos-related liabilities, the Fifth Circuit likewise rejected a "by operation of law" theory in *Ford, Bacon & David, L.L.C. v. Travelers Ins. Co.*, 2011 WL 856642 (5th Cir. Mar. 14, 2011).

Pursuant to an acquisition agreement, S&B Acquisition LLP purchased certain assets of Ford, Bacon & Davis, LLC. The agreement explicitly excluded the transfer of asbestos-related liabilities, as well as the transfer of corresponding insurance coverage. Despite these exclusions, S&B sought a defense from Travelers for several asbestos-related lawsuits pursuant to a policy issued by Travelers to Ford, Bacon & Davis. S&B argued that Travelers' duty to defend transferred "by operation of law"—a theory accepted by the Ninth Circuit as an extension of California's product-line successor liability rule in *N. Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353 (9th Cir. 1992). The Fifth Circuit disagreed, explaining that, unlike California, Texas does not recognize product-line successor liability. As such, there was no basis for applying Ninth Circuit precedent in this context. Instead, the Fifth Circuit held, the language in the asset purchase agreement—which excluded asbestos-related liabilities and coverage—foreclosed the transfer of coverage under Travelers' policy. As discussed in our December 2010 Alert, the Fifth Circuit reached a similar conclusion in *Keller Founds., Inc. v. Wausau Underwriters Ins. Co.*, 2010 WL 4673026 (5th Cir. Nov. 19, 2010).

CGL Policy Does Not Provide Coverage for CERCLA Remediation Costs, Says Fourth Circuit

On March 18, 2011, the Fourth Circuit held that a general liability policy, which indemnifies the policyholder for "sums which the insured shall become legally obligated to pay as damages because of … property damage," does not provide coverage for CERCLA remediation costs. *Indus. Enters., Inc. v. Penn Am. Ins. Co.*, 2011 WL 925451 (4th Cir. Mar. 18, 2011). Reversing the district court, the Fourth Circuit reasoned that under Maryland law, expenses incurred in cleaning up surface water constituted regulatory response costs, rather than liability for property damage. As such, the insurer had no duty to defend or indemnify the policyholder for those expenses. Central to the court's ruling was the determination that the contaminated surface water was not third-party property belonging to the federal government. Although the federal government initiated the action against the policyholder pursuant to an EPA demand letter, it did so as a *regulator* of surface waters, not as an *owner* of them. Furthermore, although the EPA demand letter was "aimed at protecting the environment and the public health," it was "specifically directed at remediating the presence of hazardous substances on [the policyholder's] land." The absence of allegations of property damage to third-party's property was fatal to the policyholder's claims for coverage, the court concluded.

The question of whether CERLCLA response costs constitute covered damages under a CGL policy has been a frequent source of litigation in recent decades, with conflicting results. Although the *Penn America* court denied coverage based on the third-party property issue, other courts have denied coverage on other grounds, including (1) that the term "damages" does not encompass equitable or injunctive relief, and (2) that remediation was voluntary and thus did not constitutes damages that the policyholder was "legally obligated" to pay.

Georgia Supreme Court Rules that Faulty Workmanship is a Covered "Occurrence" under CGL Policy

Courts across the country continue to consider the question of whether faulty workmanship triggers general liability insurance coverage. As discussed in our April 2010 and October 2010 Alerts, some courts have recently held that faulty workmanship can constitute a covered "occurrence" if it results in unintended and unexpected damage to property other than the faulty work itself. The Georgia Supreme Court recently endorsed this reasoning, ruling that faulty workmanship that causes "unforeseen or unexpected damage to other property" constitutes an "occurrence" under a general liability policy. *Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co.*, Inc., 2011 WL 768117 (Ga. Mar. 7, 2011). In so ruling, the court rejected the argument that a contractor's negligent acts could not be deemed an occurrence because the acts were performed intentionally.

In *American Empire*, the court concluded that water damage to property, caused by the negligent plumbing work of a subcontractor, constituted an "occurrence" because the damage was unexpected and accidental. Faced with an analogous fact pattern, the South Carolina Supreme Court reached a contrary conclusion in *Crossman Communities of North Carolina v. Harleysville Mutual Ins. Co.*, 2011 WL 93716 (S.C. Jan. 7, 2011). As discussed in our February 2011 Alert, in *Harleysville*, the South Carolina Supreme Court concluded that a subcontractor's faulty workmanship did not constitute an "occurrence" because the "natural and expected consequence of negligently installing siding to these condominiums is water intrusion and damage to the interior of the units."

SUBROGATION ALERT:

Connecticut District Court Rules that "Made Whole" Doctrine Bars Insurer's Contractual Subrogation Rights

On March 2, 2011, a Connecticut district court ruled that a policyholder did not impair an insurer's subrogation rights by entering into a settlement with a joint tortfeasor without prior notification to or consent from the insurer. *ACSTAR Ins. Co. v. Clean Harbors, Inc.*, 2011 WL 830553 (D. Conn. Mar. 2, 2011).

Clean Harbors was hired to perform environmental testing at a site in New Jersey. In connection with this project, Clean Harbors subcontracted with Trinity Drilling Company. During the course of its drilling, Trinity struck an underground fuel tank, causing damage to the surrounding soil. Clean Harbors and Trinity settled the matter, with Trinity paying $38,000 in exchange for a release of liability. Clean Harbors agreed to the relatively low settlement payment in light of Trinity's financial condition and because Trinity's

insurance policy contained a pollution exclusion, which Clean Harbors believed would eliminate coverage for the fuel spill. Thereafter, the owner of the site sued Clean Harbors seeking damages for clean up and remediation expenses. ACSTAR, Clean Harbor's insurer, agreed to defend Clean Harbors but reserved the right to contest coverage for the claims.

In the current action, ACSTAR argued that that it had no duty to defend or indemnify Clean Harbors because Clean Harbors' settlement with Trinity constituted a breach of the subrogation clause in the insurance policy. The subrogation clause provided: "In the event of any payment under this policy, the Company shall be subrogated to all the INSURED's rights of recovery therefor against any person or organization … . The INSURED shall do nothing after loss to prejudice such rights." ACSTAR argued that under this clause, ACSTAR should have been permitted to pursue, as a subrogee, Clean Harbors' claims against Trinity. ACSTAR further argued that in breaching this clause, Clean Harbors prejudiced ACSTAR and forfeited its right to coverage under the policy.

The court disagreed. The court explained that despite the subrogation clause, ACSTAR lacked subrogation rights under the "made whole" doctrine. Under the "made whole" doctrine, an insurer may not become a subrogee and assert claims on behalf of an insured until the insured has been fully compensated (*i.e.*, made whole) for its loss. Here, the court held that Clean Harbors had not and could not be "made whole" because it faced potential damages in excess of it insurance coverage limits. In so ruling, the court rejected the argument that the phrase "any payment" in the subrogation clause operated to override the "made whole" doctrine. Interpreting the term "any payment" in such a manner would transform the subrogation clause "into a general assignment of claims upon a single payment by the insurer, regardless of how small that payment is relative to the insured's total loss," the court explained. Alternatively, the court held that even assuming that ACSTAR did have subrogation rights, those rights were not prejudiced because the pollution exclusion in Trinity's insurance policy justified the $38,000 settlement figure.

Complex subrogation issues have been arising with increasing frequency and courts continue to grapple with the question of whether and when an insurer, acting as subrogee, may be entitled to compensation from a third party following a settlement between the insured and the third party. *ACSTAR* illustrates that strict enforcement of the "made whole" doctrine can overcome cooperation language in a policy. The decision also highlights the importance of explicit contractual language in order to override the "made whole" doctrine and permit a subrogation action by an insurer where the policyholder has been less than fully compensated.

Discovery Alert:

Bankruptcy Court Denies Debtor's Request for Asbestos Claims Data

In recent Alerts, we have followed several ongoing discovery disputes involving asbestos bankruptcy trusts. In one such dispute, debtor Garlock Sealing Technologies sought production of individual claimant settlement data from 70 law firms. In particular, Garlock sought the claimants' "aggregate tort recoveries and aggregate trust recoveries" received by the claimants from Garlock's co-defendants over a fifteen-year period. On March 4, 2011, the North Carolina bankruptcy court presiding over the matter denied Garlock's request. *In re Garlock Sealing Technologies LLC*, No. 10-31607 (Bankr. W.D.N.C. Mar. 4, 2011). The court based its ruling on three grounds: (1) that the discovery would be "an unprecedented intrusion into attorneys' practices and files"; (2) that settlement data is traditionally held secret and protected by confidentiality agreements; and (3) that the information sought would not be available to debtors outside the bankruptcy context. Similar disputes are pending in other bankruptcy cases, including *In re Specialty Products Holding Corp.*, No. 10-11780 (JKF) (Bankr. D. Del.). We will continue to keep you apprised of developments in this area.

LITIGATION WATCH ALERT:

Ohio Supreme Court to Address Whether Dissolved Out-of-State Corporations Can be Resurrected by Plaintiffs for Purposes of Obtaining Insurance Coverage

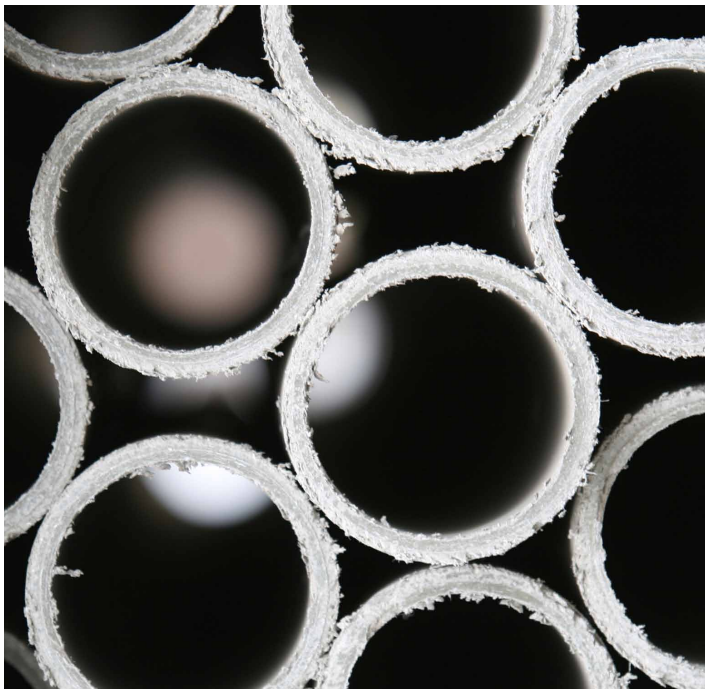
On January 19, 2011, the Ohio Supreme Court agreed to review a ruling involving an attempt by asbestos personal injury and wrongful death claimants to appoint a receiver for a dissolved corporation for purposes of seeking alleged insurance coverage. *In re All Cases Against Sager Corp.*, No. 2010-1705 (Sup. Ct. Ohio). The primary issue raised by this case is whether appointment of a receiver by a court in one state is permissible where claims against the corporation would be barred under the law of the corporation's state of incorporation by virtue of that state's applicable dissolution statutes. Such statutes are sometimes referred to as "survival" statutes because they provide for the "survival" of the corporation for purposes of litigation on behalf of or against the corporation, but typically for a limited period of time. In *Sager*, the Ohio trial court and intermediate appeals court agreed with the plaintiffs that appointment of a receiver for an Illinois corporation was appropriate. Similar attempts to "revive" dissolved corporations have been unsuccessful elsewhere, and rulings are expected in appeals courts in the near future in Pennsylvania and California. The plaintiffs' goal in such lawsuits is to access potential insurance proceeds issued to the dissolved corporation. In addition to comity-related issues, these cases raise a host of coverage issues that should inform the courts' evaluation of whether to allow such suits to proceed.

Sager was incorporated in Illinois in 1921, and was dissolved in 1998. Prior to its dissolution, Sager was alleged to have manufactured and supplied industrial apparel and other materials, including asbestos-containing gloves and curtains. As a result of its dissolution, Sager is not subject to suit under Illinois law because no remedy exists against a dissolved Illinois corporation unless suit is commenced within five years of the date of dissolution. 805 Ill. Comp. Stat. 5/12.80 (2010). Nonetheless, the Ohio trial court granted the plaintiffs' motion to appoint a receiver for purposes of accessing insurance coverage. On appeal, the intermediate appellate court affirmed, finding that whether a receiver can be appointed to distribute assets in Ohio to Ohio claimants was a matter of Ohio law, and that appointment of a receiver to distribute assets (*i.e.*, the alleged insurance) for injuries allegedly caused prior to dissolution did not violate due process or conflict with the corporate law of Illinois.

In its appeal to the Ohio Supreme Court, Sager (which, although dissolved, was represented by counsel) has raised a host of important issues, including, among others, whether, consistent with the Full Faith and Credit Clause in Article IV of the U.S. Constitution, a state may apply its own corporations law regarding dissolution and appointment of a receiver with respect to a corporation that was incorporated and dissolved under the law of another state.[1] Even if the plaintiffs in *Sager* are able to overcome the constitutional and comity-related obstacles at issue in the Ohio Supreme Court, however, and even if plaintiffs are thereafter able to maintain a successful action against Sager, it is far from clear that plaintiffs would be able to achieve their goal of recovering under Sager's insurance policies.

First, to the extent suits are permitted to proceed against Sager, it should be entitled to summary judgment based on the Illinois corporate survival statute, which provides that a remedy is available against a dissolved Illinois corporation only if suit "is commenced within five years after the date of such

1. The Supreme Court of California is currently considering a similar issue in another asbestos-related case involving an out-of-state corporation, namely whether California Corporations Code, which does not limit the time for bringing lawsuits against a dissolved corporation, can be held to apply to a dissolved foreign corporation where the law of the state in which the foreign corporation was incorporated (Delaware) limits the period for bringing suit against a dissolved corporation to three years. *See Greb v. Diamond Int'l Corp.*, 184 Cal. App. 4th 15, 108 Cal. Rptr. 741 (2010) (holding that the law of state of corporation governs), *rev. granted*, 114 Cal.Rptr.3d 199 (Cal. Aug 18, 2010).



dissolution." 805 Ill. Comp. Stat. 5/12.80 (2010). Third-party liability insurance generally protects against sums a policyholder is "legally obligated to pay as damages," subject to the terms, conditions and exclusions of the policy. Because insurers cannot be liable where Sager itself plainly had no legal obligation to the plaintiff, the Illinois survival statute should preclude plaintiffs from recovering from the insurers as well. Thus, the lower courts' rulings were predicated on a faulty (but unstated) premise: that a corporate defendant may be subject to liability that would not otherwise exist absent insurance, or that an insurer may be subject to liability under a policy where the policyholder itself is not subject to liability.

Second, insurance policy conditions, such as notice, assistance and cooperation, preservation of subrogation rights and, in some cases, the right to defend or associate in the defense, may have been breached and may not be able to be met where an insured has been dissolved. The resulting contractual breaches would preclude any insurance recovery. Thus, even if the claimant could obtain a judgment against the dissolved corporation, and even if a direct action could be maintained against an insurer (*e.g.*, under statutes providing a direct right of action for judgment creditors where the judgment has not been paid), the claimant steps in the shoes of the policyholder. Because the claimant can obtain no greater rights to coverage than the policyholder itself would have, the mere fact that the claimant may have obtained a judgment does not mean that the claimant would be entitled to a recovery. *See Cont'l Cas. Co. v. Employers Ins. Co. of Wausau*, 871 N.Y.S.2d 48, 55-56 (1st Dep't 2008) (noting that where a claim for coverage against a dissolved entity would be barred by laches, it would be inequitable to require the entity's insurers to defend against "never-ending torrent of asbestos claims" hampered in its ability to defend and under a theory of coverage never asserted by the insured).

Such policy conditions could be a significant issue in *Sager* if a receiver is ultimately approved, given that the receiver was requested primarily to do no more than accept service of process. Although it would be possible for such a receiver to provide notice to insurers, compliance with the contractual conditions would require far more than prompt delivery of pleadings. Though the powers of a receiver under the Ohio statute relied upon by the plaintiffs also include acts necessary for winding up the affairs of a corporation,[2] it is unclear how acts necessary for the winding up of affairs would include prospective and indefinite compliance with such contractual obligations as assisting the insurers in the defense and settlement of claims. For instance, cooperation provisions in CGL policies frequently obligate policyholders to assist in obtaining settlements, in providing assistance in the conduct of suits, in enforcing any right of contribution or indemnity, in providing a representative to attend hearings and trials, in securing and giving evidence and obtaining the attendance of witnesses. Under the

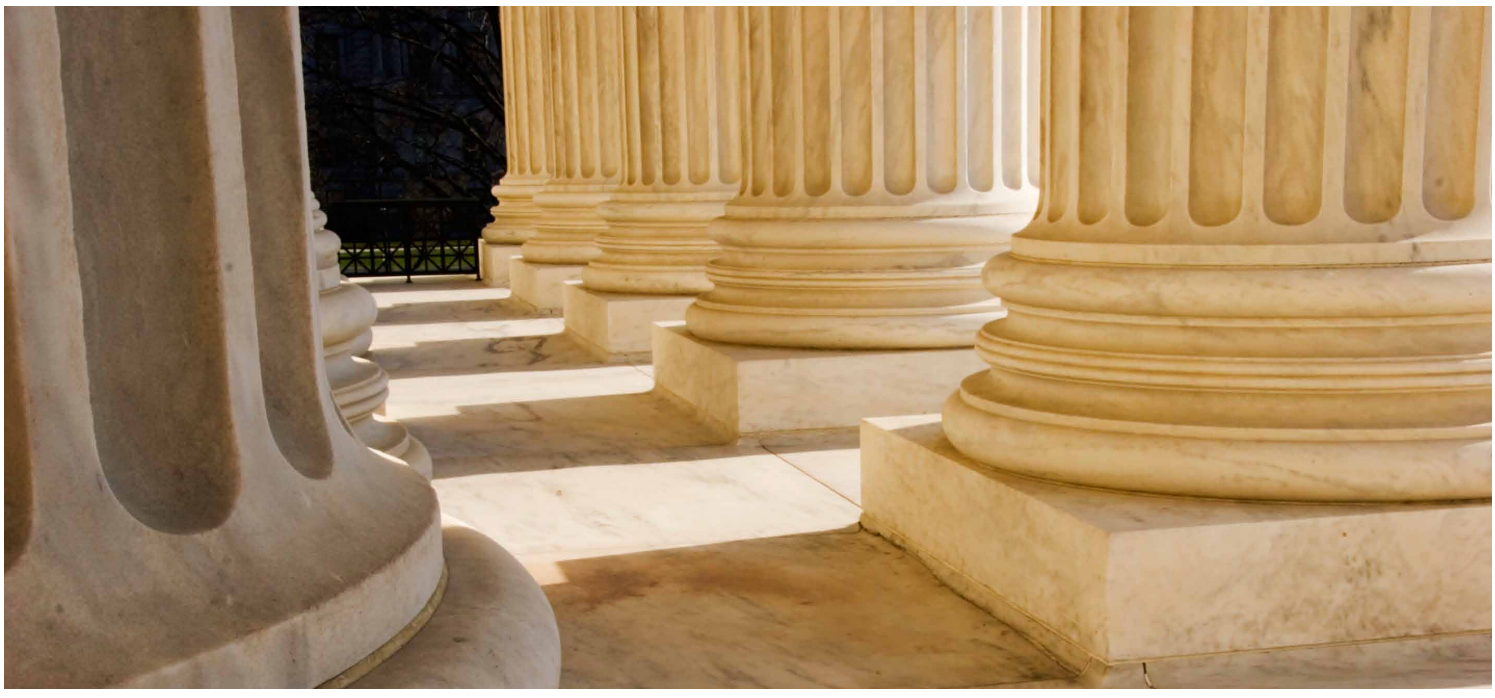
2. As noted above, one of the fundamental questions raised in *Sager* is whether a state may apply its own laws to appoint a receiver for winding up the affairs of a corporation that was incorporated (and dissolved) pursuant to another state's laws. The Ohio lower courts' ruling that a foreign corporation may be subject to Ohio dissolution and receivership laws is contrary to the weight of authority, *see generally*, 16A Fletcher Cycl. Corp. §§ 8097, 8115, 8142, 8146, 8147 (West 2011), and, if accepted, could potentially have implications in other areas of corporate governance outside the receivership and dissolution context.

Ohio law relied upon by plaintiffs in *Sager*, a receiver would be a court-appointed third-party who may include an interested party with no prior connection to or understanding of the dissolved corporation, *see* R.C. 1701.90(B) (Ohio Revised Code), and questionable ability or power to provide this type of assistance or cooperation.

In addition to the absence of any legal obligation to the plaintiffs and possible breaches of policy conditions such as the obligation to provide prompt notice and assistance and cooperation, the plaintiffs would also have to overcome any other coverage defense available under the terms of the policies. For example, if the claims did not trigger coverage under the policies, or the applicable limits under the policies were exhausted, no coverage would be available to the plaintiffs.

Third, although most states have laws or regulations that provide that the bankruptcy or insolvency of an insured does not relieve an insurer from liability under its policy, courts have distinguished between *dissolution* of an insured corporation and "insolvency" for purposes of such laws, regulations or analogous policy provisions. *See, e.g., City of S. Bend v. Century Indem. Co.*, 824 N.E.2d 794 (Ind. Ct. App. 2005). Thus, state statutes or policy provisions requiring coverage to be available upon the insolvency or bankruptcy of the insured should provide no basis to hold an insurer liable where the applicable state dissolution law precludes liability against the corporate insured.

In sum, even if the plaintiffs in *Sager* are able to overcome the substantial constitutional and comity-related obstacles in the Ohio Supreme Court, and even if they were able thereafter to maintain a successful action against Sager, it is far from clear that the plaintiffs would be entitled to any recovery from Sager's insurers at the end of the day. We will continue to monitor this case and apprise you of any developments.



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—Chambers USA 2010, quoting a client

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