SIMPSON THACHER

INSURANCE LAW ALERT

NOVEMBER 2011

This Alert addresses several significant bankruptcy-related decisions, including a recent ruling regarding an asbestos bankruptcy trust's coverage claims against an excess insurer. We also discuss recent decisions relating to directors and officers liability coverage for investigation costs and general liability coverage for defective components in a policyholder's product. Finally, we discuss decisions relating to discovery sanctions, attorney disqualification in arbitration, and federal preemption under the National Bank Act. Please "click through" to view articles of interest.

- ***Illinois Court Addresses Insurance Claim by Asbestos Bankruptcy Trust***

  In one of the few decisions addressing the rights of insurers in the aftermath of a plan of reorganization confirmed pursuant to Section 524(g) of the Bankruptcy Code, an Illinois federal court has held that an excess insurer's indemnity obligation is measured by the "allowed amount" of an asbestos claim under the plan documents "without regard to any lower percentage" actually paid to the claimant by the post-confirmation trust. *ARTRA 524(g) Asbestos Trust v. Fairmont Premier Ins. Co.*, 2011 WL 4684356 (N.D. Ill. Sept. 30, 2011). *Click here for full article*

- ***Bankrupt Insured's Failure to Exhaust Self-Insured Retention Does Not Preclude Excess Coverage, Says First Circuit***

  The First Circuit reversed a Rhode Island district court decision holding that a bankrupt insured must pay its retained limit before tort victims could access excess coverage pursuant to a direct action statute. *Rosciti v. Ins. Co. of the State of Pennsylvania*, 2011 WL 4638772 (1st Cir. Oct. 7, 2011). *Click here for full article*

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  A New York federal district court held that attorney disqualification was a matter for the court, rather than an arbitration panel, and that disqualification was justified where a law firm obtained from its party-appointed arbitrator private e-mail communications exchanged among arbitration panel members. *Northwestern National Ins. Co. v. INSCO, Ltd.*, 2011 WL 4552997 (S.D.N.Y. Oct. 3, 2011). *Click here for full article*

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- ***Ohio Court Rules That Professional Liability Policy Provides Coverage for Class Action Lawsuit***

  An Ohio district court ruled that an insurer must indemnify Grange Mutual Casualty Company for a settlement of claims alleging improper claims handling practices. *Chubb Custom Ins. Co. v. Grange Mutual Cas. Co.*, 2011 WL 4543896 (S.D. Ohio Sept. 29, 2011). *Click here for full article*

- ***Florida Court Rules That Tort Claims Based on "Force-Placed" Insurance Are Not Preempted by Federal Banking Law***

  A federal court in Florida ruled that claims alleging unjust enrichment and breach of the covenant of good faith and fair dealing, based on force-placing of insurance for mortgage customers, were not preempted by the National Bank Act. *Williams v. Wells Fargo Bank N.A.*, 2011 WL 4901346 (S.D. Fla. Oct. 14, 2011). *Click here for full article*

- ***Supreme Court of Ohio Declines to Answer Certified Question Regarding Statute of Limitations for Co-Insurer Contribution Claims***

  The Ohio Supreme Court declined to decide whether an insurer's contribution claim against another insurer is governed by the six-year statute of limitations for contract actions or by the equitable laches doctrine. *Fireman's Fund Ins. Co. v. Hartford Accident and Indem. Co.*, 954 N.E.2d 660 (Ohio 2011). *Click here for full article*

- ***Eleventh Circuit Affirms That Policyholder May Not Recover Internal Audit and Investigation Costs from D&O Insurers***

  The Eleventh Circuit affirmed a Florida district court decision holding that D&O insurers were not required to cover costs incurred in responding to a Securities and Exchange Commission investigation that did not result in a formal complaint. *Office Depot, Inc. v. National Union Fire Ins. Co.*, 2011 WL 4840951 (11th Cir. Oct. 13, 2011). *Click here for full article*

- ***Delaware Bankruptcy Court Rejects Expansive Discovery Requests Seeking Asbestos Claimant Information***

  In two recent decisions, Judge Judith K. Fitzgerald of the district of Delaware bankruptcy court denied requests for broad discovery of asbestos claimant-related data. *In re ACandS, Inc.*, 2011 WL 4801527 (Bankr. D. Del. Oct. 7, 2011); *In re Specialty Products Holdings Corp. et al.*, 2011 WL 4735962 (Bankr. D. Del. Oct. 7, 2011). *Click here for full article*

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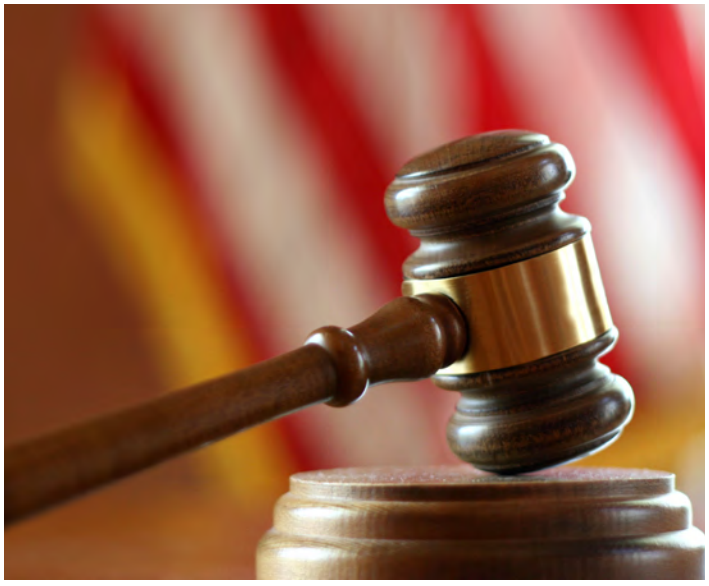
  A district court in New Jersey granted a motion for sanctions based on a party's failure to institute a litigation hold at the time litigation was imminent or to involve counsel in the overseeing of document collection. *N.V.E., Inc. v. Palmeroni*, 2011 WL 4407428 (D.N.J. Sept. 21, 2011). *Click here for full article*

BANKRUPTCY ALERT:

Illinois Court Addresses Insurance Claim by Asbestos Bankruptcy Trust

In one of the few decisions addressing the rights of insurers in the aftermath of a bankruptcy plan confirmed pursuant to Section 524(g) of the Bankruptcy Code, an Illinois federal court has construed an excess insurance policy and a confirmed plan of reorganization to find that an insurer's indemnity obligation is measured by the "allowed amount" of an asbestos claim "without regard to any lower percentage" actually paid to the claimant by the post-confirmation trust. *ARTRA 524(g) Asbestos Trust v. Fairmont Premier Ins. Co.*, 2011 WL 4684356 (N.D. Ill. Sept. 30, 2011).



In *ARTRA*, the post-confirmation 524(g) Asbestos Trust initiated an action against Transport Insurance Company to recover amounts the Trust paid to asbestos bodily injury claimants for the alleged liability of ARTRA Group, Inc., the Trust's predecessor. The Trust moved for partial summary judgment, seeking a ruling that Transport must indemnify the Trust for liabilities measured by reference to the "allowed amount" of the claims set forth in the ARTRA plan documents, rather than the actual amount paid by the Trust—a lower amount equal to the "allowed amount" reduced by a "payment percentage." To support its position, the Trust relied on *UNR Industries, Inc. v. Continental Casualty Co.*, 942 F.2d 1101 (7th Cir. 1991), in which the court ruled, on the facts of that case, that an insurer who had notice of a bankruptcy case but declined to participate had waived certain rights and could be held liable for the debtor's "loss" measured at the allowed amount of the debtor's asbestos claims.

In contrast to the insurer in *UNR*, Transport appeared in the ARTRA bankruptcy case and objected to the proposed plan. In return for withdrawal of Transport's objections, ARTRA included in its bankruptcy plan—and the bankruptcy court included in its confirmation order—an express disavowal of any right by the debtor or its successor to rely on *UNR* as a basis for fixing any insurer's liability. Transport opposed the ARTRA Trust's motion for partial summary judgment, arguing that the Trust is bound by the ARTRA plan of reorganization and confirmation order, which expressly preclude the Trust from asserting that the plan or plan documents operate to establish Transport's liability.

The Illinois federal court acknowledged that ARTRA's plan included the language referenced by Transport relating to *UNR*, and acknowledged

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that "the reorganization plan provisions in this case were intended to ensure that Transport retained the right to assert that claims were not covered by the policy even if they were allowed by the bankruptcy trustee." The court further noted that coverage for any particular claim and the reasonableness of any payment by the Trust were "still to be determined." The court ruled, however, that to the extent a claim is covered, the measure of Transport's indemnity obligation is "the full amount of the claim allowed by the trust, without regard to any lower percentage paid to a claimant because of the lack of sufficient assets."

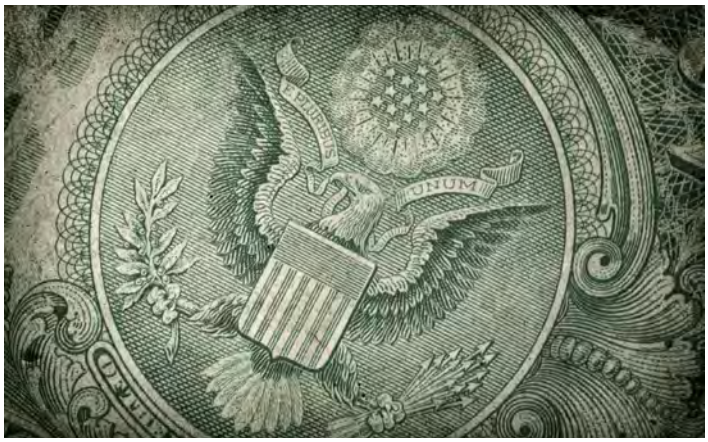
In reaching this conclusion, the court relied on *UNR*, notwithstanding provisions to the contrary in the ARTRA plan and confirmation order. Moreover, the court declined to adopt the reasoning set forth in a California case on all fours. In the only other case to address the measure of an insurer's payment obligation under a plan confirmed pursuant to Section 524(g), *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, No. B170079 (Cal. App. Ct. Jan. 19, 2006), a California appellate court reversed a trial court's ruling that insurers were obligated to indemnify the debtor for the full "allowed" value of each claim rather than the payment percentage actually paid to each claimant. The California Supreme Court declined to review the appellate court decision, and the United States Supreme Court denied the trust's petition for *certiorari*.

The Illinois court's *ARTRA* ruling is one of the first instances since the California appellate court's 2006 *Fuller-Austin* decision in which a court has addressed a coverage dispute that implicates expansive "insurance neutrality" language, which appears in numerous plans of reorganization confirmed pursuant to Section 524(g). In light of the court's apparent disregard for express language in the ARTRA plan intended to avoid the result the court reached, it is likely that the ruling will be appealed or otherwise challenged, and it will be closely watched by insurers.

Excess Alert:

Bankrupt Insured's Failure to Exhaust Self-Insured Retention Does Not Preclude Excess Coverage, Says First Circuit

Our October 2010 Alert reported on a decision in which a Rhode Island district court held that a bankrupt insured must pay its retained limit before tort victims could access excess coverage pursuant to a direct action statute. *Rosciti v. Liberty Mutual Ins. Co.*, 734 F. Supp. 2d 248 (D.R.I. 2010). Last month, the First Circuit reversed that ruling, holding that the state's interest in requiring insurance companies to compensate tort victims outweighed the interest in enforcing the excess policy's exhaustion requirement. *Rosciti v. Ins. Co. of the State of Pennsylvania*, 2011 WL 463872 (1st Cir. Oct. 7, 2011).



Monaco Coach Corp., the insured, was sued for allegedly manufacturing defective mobile homes. After Monaco filed for bankruptcy, tort victims turned to Monaco's insurers for payment, including the Insurance Company of the State of Pennsylvania (ICSOP). Rhode Island statutory law permits tort victims to bring suit directly against the insurer of a bankrupt tortfeasor. ICSOP denied coverage on the basis that its coverage attached excess of a $500,000 retained limit, which had not been paid by Monaco. The district court agreed. The district court held that

ICSOP was not obligated to "drop down" to pay the retained limit following Monaco's bankruptcy and that Rhode Island's direct action statute did not override the exhaustion requirement in ICSOP's policy.

The First Circuit reversed. Although it agreed with the district court that ICSOP's policy unambiguously required exhaustion of the self-retained limit for coverage to attach (even in the event of Monaco's bankruptcy), the appellate court held that enforcement of the exhaustion requirement here would violate Rhode Island public policy. The First Circuit explained that Rhode Island has a strong interest in "preventing insurance companies from avoiding their obligations when an insolvent insured cannot make an expenditure towards discharging liability." Therefore, despite Monaco's inability to pay the retained limit, the court held that ICSOP was responsible for judgments against Monaco in excess of $500,000 and that ICSOP must defend claims alleging damages in excess of $500,000. The court noted that a number of other jurisdictions have reached the same conclusion, but acknowledged that courts "in states without such a strong policy in favor of a claimant's right to recover from an insurance company in the event of an insured's insolvency" have reached the opposite result.

Arbitration Alert:
New York Court Disqualifies Law Firm from Reinsurance Arbitration

As discussed in previous Alerts, courts are frequently called upon to determine the allocation of authority between courts and arbitration panels with respect to resolution of ancillary issues (June 2011, May 2011 and March 2011 Alerts). In a recent decision, a New York federal district court held that attorney disqualification was a matter for the court, rather than the arbitration panel, and that disqualification was justified where a law firm obtained private e-mail communications exchanged among arbitration panel members from its party-appointed arbitrator. *Northwestern National Ins. Co. v. INSCO, Ltd.*, 2011 WL 4552997 (S.D.N.Y. Oct. 3, 2011).

The court reasoned that attorney discipline issues are matters of substance which must be decided by a court, rather than the arbitrators who are often selected by the attorneys themselves. Having established its authority to decide the issue, the court then concluded that the conduct of the law firm in question warranted the firm's disqualification. Specifically, the court held that a law firm's participation in obtaining and hiding e-mail communications which had been exchanged among panel members constituted a serious breach of arbitral guidelines and ethical codes of conduct. In so ruling, the court rejected the law firm's argument that the e-mails were "legitimately discoverable" for the purpose of establishing the partiality of the other party-appointed arbitrator.

Although the standard for attorney disqualification is stringent in the Second Circuit, *INSCO* illustrates that violations of arbitral or professional codes of conduct can serve as the basis for disqualification. Additionally, *INSCO* serves as a reminder that although some amount of *ex parte* communication may be appropriate in the arbitration context, *ex parte* communications which relate directly to the substance of "live and contested issues" or to the thought process of panel members may be improper.

COVERAGE ALERTS:

California Court Rules That Defective Component of Insured's Product Does Not Constitute "Property Damage" under General Liability Policy

A federal court in California granted summary judgment in favor of an excess insurer, finding that a product defect in the manufacture of cans, which prompted the voluntary destruction of canned tomato products, did not constitute "property damage" within the meaning of a general liability policy. *Silgan Containers, LLC v. National Union Fire Ins. Co.*, 2011 WL 4551467 (N.D. Cal. Oct. 3, 2011).

The policy at issue defined property damage as "physical injury to tangible property" or the "[l]oss of use of tangible property that is not physically injured." The court held that defects in the policyholder's production of cans—which resulted in the destruction of canned goods inventory and the loss of revenue—did not constitute property damage covered by the policy. The court noted that the policyholder failed to establish that physical changes to the food product had already taken place in any significant portion of the cans at the time they were voluntarily destroyed. The canned goods had, in fact, been destroyed because of a risk of future harm to the products. For similar reasons, coverage under the "loss of use" prong was unavailable, the court held. Although evidence demonstrated that the products were likely to become unusable in the future, there was no indication that the product could not have been safely consumed (*i.e.*, had lost its use) at the time of destruction.

Food-related product recalls are increasingly common, and derivative coverage litigation often follows. General liability coverage for recall-related losses is often unavailable in light of several standard policy exclusions, including the "sistership" exclusion, which excludes coverage for damages that arise when an insured withdraws products from the market which have not yet failed, but which are suspected of containing defects found in similar products. *Siligan Containers* illustrates that in some cases, coverage may also be unavailable based on a lack of any insured property damage.

Ohio Court Rules That Professional Liability Policy Provides Coverage for Class Action Lawsuit

An Ohio district court ruled that Chubb Custom Insurance Company must indemnify Grange Mutual Casualty Company for a settlement of claims alleging that Grange had engaged in improper claims handling practices. *Chubb Custom Ins. Co. v. Grange Mutual Cas. Co.*, 2011 WL 4543896 (S.D. Ohio Sept. 29, 2011). The court held that Chubb's professional liability policy provided coverage for the claims against Grange and that the "benefits due" exclusion did not apply.

The class action lawsuit alleged that Grange improperly used a software program to evaluate and underpay its policyholders' motor vehicle-related bodily injury claims. Grange settled the action and then sought indemnification from Chubb. Chubb denied coverage, arguing that (1) the lawsuit was not within the scope of the "Insuring Clause" in Chubb's policy, (2) there was no "loss" as defined by the policy, and (3) that the "benefits due" exclusion applied. The court rejected each of these contentions.

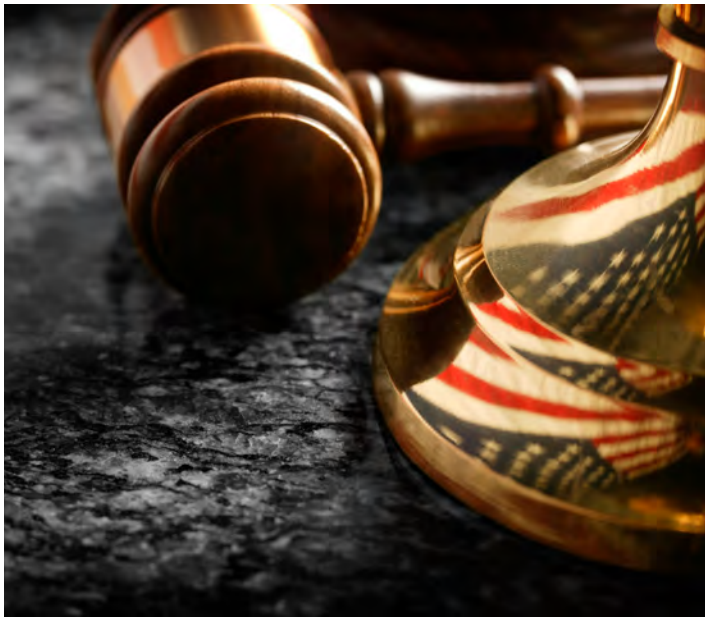
Chubb's professional liability policy provided coverage for claims made against Grange "arising out of any Wrongful Act committed by" Grange "while performing Insurance Services." The court concluded that the claims against Grange—alleging that Grange improperly utilized a software program in order to underpay bodily injury claims—constituted the performance of "insurance services." The court also held that Grange's settlement payments and defense costs constituted a covered "loss" under Chubb's policy. Chubb argued that the money that Grange saved from using the software constituted uninsurable "ill-gotten gains," rather than a covered loss. However, the court held that the concept of uninsurable "ill-gotten gains" applied to claims for restitution of wrongfully acquired funds, not to claims for damages arising out of wrongful conduct, as alleged here. Finally, the court held that the "benefits due" exclusion in Chubb's policy did not preclude coverage. The exclusion barred coverage for "any amounts which constitute benefits, coverage or amounts due or allegedly due from Grange as … an insurer … under any policy … of insurance." Acknowledging that the issue was a "close call," the court concluded that the underlying action against Grange did not seek "amounts due" under Grange's policies. The court reasoned that the action against Grange sought an undetermined amount of damages based on alleged underpayments, rather than reimbursement for a specific amount due under Grange's policies. The court also noted that because Grange had already settled the bodily injury claims with underlying class members, there were no longer any "amounts due" under the policies.

As the *Chubb* court noted, another court reached a different conclusion in a case involving a "benefits due" exclusion. In *Georgia Farm Bureau Mut. Ins. Co. v. Great Am. Surplus Excess Ins. Co.*, 2005 WL 1459649, *aff'd*, 152 Fed. Appx. 883 (11th Cir. 2005), the court held that the "benefits due" exclusion precluded coverage for claims alleging that the insurance company had wrongfully denied coverage to its policyholders.

Preemption Alert:

Florida Court Rules That Tort Claims Based on "Force-Placed" Insurance Are Not Preempted by Federal Banking Law

In this class action lawsuit, plaintiffs alleged that Wells Fargo Bank received kickbacks and/or unreasonable commissions as a result of force-placed insurance policies on properties with mortgages serviced by Wells Fargo. Mortgage servicers purchase force-placed insurance on a home if a borrower fails to maintain the requisite property insurance. When a mortgage company force-places insurance, it charges the borrower the full cost of the premium. According



to the complaint, Wells Fargo charged unreasonably inflated premiums for force-placed insurance. Specifically, plaintiffs alleged that the excessive premiums did not represent the actual amount that Wells Fargo paid, because a "substantial portion of the premiums [were] refunded to Wells Fargo through various kickbacks and/or unwarranted commissions." The complaint alleged, among other things, breach of the covenant of good faith and fair dealing and unjust enrichment causes of action. Wells Fargo

moved to dismiss the complaint, arguing that the claims were preempted by the National Bank Act, a federal law which grants national banks "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24. The court disagreed. *Williams v. Wells Fargo Bank N.A.*, 2011 WL 4901346 (S.D. Fla. Oct. 14, 2011).

As a general matter, "the Supreme Court has consistently upheld the use of the federal preemption doctrine to shield the banking activities of national banks from the application of state law." However, cases enforcing preemption in this context have typically involved state laws specifically targeted at banks or banking-related activities. Here, in contrast, the state laws at issue—pertaining to unjust enrichment and the covenant of good faith and fair dealing—are laws of "general applicability." The court held that such tort-based common law causes of action, which govern the conduct of all businesses, do not conflict with the National Bank Act and only incidentally affect a bank's lending or insurance-related activities. The court stated:

> [N]one of Plaintiffs' claims questions Wells Fargo Bank's *ability* to charge fees or premiums related to force-placed insurance or to collect commissions form the force-placing of insurance. Plaintiffs only challenge the *manner* in which Wells Fargo Bank manipulated those charges and the force-placed insurance process in general. A desire to limit a bank's authority to charge a fee is not synonymous with a desire to hold a bank liable for the bad-faith manner in which it exercises that authority. The former is not permitted in light of the NBA's preemptive reach, but the latter is. (Quotations and citations omitted).

Courts in other jurisdictions have likewise concluded that the National Bank Act does not preempt state law claims alleging breach of the duty of good faith and/or unjust enrichment.

Contribution Alert:

Supreme Court of Ohio Declines to Answer Certified Question Regarding Statute of Limitations for Co-Insurer Contribution Claims

Contribution claims by one insurer against another may implicate numerous legal issues, many of which have been discussed in previous Alerts: whether late notice can bar a contribution claim (July/August 2011 Alert); whether an insurer seeking contribution must demonstrate overpayment in order to recover from a co-insurer (April 2010 Alert); and whether reimbursement claims should be analyzed under

equitable contribution theory or the subrogation doctrine (June 2010 and May 2011 Alerts). The issue in *Fireman's Fund Ins. Co. v. Hartford Accident and Indem. Co.*, 954 N.E.2d 660 (Ohio 2011) was whether an insurer's contribution claim against another insurer is governed by the six-year statute of limitations for contract actions or by the equitable laches doctrine.

Fireman's Fund filed an action seeking contribution from Harford, seeking to recover defense and indemnity costs that Fireman's Fund incurred in connection with asbestos-related lawsuits against a common insured. Hartford refused to reimburse

Fireman's Fund, arguing that a contribution action was time barred under Ohio's six-year statute of limitations, which applies to actions in "contract not in writing, express or implied." O.R.C. § 2305.07. According to Hartford, the contribution claim was based on an implied contract and thus subject to the statute of limitations for contract-based actions. Fireman's Fund argued that the contribution action sounded in equity rather than contract, and therefore that the statute of limitations did not apply. The district court agreed with Fireman's Fund and held that the statute of limitations was inapplicable to the contribution claim. Hartford then moved to certify the issue to the Ohio Supreme Court. The district court granted the motion, and certified the following question to the state's highest court: "Does the six-year limitations period set forth in O.R.C. § 2305.07 apply to a claim by one insurer against another insurer for equitable contribution?" On October 5, 2011, the Supreme Court of Ohio declined to answer the question.

D&O Alert:

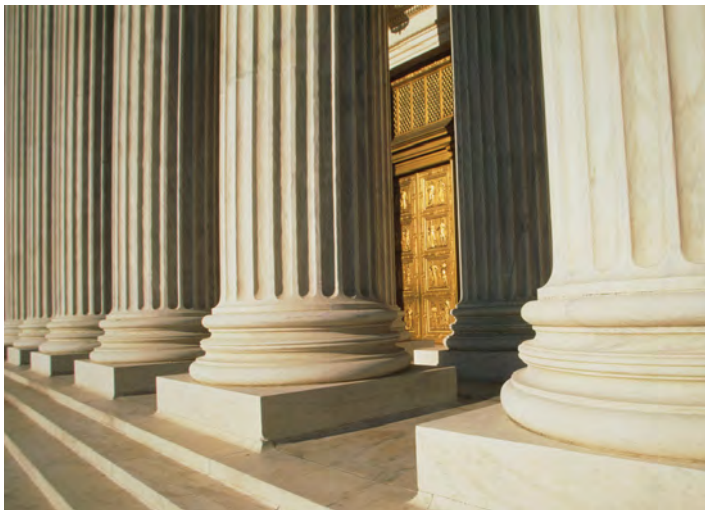
Eleventh Circuit Affirms That Policyholder May Not Recover Internal Audit and Investigation Costs from D&O Insurers

In our November 2010 Alert, we discussed a Florida district court decision holding that Office Depot's D&O insurers were not required to cover the costs incurred by the company in responding to a Securities and Exchange Commission investigation that did not result in a formal complaint against Office Depot or its officers or directors. The district court also held that Office Depot was not entitled to indemnification for costs incurred in conducting an internal investigation and audit triggered by a whistleblower complaint. *Office Depot, Inc. v. National Union Fire Ins. Co.*, 734 F. Supp.2d 1304 (S.D. Fla. 2010). On October 13, 2011, the Eleventh Circuit affirmed in an opinion emphasizing that the insurers' defense and indemnity obligations were not triggered under the policies unless and until an actual "claim" is made against the insured. *Office Depot, Inc. v. National Union Fire Ins. Co.*, 2011 WL 4840951 (11th Cir. Oct. 13, 2011).

Discovery Alerts:

Delaware Bankruptcy Court Rejects Expansive Discovery Requests Seeking Asbestos Claimant Information

In previous Alerts, we have reported on various discovery disputes between asbestos defendants and asbestos bankruptcy trusts and claimants (April 2011, March 2011 and January 2011 Alerts). In two recent decisions, Judge Judith K. Fitzgerald denied debtors' requests for broad discovery of claimant-related data in two cases pending in the bankruptcy court for the District of Delaware.



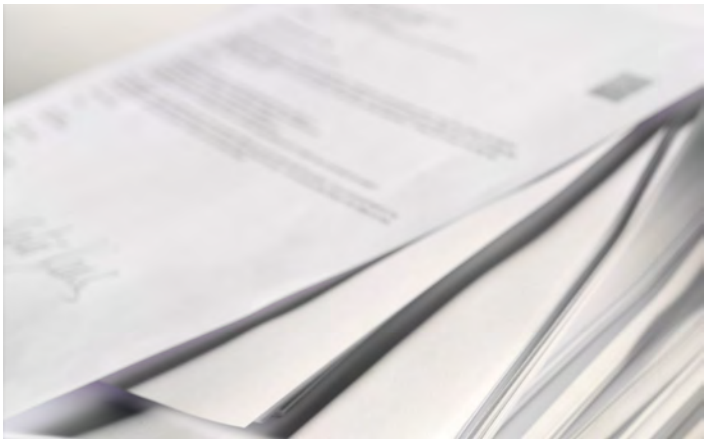
In *In re ACandS, Inc.*, 2011 WL 4801527 (Bankr. D. Del. Oct. 7, 2011), Judge Fitzgerald ruled that Garlock Sealing Technologies was not entitled to discovery of attorney statements of authority under Bankruptcy Rule 2019. Rule 2019 statements are verified statements setting forth an attorney's authority to represent more than one client who

may have claims against the debtor. In the context of asbestos bankruptcy cases, Rule 2019 cases often are filed by law firms representing multiple asbestos claimants. Garlock sought access to Rule 2019 statements filed in ten bankruptcy cases (seven of which have been closed) to obtain information about the asbestos plaintiffs in those cases. Garlock, itself a debtor in bankruptcy, argued that the information was relevant to its claim that asbestos plaintiffs' law firms had concealed their clients' exposure to the asbestos products of other bankruptcy debtors in order to inflate settlement values against Garlock. The court denied Garlock's motions, holding that Garlock lacked standing to intervene in the other bankruptcy cases and that there was no basis for reopening the cases that had already been closed. The court also concluded that Garlock had failed to establish a legitimate basis for access to the 2019 statements. The court noted that although Garlock sought thousands of 2019 statements filed by dozens of lawyers in each of the ten cases, Garlock had failed to identify any specific creditor for which it sought information. Garlock had filed a similar motion in another case, which was also denied. Transcript of Jan. 13, 2010 Hearing, *In re Pittsburgh Corning Corp.*, No. 00-22876 (Bankr. W.D. Pa.) (Doc. No. 7422).

In *In re Specialty Products Holdings Corp. et al.*, 2011 WL 4735962 (Bankr. D. Del. Oct. 7, 2011), Judge Fitzgerald denied the debtors' motion pursuant to Bankruptcy Rule 2004, seeking information from law firms involved in asbestos-related lawsuits against the debtors. The debtors sought detailed information regarding recoveries on asbestos claims in order to compare the anticipated recovery from trusts with the claimants' expected tort-based recoveries. In denying the motion, the court noted that the debtors' discovery requests were burdensome, speculative, and, in some respects, irrelevant. As discussed in our March 2011 Alert, a similar motion was denied in *In re Garlock Sealing Technologies, LLC*, Bankr. No. 10-31607 (Bankr. W.D.N.C. Mar. 4, 2011). There, the court reasoned that the discovery sought was intrusive to attorneys and not generally discoverable.

New Jersey Court Issues Sanctions for Failure to Preserve Documents

A district court in New Jersey granted a motion for sanctions based on a party's failure to (1) institute a litigation hold at the time litigation was imminent, and (2) involve counsel in the overseeing of document collection, resulting in the failure to preserve, search for and produce requested discovery. *N.V.E., Inc. v. Palmeroni*, 2011 WL 4407428 (D.N.J. Sept. 21, 2011). The court held that although the discovery failures were not the result of intentional or bad faith conduct,



the violating party was grossly negligent—conduct sufficient to justify the imposition of sanctions. The court declined to impose "the most drastic sanctions" of dismissal or suppression of evidence. Instead, the court agreed to issue an "adverse inference" jury instruction relating to the spoliation of evidence. In addition, the court held that attorneys' fees and costs were appropriate, conditional upon the filing of appropriate documentation. In reaching its decision, the court cited to Judge Shira A. Scheindlin's opinion in *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC.*, 685 F. Supp.2d 456 (S.D.N.Y. 2010), discussed in our February 2010 Alert.

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