Simpson Thacher

INSURANCE LAW ALERT

JUNE 2013

This Alert highlights decisions relating to an exhaustion requirement in excess policies, pro rata allocation of costs to a policyholder and the application of a pollution exclusion to carbon monoxide claims. We also address recent rulings relating to the scope of coverage for disgorgement payments, injunctive relief and damages imposed under the Telephone Consumer Protection Act. Finally, we summarize rulings on late notice, rescission, attorney-client privilege and an arbitrator's "evident partiality." Please "click through" to view articles of interest.

- ***New York Court of Appeals Reinstates Coverage Action for Disgorgement Payments***
  New York's highest court ruled that insurers were not entitled to judgment on the pleadings in a coverage action seeking indemnification for disgorgement payments. *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 2013 WL 2475864 (N.Y. June 11, 2013). *Click here for full article*

- ***Second Circuit Rules That Payment of Underlying Policy Limits is Prerequisite to Excess Coverage***
  The Second Circuit ruled that an exhaustion requirement in excess policies mandates the actual payment of primary policy limits and rejected the argument that excess coverage is implicated when the policyholder's liabilities reach excess attachment levels. *Mehdi Ali v. Federal Ins. Co.*, 2013 WL 2396046 (2d Cir. June 4, 2013). *Click here for full article*

- ***Massachusetts Appellate Court Affirms Pro Ration to Policyholder for Uninsured Periods***
  A Massachusetts appellate court found that a policyholder is responsible for asbestos-related damages during a period in which it was unable to purchase insurance for asbestos claims under a pro rata time-on-the-risk allocation. *New England Insulation Co., Inc. v. Liberty Mutual Ins. Co.*, 2013 WL 2171903 (Mass. App. Ct. May 22, 2013).
  Click here for full article

- ***Minnesota Supreme Court Rules That Pollution Exclusion Excludes Coverage For Carbon Monoxide Claims***
  The Minnesota Supreme Court ruled that claims arising out of the release of carbon monoxide in a home were barred by a general liability policy's pollution exclusion. *Midwest Family Mutual Ins. Co. v. Wolters*, 2013 WL 2363239 (Minn. May 31, 2013). *Click here for full article*

- ***Illinois Supreme Court Rules That TCPA Damages Are Not Punitive Damages Excluded From Coverage***

  The Illinois Supreme Court ruled that the Telephone Consumer Protection Act ("TCPA") has a remedial rather than penal purpose and that TCPA damages are not punitive damages, which are uninsurable as a matter of Illinois public policy. *Standard Mutual Ins. Co. v. Lay*, 2013 WL 2253203 (Ill. May 23, 2013). *Click here for full article*

- ***Fifth Circuit Rules That Fines and Penalties Exclusion Does Not Exclude Claims For Injunctive Relief***

  The Fifth Circuit ruled that a "Fines and Penalties" exclusion did not bar coverage for claims for injunctive relief sought by environmental agencies. *Louisiana Generating LLC v. Illinois Union Ins. Co.*, 2013 WL 2096382 (5th Cir. May 15, 2013). *Click here for full article*

- ***Kansas Court Rules That Policyholder's Late Notice Results in Forfeiture of Coverage***

  A federal district court in Kansas granted summary judgment to an insurer, finding as a matter of law that the policyholder violated a notice provision and that the delay prejudiced the insurer. *B.S.C. Holding, Inc. v. Lexington Ins. Co.*, 2013 WL 2254436 (D. Kan. May 22, 2013). *Click here for full article*

- ***First Circuit Allows Life Insurer to Rescind Policy and Retain Premiums***

  The First Circuit found that fraudulent misrepresentations in a life insurance application justified the insurer's rescission of the policy and retention of the premiums. *PHL Variable Ins. Co. v. The P. Bowie 2008 Irrevocable Trust*, 2013 WL 1943820 (1st Cir. May 13, 2013). *Click here for full article*

- ***United States Supreme Court Denies Certiorari in Global Warming Suit***

  The United States Supreme Court denied a petition for certiorari in a global warming public nuisance suit seeking damages caused by the release of greenhouse gases. *Kivalina v. ExxonMobil Corp.*, 2013 WL 798854 (U.S. May 20, 2013). *Click here for full article*

- ***Sixth Circuit Vacates Arbitration Award Based on Neutral Arbitrator's Evident Partiality***

  The Sixth Circuit affirmed a Michigan district court decision vacating an arbitration award on the basis that an arbitrator's conduct established evident partiality. *Thomas Kinkade Co. v White*, 711 F.3d 719 (6th Cir. 2013). *Click here for full article*

- ***Delaware Court Rules That Attorney-Client Privilege Not Waived by Advice of Counsel Defense***

  A Delaware Court of Chancery denied a motion to compel the production of privileged documents, finding no waiver of privilege based on the reliance on an advice of counsel defense. *In re Comverge, Inc. Shareholders Litig.*, 2013 WL 1455827 (Del. Ch. Apr. 10, 2013). *Click here for full article*

Coverage Alert:
New York Court of Appeals Reinstates Coverage Action for Disgorgement Payments

Reversing an intermediate appellate court decision, New York's highest court ruled that insurers were not entitled to judgment on the pleadings in a coverage action seeking indemnification for disgorgement payments. *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 2013 WL 2475864 (N.Y. June 11, 2013).

The insurance dispute arose out of a settlement between the Securities and Exchange Commission and Bear Stearns & Co. Under the settlement, Bear Stearns agreed to pay $160 million as "disgorgement" and $90 million as a civil penalty in connection with deceptive trading claims. The $250 million payment was used to compensate mutual fund investors who were allegedly harmed by Bear Stearns' conduct. Bear Stearns sought indemnification for the disgorgement portion of the settlement (as well as for defenses costs and a settlement payment made to private claimants in a related class action suit) from its primary and excess insurers. The insurers denied coverage on the basis that the disgorgement payment was uninsurable as a matter of public policy. In ensuing coverage litigation, a New York trial court denied the insurers' motion to dismiss. The trial court held that the settlement order did not conclusively establish that the "disgorgement" component of the settlement was "specifically linked" to Bear Stearns' improperly acquired funds and thus uninsurable under New York law. The intermediate appellate court reversed and dismissed the complaint on the basis that public policy precluded indemnification of the disgorgement payment. The New York Court of Appeals reversed the ruling and reinstated Bear Stearns' complaint.

The New York Court of Appeals noted that although numerous courts have precluded coverage for

disgorgement payments (either on the basis of public policy or policy language defining "loss" or "damages"), an issue of fact remained as to whether the $160 million payment labeled as "disgorgement" in the SEC settlement order actually represented disgorgement of Bear Stearns' own profits. In particular, the court explained that in ruling on a motion to dismiss, it was required to accept as true Bear Stearns' allegation that the majority of the $160 payment was "calculated in large measure on the profits of others" rather than profits that Bear Stearns improperly earned as a result of its securities violations. The court found this distinction critical, noting the lack of precedent "in which coverage was prohibited where, … the disgorgement payment was (at least in large part) linked to gains that went to others." The court also rejected the argument that dismissal was warranted because Bear Stearns acted with the intent to cause injury, conduct which is uninsurable under New York public policy. The court held that the "public policy exception for intentionally

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harmful conduct is a narrow one, under which it must be established not only that the insured acted intentionally but, further, that it acted with the intent to harm or injure others." Finally, the court declined to find, in the context of a dismissal motion, that personal profit or wrongful acts exclusions precluded coverage for the disgorgement payment.

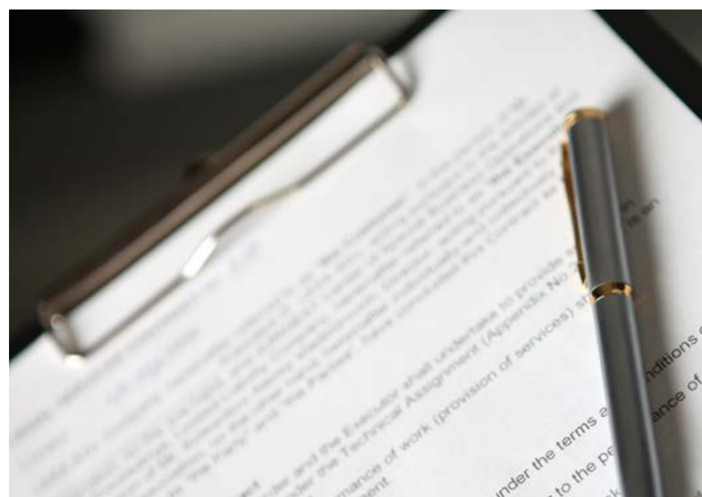
Excess Alert:

Second Circuit Rules That Payment of Underlying Policy Limits is Prerequisite to Excess Coverage

The Second Circuit ruled that an exhaustion requirement in excess policies mandates the actual payment of primary policy limits and rejected the argument that excess coverage is implicated when the policyholder's liabilities reach excess attachment levels. *Mehdi Ali v. Federal Ins. Co.*, 2013 WL 2396046 (2d Cir. June 4, 2013).

Former directors and officers of a computer technology company were insured under a series of primary and excess policies. When two low level insurers became insolvent, Federal Insurance Company, which provided excess coverage at the second and fifth tier, filed a declaratory judgment action against the directors and officers seeking a ruling that it was not required to "drop down" to cover liabilities that would have been insured by the insolvent carriers. A New York district court ruled in favor of Federal. The directors filed a counter-claim against Federal and Travelers, a high level excess insurer, seeking a declaration that "Federal and Travelers' coverage obligations are triggered once the total amount of [the Directors'] defense and/or indemnity *obligations* exceeds the limits of any insurance policies underlying their respective policies, regardless of whether such amounts have actually been paid by those underlying insurance companies." The district court rejected this position and held that excess coverage is not triggered until underlying insurance is exhausted as a result of *payment* of underlying losses. The Second Circuit affirmed.

The Federal and Travelers policies stated that exhaustion of underlying insurance occurs "solely as



a result of payment of losses thereunder." The Second Circuit held that this language mandates actual payment of underlying limits and could not be interpreted to provide excess coverage when underlying liabilities reached the attachment points. Importantly, however, the court declined to rule on whether the payment of underlying limits had to be made by the underlying insurers, explaining that a ruling on this issue was not sought by the parties.

The Second Circuit distinguished *Zeig v. Massachusetts Bonding & Insurance Co.*, 23 F.2d 665 (2d Cir. 1928), in which the court held that a policyholder could be entitled to excess coverage despite a below-primary limits settlement if losses were shown to reach excess levels. The Second Circuit noted that *Zeig* was inapposite because it involved first party property insurance rather than liability insurance and because there, the policyholder sought excess coverage for a fixed out-of-pocket loss whereas here, the directors sought excess coverage for undetermined obligations to third parties.

As discussed in previous Alerts (September 2011 Alert, October 2011 Alert, October 2012 Alert), decisions in this context have turned on applicable jurisdictional law and the language of excess exhaustion provisions.

Allocation Alert:

Massachusetts Appellate Court Affirms Pro Ration to Policyholder for Uninsured Periods

Virtually all jurisdictions that have endorsed pro rata allocation have ruled that under certain circumstances, pro ration to the insured is appropriate. However, courts disagree as to whether a policyholder should be held responsible for damages allocated to a policy period in which applicable insurance was unavailable in the marketplace. Some courts have held that while pro ration to the insured for a period of voluntary self-insurance is appropriate, pro ration for periods in which insurance was unavailable is not justified.

In a recent decision, a Massachusetts appellate court reinforced that Massachusetts law does not recognize such an "unavailability exception" because doing so would effectively create insurance for the policyholder during a time frame in which the insurance market had made the business decision not to assume certain risks. *New England Insulation Co., Inc. v. Liberty Mutual Ins. Co.*, 2013 WL 2171903 (Mass. App. Ct. May 22, 2013). In *New England Insulation*, the court ruled that under pro rata time-on-the-risk allocation, a policyholder was responsible for asbestos-related damages during a period in which it was unable to purchase insurance for asbestos claims.

Pollution Exclusion Alert:

Minnesota Supreme Court Rules That Pollution Exclusion Excludes Coverage For Carbon Monoxide Claims

A majority of the Minnesota Supreme Court ruled that claims arising out of the release of carbon monoxide in a home were barred by a general liability policy's pollution exclusion. *Midwest Family Mutual Ins. Co. v. Wolters*, 2013 WL 2363239 (Minn. May 31, 2013).

When family members sustained bodily injury as a result of carbon monoxide exposure, they sued the contractor who had negligently installed a boiler in their home. In the coverage litigation that followed, the contractor's general liability insurer argued that coverage was barred by the policy's pollution exclusion.

The Minnesota Supreme Court agreed.

Adopting a "plain meaning" approach to the exclusion, the court reasoned that application of the pollution exclusion should not be limited to traditional environmental pollution. Under this approach, the court concluded that carbon monoxide released from a boiler constituted a "pollutant" and an "irritant" subject to the exclusion. In so ruling, the court rejected the notion that the term "pollutant" was ambiguous and/or that the policy should be interpreted in accordance with the reasonable expectations of the policyholder. The court also rejected the argument that the exclusion did not apply because the release was limited to the inside of the house. The court explained that because the pollution exclusion barred coverage for the "discharge, dispersal, release or escape of pollutants" and did not contain the qualifying phrase "into or upon land, the atmosphere or any water course of body of water," there was no basis to limit the exclusion to outdoor pollution. Other courts addressing this issue have reached mixed decisions as to whether carbon monoxide claims fall within the scope of a pollution exclusion. *See* September 2012 Alert.

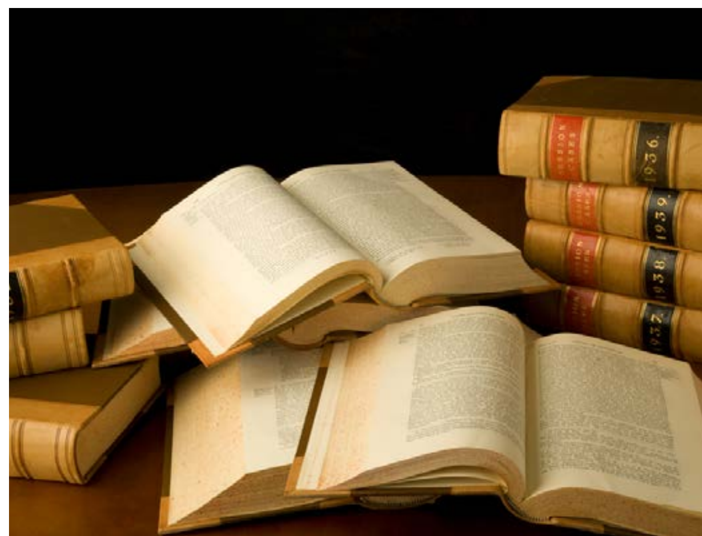
DAMAGES ALERTS:

Illinois Supreme Court Rules That TCPA Damages Are Not Punitive Damages Excluded From Coverage

Reversing in part an intermediate appellate court decision, the Illinois Supreme Court ruled that the Telephone Consumer Protection Act ("TCPA") has a remedial rather than penal purpose and that TCPA damages were not punitive damages, which are uninsurable as a matter of Illinois public policy. *Standard Mutual Ins. Co. v. Lay*, 2013 WL 2253203 (Ill. May 23, 2013).

A class action suit alleged that the policyholder engaged in "fax blast" advertising in violation of the TCPA. Standard, the company's general liability insurer, agreed to defend the suit under a reservation of rights. The suit settled for approximately $1.74 million, in the face of a TCPA liquidated damages clause which imposes $500 per violation. Standard filed a declaratory judgment action seeking a ruling that the TCPA damages were punitive in nature and not insurable as a matter of Illinois law and public policy. An intermediate appellate court agreed. The Illinois Supreme Court reversed.

Citing to the history and purposes underlying



the statute, the Illinois Supreme Court concluded that "the manifest purpose of the TCPA is remedial and not penal." The court explained that the statute sought to prevent companies from shifting the cost of their advertisements to consumers. The court further reasoned that the $500 per violation damage provision served two non-punitive purposes: (1) compensating fax recipients for the "loss of paper and ink, annoyance and inconvenience;" and (2) creating an incentive for private parties to enforce the statute. Finally, the court rejected the notion that the availability of treble damages alone under the TCPA rendered it a penal statute.

Courts in other jurisdictions have reached contrary results. Additionally, several courts have ruled that general liability policies do not provide coverage for

TCPA claims because they do not allege an "invasion of privacy" within the meaning of an advertising injury provision. *See* March 2010 Alert, October 2011 Alert, October 2012 Alert.

Fifth Circuit Rules That Fines and Penalties Exclusion Does Not Exclude Claims For Injunctive Relief

The Fifth Circuit rejected an insurer's argument that a "Fines and Penalties" exclusion barred coverage for claims for injunctive relief sought by environmental agencies. *Louisiana Generating LLC v. Illinois Union Ins. Co.*, 2013 WL 2096382 (5th Cir. May 15, 2013).

Federal and state environmental agencies sued Louisiana Generating LLC ("LaGen") and alleged various regulatory violations. The suit sought civil penalties and several forms of injunctive relief, including an order enjoining LaGen from engaging in certain operations and requiring it to implement remediation and mitigation measures. LaGen turned to Illinois Union for a defense of the suit pursuant to a pollution liability policy. In ensuing coverage litigation, a Louisiana trial court ruled that Illinois Union had a duty to defend, and the Fifth Circuit affirmed.

Applying New York law, the court ruled that Illinois Union was required to defend LaGen because the underlying claims were potentially within the scope of coverage. The policy provided coverage for "claims, remediation costs, and associated legal defense expenses … as a result of a pollution condition." The court explained that because at least some of the underlying claims sought remediation costs, Illinois Union's duty to defend was triggered. The court rejected the argument that an exclusion for the payment of "criminal fines, criminal penalties, punitive, exemplary or injunctive relief," barred coverage for the injunctive relief claims. "Reading the policy as a whole, including construing the exclusion narrowly," the court held that the fines and penalties exclusion barred only coverage for injunctive relief that was criminal or punitive in nature, and thus did not encompass the injunctive relief sought in the underlying environmental suit.

The court sidestepped the larger question of whether civil penalties sought by the Environmental Protection Agency for alleged Clean Air Act violations were punitive in nature and thus excluded under the exception. The court declared the issue "an unsettled question of New York state law" and held that because there was a duty to defend at least some of the claims, Illinois Union was obligated to defend the entire suit.

Notice Alert:
Kansas Court Rules That Policyholder's Late Notice Results in Forfeiture of Coverage

When policies require a policyholder to give notice of incidents that "may give rise to a claim" "as soon as practicable," disputes often arise as to when the duty to give notice begins. In a recent decision, a federal district court in Kansas granted summary judgment to an insurer, finding as a matter of law that the policyholder violated a notice provision and that the delay prejudiced the insurer. *B.S.C. Holding, Inc. v. Lexington Ins. Co.*, 2013 WL 2254436 (D. Kan. May 22, 2013).

In 2004 and 2005, a salt mine company consultant identified certain abnormally high closure rates, indicating that the mine floor and ceiling were moving closer together. In 2008, water inflow was discovered in mine areas with high closure rates. During 2008 and 2009, the mine company undertook measures designed to stop the water inflow. At this time, the consultant expressed concern that the water would cause a "catastrophic event." In 2010, after experts had identified the cause of the water inflow and recommended certain remedial measures, the mine sent notice to Lexington under an all risk commercial property insurance policy. Lexington reserved its rights, and the mine company initiated a declaratory judgment action, seeking a ruling that it was entitled to more than $20 million for investigative and remedial expenses. Lexington moved for summary judgment on late notice grounds. The court granted the motion.

The Lexington policy required that "[t]he Insured shall as soon as practicable report in writing to the Company or its agent every loss, damage, or occurrence which may give rise to a claim under this policy … ." The court ruled that the mine company's notice was late as a matter of law because it was triggered in 2008, upon discovery of the water inflow problem. The court explained that at that point, the mine company had

"an actual concern that catastrophic flooding would result in total loss" of the mine and began to undertake remedial measures. The court rejected the assertion that the notice requirement was first triggered in April 2010, when consultants provided "absolute knowledge of an alleged *covered* loss." The court, siding with the majority of decisions in this context, ruled that a lack of awareness that a claim may be covered under a policy does not excuse a failure to comply with a notice provision. In addition, the court held that Lexington suffered prejudice as a result of the delay because it was unable to obtain accurate reports and information from witnesses or to inspect the mine conditions prior to the implementation of remedial measures.

Rescission Alert:
First Circuit Allows Life Insurer to Rescind Policy and Retain Premiums

Affirming a Rhode Island district court opinion, the First Circuit found that fraudulent misrepresentations in a life insurance application justified the insurer's rescission of the policy and retention of the premiums. *PHL Variable Ins. Co. v. The P. Bowie 2008 Irrevocable Trust*, 2013 WL 1943820 (1st Cir. May 13, 2013).

Peter Bowie, through an insurance broker, submitted

a life insurance application to PHL Variable Insurance Company. Among other things, the application attested to Bowie's income, net worth and intention to re-issue the policy to a trust. After an underwriting investigation, PHL offered Bowie a $5 million policy. Upon execution of the policy, an attorney acting for the trust issued payment for the premium in the amount of $192,000. Eventually, it was discovered that virtually all of the statements made in the application were untrue and that Bowie had contracted with a company to provide the money for the premium in exchange for the company's right to take possession of the policy upon default – an arrangement that was contrary to specific representations made in the application. PHL filed a declaratory judgment action seeking to void the policy and retain the premium as an "offset" against the damages it sustained in connection with policy issuance. In response, the Trust agreed to rescission of the policy but demanded return of the premium. On cross-motions for summary judgment, the trial court found that PHL was entitled to retain the premium as special damages. The First Circuit affirmed, issuing several significant rulings relating to an insurer's right to rescind and obtain equitable damages based on a policyholder's fraudulent conduct.

First, the court rejected application of a "tender back rule" under which a party seeking rescission must return the consideration received under the contract. The court noted that the doctrine is not stringently enforced under Rhode Island law and that a court has the equitable power to "make whole a party who seeks rescission of a contract procured by fraud." The court further noted that even if a "tender back rule" applied, PHL fulfilled its obligations under the rule by tendering the policy's premium to the court registry upon filing its complaint.

Second, the court emphasized its broad powers to award special damages in connection with rescission in order to "create a situation the same as if no contract ever had existed." In this context, the court reasoned that in addition to rescission, PHL was entitled to recover costs it would not have incurred but for the fraudulently-obtained policy. Here, because such costs included the commission paid to Bowie's broker and various underwriting and administrative expenses, the court concluded that retention of the premium was justified.

Third, the court rejected the notion that allowing PHL to rescind the policy and retain premiums violated the "election of remedies" rule, under which a party claiming fraudulent formation of a contract can either affirm the contract and sue for damages, or alternatively seek rescission, but not both. The court reasoned that the rule is inapplicable because PHL pursued the equitable remedy of rescission and sought only "expenses incidental to the rescinded contract" rather than damages on the policy.

Climate Change Alert:

United States Supreme Court Denies Certiorari in Global Warming Suit

Our November 2012 Alert reported on a Ninth Circuit decision affirming the dismissal of a global warming public nuisance suit seeking damages caused by the release of greenhouse gases. *Kivalina v. ExxonMobil Corp.*, 2012 WL 4215921 (9th Cir. Sept. 21, 2012). The Ninth Circuit ruled that federal statutory law, including the Clean Air Act, displaced plaintiffs' common law nuisance claims. Plaintiffs subsequently

filed a petition for certiorari with the United States Supreme court. Last month, the Supreme Court denied the petition. *Kivalina v. ExxonMobil Corp.*, 2013 WL 798854 (U.S. May 20, 2013). The Supreme Court has previously dismissed similar global warming claims. *See American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011).

Arbitration Alert:
Sixth Circuit Vacates Arbitration Award Based on Neutral Arbitrator's Evident Partiality

Previous Alerts (March 2010, April 2010, March 2011) have addressed the stringent standards for vacating an arbitration award and/or disqualifying an arbitrator on the basis of arbitrator partiality. In a recent decision, the Sixth Circuit affirmed a Michigan district court decision vacating an arbitration award on the basis that an arbitrator's conduct established evident partiality. *Thomas Kinkade Co. v White*, 711 F.3d 719 (6th Cir. 2013).

In a breach of contract arbitration between artist Thomas Kinkade and a pair of art dealers, the two party-appointed arbitrators appointed a neutral arbitrator. After closing briefs had been submitted, the art dealers began sending a substantial amount of new business to the neutral arbitrator's law firm. Kinkade objected to those engagements and unsuccessfully sought to disqualify the arbitrator. Ultimately, the panel issued an interim award in which it summarily granted several of the art dealers' claims and rejected Kinkade's breach of contract claim, notwithstanding that it was "virtually uncontested." The award also implicitly denied the art dealers' request for attorneys' fees, noting that "all claims that are not expressly granted were hereby denied." Despite this ruling (and the art dealers' failure to seek costs and sanctions following the interim award), the neutral arbitrator, over Kinkade's objection, ordered the parties to submit fee applications. The panel's final award awarded the art dealers more than $1.4 million, including nearly $500,000 in attorneys' fees. Kinkade's petition to the Michigan district court to vacate the award was granted. The Sixth Circuit affirmed.

Under the Federal Arbitration Act, an award may be vacated upon a showing of "evident partiality or corruption in the arbitrators." 9 U.S.C. § 10. To establish partiality, a party must show that "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." This requires a showing "greater than an appearance of bias, but less than actual bias." Here, the court concluded that Kinkade "established a convergence of undisputed facts that, considered together, show a motive for [the arbitrator] to favor the [art dealers] and multiple, concrete actions in which he appeared actually to favor them." The court's finding was based on the facts that: (1) the arbitrator

provided multiple unsolicited opportunities for the art dealers to bolster proof of their claims; (2) he allowed the art dealers to rely on 8,800 documents that they had deliberately withheld for more than four years; (3) he denied Kinkade any relief on an uncontested breach of contract claim; (4) he refused to rule on numerous objections by Kinkade during the arbitration; and (5) he awarded the art dealers' attorneys' fees after the interim award had effectively denied such relief.

Discovery Alert:

Delaware Court Rules That Attorney-Client Privilege Not Waived by Advice of Counsel Defense

A Delaware Court of Chancery denied plaintiffs' motion to compel the production of privileged documents, finding that the defendants had not waived privilege by relying on the advice of counsel as a defense to breach of fiduciary duty claims. *In re Comverge, Inc. Shareholders Litig.*, 2013 WL 1455827 (Del. Ch. Apr. 10, 2013).

In this shareholder litigation action, plaintiffs sought the production of documents relating to defendants' counsel's advice on the enforceability of a contractual provision. Plaintiffs argued that defendants had waived privilege as to the documents by placing the communications "at issue" in the litigation. Specifically, plaintiffs claimed that by relying on the advice of counsel in their defense, defendants had forfeited the right to claim privilege as to documents relating to legal advice. The court disagreed.

Applying Delaware statutory law, the court held that a party waives privilege by placing documents "at issue" if it (1) injects the communications into the litigation, or (2) injects an issue into the litigation, "the truthful resolution of which requires an examination of confidential communications." The court concluded

that neither of those circumstances existed here. The court explained that the plaintiffs, rather than the defendants, injected the existence or nonexistence of attorney-client communications into the litigation and that the defendants did not assert a defense based on the reliance upon the substance of any legal advice. Rather, defendants sought only to rely on the fact that they sought legal advice, without regard to the substance of that advice.

This ruling provides support for insurers in the context of discovery disputes arising out of bad faith claims. In bad faith coverage litigation, policyholders often seek the production of otherwise privileged documents on the basis that the "at issue" waiver doctrine applies. Under *In re Comverge, Inc.*, insurance companies may argue that reliance on the existence (rather than the substance) of legal advice does not constitute a waiver of privilege.

STB News Alert

Simpson Thacher received the Award for Excellence in Insurance, conferred by *Chambers & Partners*, at its annual U.S.-based awards ceremony held on May 23, 2013 in New York City. This marks the third time the Firm's Insurance Practice has received this Award. *Chambers & Partners* describe Simpson Thacher's Insurance Practice as "the star firm in the nationwide insurance market."

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

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