SIMPSON THACHER
INSURANCE LAW ALERT
JUNE 2010

In this month's Alert, we discuss a recent lawsuit filed by excess insurers of Transocean Ltd. and its affiliates against various BP entities, arising out of the *Deepwater Horizon* accident and resulting oil discharges in the Gulf of Mexico. We also report on a Georgia Supreme Court ruling regarding an insurer's right to withdraw from a policyholder's defense, two recent decisions addressing an insurer's right to seek reimbursement from co-insurers under theories of equitable subrogation and contribution, and, on the property insurance front, a decision enforcing an insurer's right to an appraisal of hurricane-related property damage. Other decisions of interest highlighted in this report include a federal court ruling regarding a D&O insurer's obligation to pay executives' defense costs in connection with an IRS investigation; the Ninth Circuit's enforcement of a "Policy Territory" provision that limited coverage to occurrences that took place outside the United States; the Florida Supreme Court's dismissal of a third-party bad faith action against an insurer; the Supreme Court's denial of certiorari in the *Textron* case, which left standing a controversial decision by the First Circuit on the scope of the work product privilege; and the Second Circuit's determination that policyholder information is not entitled to "trade secret" or "confidential" protection. Finally, we summarize a report issued by the New York State Unified Court System regarding electronic discovery.

Environmental Alert:

Insurance Implications of Gulf of Mexico Oil Rig Disaster

The still-unfolding impact of the April 20, 2010 explosion and fire on the *Deepwater Horizon* oil rig in the Gulf of Mexico has been widely reported. As of this writing, oil is still escaping from a mile-deep oil well on the ocean floor at an undetermined rate and oil has contaminated coastal zones and shorelands and killed indigenous wildlife. The financial impact of the accident will likely not be known for years to come, although some experts have estimated losses approaching the $10 billion mark. Numerous businesses, particularly those in the tourism and fishing industries, have already begun to feel the economic effects of the disaster.

More than one hundred lawsuits, including several class actions, have already been filed and more are sure to follow. Myriad insurance coverage issues will be implicated, including the extent of business interruption insurance,[1] the applicability and scope of pollution exclusions, and the interpretation of "additional insured" provisions, to name just a few. One of the opening salvos in the insurance wars is a declaratory judgment action filed on May 21, 2010 in the United States District Court for the Southern

1 For a discussion of business interruption insurance issues raised by the Gulf of Mexico oil spill, *see* Simpson Thacher's recently-published Memorandum, entitled *Business Interruption Insurance in the Wake of the Gulf Oil Spill—What Insurers Can Do to Keep Slippery Claims at Bay.*

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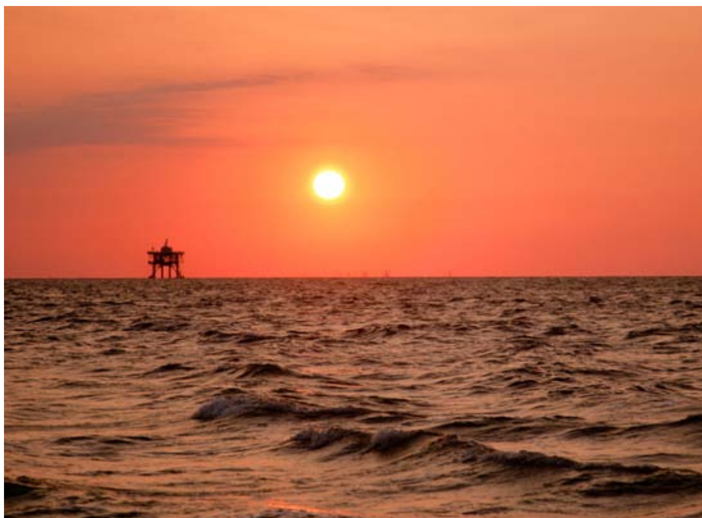
District of Texas, captioned *Certain Underwriters at Lloyd's London v. BP plc.*, No. 4:10-cv-01823 (S.D. Tex. May 21, 2010).

The *Lloyd's* case is brought on behalf of excess insurers that issued coverage to Transocean, the owner of the *Deepwater Horizon* drilling rig, and seeks a declaration that the BP entities named as defendants do not qualify as "additional insureds" under the relevant policies. According to the complaint, the additional insured coverage afforded to BP was "limited in scope to the liabilities assumed by Transocean under the terms of the drilling contract." *Id.* at ¶ 11. The complaint further alleges that pursuant to the drilling contract, Transocean agreed to indemnify BP and hold it harmless "from and against any loss, damage, expense, claim, fine, penalty, demand or liability for pollution or contamination, including control or removal thereof, **originating above the surface of the land or water from spills, leaks, or discharges of fuels . . . in the possession and control of**" Transocean. *Id.* at ¶ 12. The insurers claim that BP assumed any liabilities for pollution or contamination "originating" below the surface.

The *Lloyd's* complaint alleges that the policies at issue contain clauses which provide that they are governed by Texas law and that "disputes arising under or in connection with" the policies "shall be subject to the exclusive jurisdiction of the Texas courts." *Id.* at ¶ 18. While the *Lloyd's* action is, on its face, a coverage dispute, the "additional insured" issue as framed by the complaint actually tees up the fundamental questions of what caused the spill and who, as between BP and Transocean, is responsible for it. Those issues are, of course, central to the tort suits that have and will continue to be filed in Louisiana, Florida and Texas. Given this, a series of forum fights, including applications to the Panel on Multi-District Litigation, and other procedural wrangling are sure to follow. Stay tuned.



Defense Alerts:

Texas Court Holds That D&O Insurer Must Pay Defense Costs for IRS Investigation

The United States District Court for the Eastern of Texas recently held that a directors and officers liability insurer must defend executives of the insured company in connection with a federal investigation undertaken by the Internal Revenue Service. *Agilis Benefit Svs. LLC v. Travelers Cas. and Sur. Co. of America*, No. 5:08-CV-213 (E.D. Tex. Apr. 30, 2010). Ruling on the parties' cross-motions for summary judgment, the court concluded that service of a subpoena and search warrants on the company and individual officers constituted a "claim" within the meaning of the D&O policy. Accordingly, the court held that the officers were entitled to recover the legal fees they incurred in defending themselves against the ongoing IRS investigation.

The case arose out of an IRS investigation alleging that the executives participated in a tax evasion scheme. In connection with a federal grand jury proceeding, the IRS issued a subpoena to the company and obtained search warrants authorizing the seizure of various records and documents in the possession of the individual officers. The central issue before the court was whether these investigative

actions constituted a "claim" under the policy so as to trigger the insurer's defense obligations.

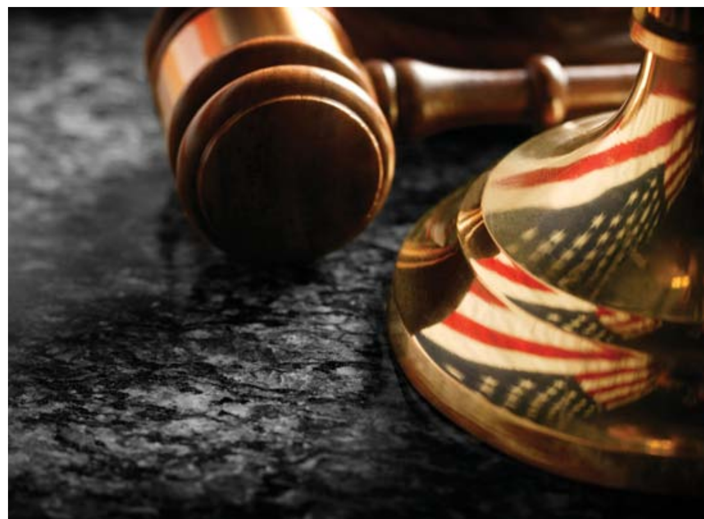
The policy defined "claim" as (among other things) a "written demand for monetary or non-monetary relief." Slip op. at 2. According to the court, this definition was "broad enough to include a demand for something due, including a demand to produce documents or appear before a grand jury." *Id*. at 10–11. The court emphasized the "seriousness" of the investigative actions, noting that a failure to comply with the warrants would have subjected the executives to criminal liability. The court also concluded that the term "claim" was susceptible to different yet equally reasonable interpretations and that under Texas law, such ambiguities must be resolved in favor of coverage.

The *Agilis* court observed that its approach "appears to be the one taken by the majority of courts." *Id*. at 13. Notably, however, at least one other court has reached a contrary conclusion in the face of nearly identical policy language. *See Diamond Glass Companies, Inc. v. Twin City Fire Ins. Co.*, 2008 WL 4613170 (S.D.N.Y. Aug. 18, 2008).

Ninth Circuit Holds That Territory Restrictions in Liability Policy Relieve Insurer of Defense Obligations

On the heels of the Seventh Circuit's decision in *Ace American Ins. Co. v. RC2 Corp., Inc.*, 600 F.3d 763 (7th Cir. 2010), which was the subject of a report in our May Alert, the Ninth Circuit has similarly ruled that an insurer has no duty to defend an insured where the policy contains a territory clause that limits coverage to occurrences taking place outside of the United States. *Hewlett-Packard Co. v. ACE Property and Cas. Ins. Co.*, 2010 WL 1896464 (9th Cir. May 12, 2010).

In litigation initiated by Hewlett-Packard against Nu-kote, Nu-kote asserted cross-claims alleging that Hewlett-Packard committed advertising-related antitrust offenses. Hewlett-Packard tendered the



defense of the claims to Ace under a "foreign" general liability policy that defines the "Policy Territory" as worldwide for a "claim or suit resulting from an occurrence outside the United States of America, its territories or possessions . . . ." *Id*. at *1. The United States District Court for the Northern District of California ruled that Ace was obligated to defend Hewlett-Packard despite the fact that Nu-kote conducted business exclusively within the United States. In an unpublished two-to-one summary opinion, the Ninth Circuit reversed. Noting that Nu-kote's business was conducted solely within the United States, the Court of Appeals reasoned that "any injury to Nu-kote resulted from an occurrence in the United States." *Id*. As such, there was no potential for coverage and no duty to defend.

In a dissenting opinion, Judge Callahan focused on allegations that Hewlett-Packard engaged in false advertising and anti-competitive conduct on a "worldwide" basis. This led Judge Callahan to conclude that Nu-kote's claims could be "reasonably read as alleging an 'occurrence' within the policy territory,"—*i.e.*, outside of the United States. *Id*. (Callahan, J., dissenting). At a minimum, the dissent argued, the territory provision was ambiguous because it could be interpreted as providing coverage for offenses that occurred outside of the United States but which resulted in injury within the United States. *Id*.

Coverage Alert:

Georgia Supreme Court Holds That Insurer Is Estopped From Denying Coverage After Assuming Policyholder's Defense Without a Proper Reservation of Rights

On May 3, 2010, the Supreme Court of Georgia, answering questions certified by the Eleventh Circuit, ruled that an insurer which fails to issue an effective reservation of rights before undertaking the policyholder's defense may not subsequently deny coverage. The court held that under such circumstances, the insurer's right to disclaim coverage is waived regardless of whether the insured can establish prejudice. *World Harvest Church, Inc. v. GuideOne Mutual Ins. Co.*, 2010 WL 1739943 (Ga. May 3, 2010).

World Harvest Church was named as a defendant in an Illinois suit asserting claims of fraudulent transfer and unjust enrichment arising out of the Church's receipt of donations from allegedly illegal business operations. GuideOne, the Church's CGL insurer, was notified of that suit. In turn, GuideOne's sister company issued a written reservation of rights and ultimately denied coverage altogether. The Illinois action against the Church was eventually dismissed for lack of personal jurisdiction, and a similar action was then filed in Georgia. After being notified of the second action, GuideOne verbally informed the Church that it "didn't see coverage but [ ] would have to evaluate what we have currently to see if there would be coverage issues." *Id*. at *1. Without issuing a written reservation of rights, GuideOne then assumed the Church's defense. Ten months later, however, GuideOne withdrew its defense on the basis that the claims were not covered. The Church retained its own counsel, and shortly thereafter, the court ruled against the Church, imposing damages in the amount of $1.8 million. As a result, the Church filed an action against GuideOne, alleging breach of the duty to defend and indemnify the Georgia lawsuit. The Church argued that GuideOne was estopped from denying coverage given its prior representation of the Church without a reservation of rights. The district court disagreed, finding no evidence that GuideOne's participation in the defense prejudiced the Church. The case was appealed to the Eleventh Circuit Court of Appeals, which certified the following question to the Georgia Supreme Court:

> Does an insurer effectively reserve its right to deny coverage if it informs the insured that it does 'not see coverage,' after the insured had received a written reservation of rights from the insurer's sister company in a similar lawsuit in another jurisdiction, or is a written or more unequivocal reservation of rights required?

Id. at *2. The Georgia Supreme Court determined that although a written reservation of rights is preferable, a reservation need not be written in order to be effective. The court held, however, that whether written or verbal, a reservation must fairly inform the policyholder that "notwithstanding the insurer's defense of the action, it disclaims liability and does not waive" available defenses to coverage. *Id*. Additionally, the court noted that a valid reservation must indicate the specific bases for denying coverage. With respect to the facts before it, the court concluded that GuideOne's statement that it "did not see coverage" did not reserve GuideOne's right to deny coverage and that its sister company's issuance of a prior reservation of rights in a similar lawsuit involving an identical insurance policy did not cure this defect.

Having concluded that GuideOne did not effectively reserve its right to deny coverage, the Georgia Supreme Court turned to the second certified question, which asked: "When an insurer assumes and conducts an initial defense without notifying the insured that it is doing so with a reservation of rights, is the insurer estopped from asserting the defense of noncoverage only if the insured can show

prejudice, or is prejudice conclusively presumed?" *Id*. Acknowledging a jurisdictional split on this issue, the court adopted what it perceived to be the "general or majority" rule of presuming prejudice, relying on state law precedent holding that the "loss of the right to control and manage the case is itself sufficient prejudice to the insured." *Id*. at *4 (citations omitted). When an insurer's conduct is minimal, the court noted, Georgia precedent holds that prejudice is not presumed, but rather must established by the policyholder in order to preclude an insurer from raising a defense of non-coverage.

GuideOne addresses an often-disputed issue: under what circumstances is a reservation of rights effective, and if ineffective, can coverage be created where it would not otherwise exist, even in the absence of a showing of prejudice to the policyholder? The *GuideOne* decision may ultimately raise as many questions as it answers. Both of the court's responses to the certified questions involved highly fact-specific inquiries relating to (i) the validity of an insurer's reservation of rights, and (ii) the insurer's level of participation in a policyholder's defense. The court's determination that GuideOne's conduct did not suffice to reserve its right to deny coverage suggests that a wide range of conduct might very well constitute an effective reservation of rights under different factual circumstances. In particular, the court's pronouncement that a reservation of rights need not be written in order to be valid opens the door to a flexible, case-specific standard by which an insurer's conduct may be evaluated. (Of course, a clear, written reservation of rights is the safest course for an insurer.) Additionally, in ruling on the prejudice issue, the court distinguished an insurer's assumption and control of a defense up until one month before trial from lower levels of involvement or participation in the defense of a case. *Id.* Under the rule of law set forth in *GuideOne*, the estoppel issue will turn, in part, on the quality and quantity of involvement of the insurer in the policyholder's defense prior to the denial of coverage.

Property Insurance Alert:

Trial Court's Denial of Request for Appraisal Held To Be an Abuse of Discretion by Texas Appellate Court

On April 22, 2010, the Texas Court of Appeals for the Fourteenth District conditionally issued a writ of mandamus, directing a lower court to set aside a ruling denying an insurer's motion to compel an appraisal pursuant to a property insurance policy. *In re Security National Ins. Co.*, 2010 WL 1609247 (Tex. App.-Houston Apr. 22, 2010). The appellate court concluded that issuance of the writ was justified because the trial court abused its discretion by denying the appraisal, and that an appeal would not have provided the insurer with an adequate remedy.

The case involved a commercial property insurance policy issued by Security National to Waloon Investment covering property in Texas that had been damaged as a result of Hurricane Ike. The policy covered both direct physical loss to the property as well as the loss of business income caused by a covered peril, and contained provisions setting forth detailed appraisal procedures to govern disputes over loss calculations.

In accordance with these provisions, Waloon initiated appraisal procedures in January 2009.

Shortly thereafter, however, Waloon notified Security National that it intended to "table" the appraisal procedure during its own internal investigation of the losses. Over the next several months, Waloon became engaged in litigation with a contractor hired to perform repairs on the damaged property. Security National filed an interpleader in that action and sought a declaratory judgment as to the parties' rights and obligations under the property policy. Waloon counterclaimed against Security National, asserting, among other things, breach of the insurance contract. In July and August 2009, during the course of mediation, Security National twice reiterated the need to continue the appraisal process. Waloon refused to do so, and Security National moved to compel appraisal. The trial court denied the motion.

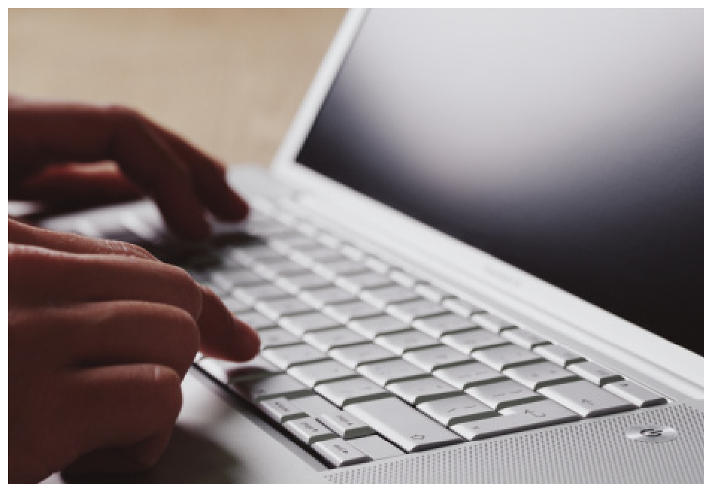
Against this backdrop, the Texas Court of Appeals ruled that Security National was entitled to an appraisal and that Security National had not waived its appraisal rights. According to the court, the "tabling" of the appraisal for five months, Security National's initiation of a declaratory judgment action against Waloon, its participation in mediation and its alleged denial of coverage did not operate to waive its right to demand an appraisal. As the *Security National* court observed, appraisal clauses are included in virtually all forms of property insurance policies as a means of resolving disputes as to the amount of loss for covered claims. Courts tend to strictly enforce appraisal clauses, as the failure to do so almost certainly "vitiates or severely compromises the [insurer]'s ability to defend a breach-of-contract claim." *Id*. at *7.

Subrogation/Contribution Alerts:

Excess Insurer May Assert Equitable Subrogation Claim Against Primary Insurer To Prevent Unjust Enrichment, Bankruptcy Court Rules

The United States Bankruptcy Court for the Northern District of Texas ruled that although Texas law does not generally recognize duties owed by a primary insurer to an excess insurer, Texas law permits an action by an excess insurer against a primary insurer under a theory of equitable subrogation. *Cool Partners, Inc. v. Admiral Ins. Co.*, 2010 WL 1779668 (Bankr. N.D. Tex. Apr. 30, 2010).

Cool Partners, a company in the business of providing internet services and related marketing, was named as a defendant in a number of fraud actions. Cool Partners obtained primary D&O insurance from Admiral Insurance Co. and excess D&O insurance from Royal Indemnity Co. Admiral initially defended the investor suits under a reservation of rights, but subsequently sought rescission of its policies on the ground that Cook Partners failed to make adequate disclosures relating to previous securities violations. Royal issued a similar notice relating to policy rescission.



Cool Partners eventually filed for bankruptcy, and the Trustee of the bankruptcy estate filed actions against both Admiral and Royal for failure to defend or indemnify Cool Partners with respect to certain underlying actions. During mediation, Royal was provided with inaccurate information regarding the nature of a settlement between Admiral and the Trustee. Additionally, Royal was incorrectly informed that there was not a written settlement between Admiral and the Trustee. Based on this inaccurate information, Royal entered into a "high/low" settlement with the Trustee. Approximately two months later, Royal learned the true details of the settlement between Admiral and the Trustee, which involved an arrangement whereby Admiral would receive a payment from the bankruptcy estate after Admiral paid its limits to the Trustee. Upon learning of this arrangement, Royal brought suit against Admiral, alleging fraud and unjust enrichment.

The bankruptcy court rejected Royal's common law fraud claim, reasoning that any misrepresentations regarding Admiral's settlement were made (perhaps inadvertently) by either the mediator or counsel for the Trustee, and not by Admiral. The court also rejected the fraud by omission claim, noting that Admiral was under no legal duty to disclose settlement information to Royal. The court, however, determined that Royal had properly asserted an equitable subrogation claim against Admiral based on Royal's overpayment to the Trustee. The court ruled that under Texas law, equitable subrogation provides "a basis for an excess insurer's recovery against a primary insurer to prevent a primary insurer from taking advantage of an excess insurer, acting solely as such, when a potential judgment approaches the primary insurer's policy limits." *Id.* at *9 (citations omitted). In this case, the court observed, Royal was "flim-flammed" into entering into a settlement agreement without knowing that Admiral would receive a claim for a potential $1 million payment in return for tendering its remaining policy limits. Equitable subrogation provides a remedy in such circumstances, the court explained, in order to prevent unjust enrichment. *Id.*

Oregon Appellate Court Holds That Non-Settling Insurer May Seek Equitable Contribution for Defense Costs From Settling Insurers

The Court of Appeals of Oregon reversed a trial court ruling that certain insurers' settlements with a policyholder foreclosed a non-settling insurer's subsequent contribution claim against the settling insurers. *Certain Underwriters at Lloyd's London v. Massachusetts Bonding and Ins. Co.*, 239 Or. App. 99 (Apr. 2010).

A number of insurers issued policies to a common insured, Zidell, a company engaged in the scrapping business. Zidell submitted claims for defense and indemnity to its insurers after being named as a defendant in an administrative environmental cleanup action. Although some insurers agreed to participate in Zidell's defense, coverage litigation between Zidell and its insurers ensued. Ultimately, Zidell settled with each of its insurers except Lloyd's London and Excess Insurance Co. The trial court in the coverage litigation subsequently ruled that Lloyd's London and Excess were responsible for certain outstanding defense and allocated indemnity costs, as well as pre-judgment interest and attorneys' fees. After entry of this judgment, Lloyd's London and Excess Insurance filed a contribution action against the settling insurers who had not contributed to Zidell's defense, seeking a proportionate share of Zidell's defense costs, pre-judgment interest, and attorneys' fees. The trial court dismissed Lloyd's London and Excess's claims.

The appellate court reversed, finding that an insurer's right to contribution from settling co-insurers exists independently of duties owed (or no longer owed) directly to the common insured. The court based its decision on the principle of equitable contribution, as distinguished from subrogation. Under a theory of subrogation, an insurer stands in the shoes of its policyholder for the purposes of enforcing rights against a co-insurer. Thus,

a settlement between certain insurers and the insured extinguishes subrogation claims against the settling insurers. Under the theory of equitable contribution, however, the right to reimbursement exists independently of the fulfillment of duties to the insured. Observing that the duty to defend Zidell was

shared among all insurers, the court stated, "[Lloyd's London and Excess] discharged a disproportionate share of that obligation, [and] their right to equitable contribution arose at that point in time. Although Zidell was able to release its own claims against [the settling insurers] for defense costs, Zidell was not in a position to release *[Lloyd's London and Excess]'s claims* against [the settling insurers]." *Id*. at 113 (emphasis in original). The court rejected the notion that public policy favoring settlement overrode the equitable considerations that underlie the right to contribution among co-insurers.

As discussed in our April Alert, courts in some jurisdictions have held that in order for reimbursement claims to proceed (whether based on equitable contribution or subrogation), a participating insurer must establish that it overpaid (*i.e.*, paid more than its "fair share") by virtue of a co-insurer's non-participation.

Bad Faith Alert:

Florida High Court Rejects Bad Faith Action Against Insurer, Holding That Absence of Policyholder Damages Is Fatal To Claim

On May 6, 2010, the Florida Supreme Court, addressing an issue of first impression, ruled that even where an insurer has acted in bad faith, a bad faith claim does not lie against the insurer if the insurer's actions neither caused the damages claimed by the insured nor exposed the insured to liability in excess of the insured's policy limits. *Perera v. United States Fidelity and Guaranty Co.*, 2010 WL 1791151 (Fla. May 6, 2010).

Perera, a third party assignee of the policyholder brought a bad faith action against United States Fidelity and Guaranty Co. ("USF&G") based on its denial of coverage and its refusal to participate in a consent judgment with the policyholder and its other insurers. A jury found that USF&G breached its insurance policy and acted in fad faith. In connection with this verdict, USF&G tendered the full amount of its $1 million policy limits. The remaining issue was Perera's claim against USF&G for an additional $4 million. The $10 million settlement among the policyholder and the participating insurers had provided that Perera would receive $5 million from the policyholder and the two settling insurers, and that the remaining $5 million was to be sought in a lawsuit against USF&G which the policyholder agreed to assign to Perera.

After conducting an extensive overview of Florida bad-faith law, the court ruled that USF&G could not be held liable for the additional $4 million. The court noted that there was no excess judgment because the consent judgment of $10 million was within the limits of all applicable primary and excess policies (which provided more than $25 million of coverage). The court noted that "[a]lthough an excess judgment is not always a prerequisite to bringing a bad-faith claim,

the existence of a causal connection is a prerequisite—in other words, the claimed damages must be caused by the bad faith." *Id*. at *7. Here, the court explained, there was no causal connection between USF&G's bad faith and the $4 million in damages claimed.

Privilege and Confidentiality Alerts:

United States Supreme Court Denies Certiorari in Textron v. United States

On May 24, 2010, the United States Supreme Court denied certiorari in the matter of *Textron Inc. v. Unites States*, a widely-followed case addressing the privileged status of legal work documents. *Textron Inc v. United States*, 2010 WL 2025148 (U.S. May 24, 2010). The Court's summary denial of review lets stand a controversial decision by the Court of Appeals for the First Circuit holding that tax accrual work papers prepared by attorneys were not protected by the work product doctrine, and must be produced to the Internal Revenue Service. As discussed in our January 2010 Alert, the First Circuit held that the fact that the subject matter of a document relates to a litigated issue was not enough to trigger work product protection; rather work product privilege is limited to documents prepared "in anticipation of or for trial." *United States v. Textron*, 577 F.3d 21, 30 (1st Cir. 2009).

Many legal experts have voiced concerns that *Textron* may alter the landscape of discovery in civil litigation, particularly for publicly-traded companies that routinely prepare audited financial statements and that may, together with counsel, conduct anticipated litigation analyses. However, it remains to be seen whether federal courts—both within and outside the First Circuit—will follow *Textron* or interpret it to apply only to papers sought by the IRS. (The First Circuit relied in part on the important

public policy of tax collection in ruling in the IRS's favor.) To date, only a handful of federal courts have cited to *Textron* in ruling on privilege-related disputes. *See FPL Group, Inc. v. Internal Revenue Service*, 2010 WL 890219, at *16 (D.D.C. Mar. 12, 2010) (granting in part and denying in part a motion to compel disclosure of certain tax documents maintained by the IRS, and noting that "an attorney's mental impressions do not become protected work product simply because they were expressed *concurrently with* some form of litigation"); *Gerber v. Down East Community Hospital*, 299 F.R.D. 29 (D. Me. Mar. 12, 2010) (ruling that non-attorney notes relating to witness interviews, counsel's correspondence with potential witnesses, and an itemized list of witness names are protected work product); *Smith v. Life Investors Ins. Co. of America*, 2009 WL 3364933 (W.D. Pa. Oct. 16, 2009) (rejecting assertion that articles under review by attorneys for purposes of providing legal advice were protected work product).

Second Circuit Declares That Policyholder Information Compiled by Insurance Agents Is Not Protected "Trade Secret" or Confidential Information

On May 11, 2010, the Second Circuit Court of Appeals ruled that policyholder information compiled by insurance agents does not constitute protected "trade secrets" or confidential information. *Nationwide Mutual Ins. Co. v. Mortensen*, 2010 WL 1853458 (2d Cir. May 11, 2010). The matter arose after a number of insurance agents terminated their exclusive agency agreement with Nationwide Mutual Insurance Co. In seeking employment with Nationwide's competitors, the agents allegedly revealed information contained in Nationwide's files, including information related to pricing, sales and commissions. The agents also allegedly shared computer print-outs from Nationwide's centralized computer system. As a result of this conduct, Nationwide filed suit against the agents, asserting various claims, including violations of Connecticut "trade secret" statutory law. The district court initially dismissed the trade secret claim, and set the remaining claims for trial, acknowledging uncertainty as to whether the policyholder information could classify as "confidential information." Prior to trial, however, the district court took the unusual step of dismissing, *sua sponte*, all of Nationwide's remaining claims.

On appeal, the Second Circuit affirmed the lower court's ruling that the policyholder information Nationwide sought to protect was "readily available from another source," thereby disqualifying it from "trade secret" status as a matter of law. *Id*. at *5. The court noted that it did not matter whether the disclosed information was derived directly from Nationwide's computer system or from policyholder files possessed by the agents. "It is not the medium that matters here, but whether the information itself was adequately protected—and it was not." *Id*. And because Nationwide did not dispute that the information was "readily available elsewhere," the court also rejected the notion that the policyholder information could constitute a "wider category" of protected "confidential" information, subject to a duty of loyalty. On a final note, the court affirmed the dismissal of Nationwide's remaining claims, finding that Nationwide had failed to establish the existence of damages as a result of the agents' alleged conduct.

The Second Circuit's ruling suggests that in some circumstances, information collected and stored on a centralized insurance company database may not necessarily be given "trade secret" or "confidential" status, even where such information is provided to agents on a lease-only basis. As the *Nationwide* court explained, materials such as customer lists "often lie 'on the periphery of the law of trade secrets and unfair competition.'" *Id*. at *4 (citations omitted).

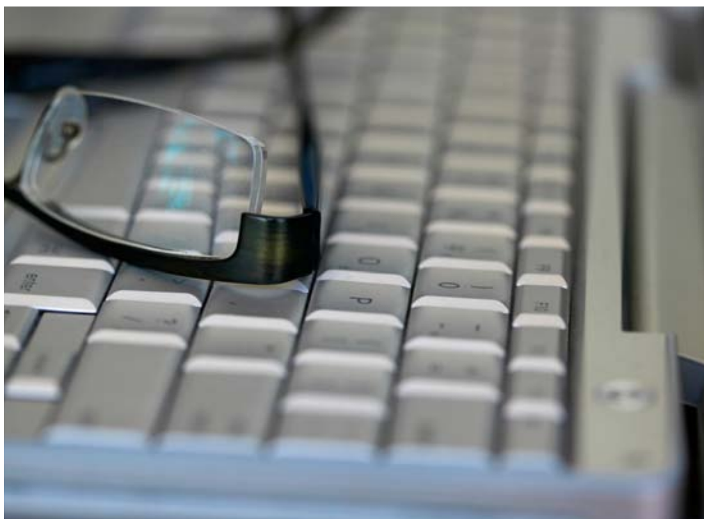
Discovery Alert:

New York State Unified Court System Issues Report on Electronic Discovery

Chief Judge Jonathan Lippman and Chief Administrative Judge Ann Pfau of the New York State Unified Court System recently released a report detailing the impact of electronic discovery in New

York state courts. Based upon expert interviews and extensive research, the Report discusses the unique challenges and escalating costs associated with the management of e-discovery. The Report opines that prior attempts to effectively control e-discovery have been largely unsuccessful. To that end, the Report issues specific recommendations aimed at improving judicial management over e-discovery. Report to the Chief Judge and Chief Administrative Judge on Electronic Discovery in the New York State Courts (Feb. 2010), *available at* http://www.courts.state.ny.us/courts/comdiv/PDFs/E-DiscoveryReport.pdf.

According to the Report, a critical element to the efficient management of e-discovery is early intervention and increased preparedness by both litigants and the court. As such, the Report proposes that during the initial stages of litigation (prior to and in connection with a Preliminary Conference) the parties actively educate themselves on a wide variety of e-discovery issues. In particular, the Report contemplates the use of "an insert sheet specifically targeting e-discovery issues" which would serve as the "minimum best practice" for Preliminary



Conference forms in New York state court. *Id*. at 15. Compliance with the proposed "insert sheet" would require counsel and clients to jointly and thoroughly examine e-discovery issues at the outset of litigation. Along similar lines, the Report recommends that new language be added to trial court rules, providing that counsel appearing at a Preliminary Conference be "sufficiently versed in matters relating to their client's technological systems to competently discuss with the court and opposing counsel all issues relating to e-discovery." *Id*. In certain cases, this may necessitate the presence of client representative or outside expert at the Preliminary Conference. The Report also outlines two long-term pilot projects directed at early awareness of and compliance with e-discovery obligations: (1) the use of initial disclosure documents which would identify specific information relevant to e-discovery productions, such as key IT personnel and the type of computer technology in use, and the extent to which preservation measures have been implemented to prevent the spoliation of evidence; and (2) the joint execution of e-discovery compliance affirmations, which would provide the court with information regarding potential e-discovery disputes, and the steps taken by the parties in efforts to resolve such disputes.

In addition to the proposed early intervention measures, the Report issues several other "key recommendations" directed at educating the judiciary on issues related to e-discovery, and improving the process whereby e-discovery disputes are resolved. Among the proposals included in the Report is the designation of court-appointed referees to serve as e-discovery specialists for purposes of supervision and resolution of e-discovery disputes.

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

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