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INTERNATIONAL INSURANCE OBSERVER

NEWS ON CONTEMPORARY ISSUES

WINTER 2002/03

DEAR CLIENTS AND FRIENDS:

We are pleased to provide the second issue of the Cozen O'Connor International Insurance Observer. For the first time, the Observer is being provided by e-mail and with a modified length to make it readily accessible. This issue of the Observer has articles on the new U.S. Terrorism Risk Insurance Act of 2002, punitive damages, and other subjects of great concern to insurers and reinsurers.

I am delighted to advise that Dick Allen has moved from the Seattle to the London office. Dick, who has more than thirty years of experience in representing Lloyd's Underwriters and London market insurers, will lead the London office as Regional Manager from 1st November. David Strawbridge, who founded the office four years ago, has returned to Philadelphia, where he will continue to be active in the growth of the London office and our international practice. The firm is grateful to David for putting together a talented team in London to further service our clients' international needs.

In our efforts to continually improve service and communication with clients across our 17 U.S. offices, we are establishing national insurance practice groups based on the successful model of our national subrogation practice. Moving forward into 2003, we have identified areas of substantive insurance practice, organised those practice areas into groups, and staffed the groups by matching clients' needs with our lawyers' experience and skills. The new insurance hourly practice department covers 33 substantive practice areas, and is organised into five practice groups. These practice groups are the Coverage, the Products Liability and Complex Litigation, the Environmental and the Insurance Regulatory Practice Groups, along with the International Practice Group that I have been asked to chair. Chris Kende of the New York office is the Vice Chair of this Group. The International Practice Group is devoted to serving the legal needs of insurers and reinsurers based outside of the U.S.

The Cozen O'Connor International Practice Group has 28 lawyers in the United States in offices from the east to west coasts and in London. Having just reviewed the client, professional and community service activities of the Group's lawyers, I can confirm that the Group is uniquely committed to representing international insurers and reinsurers. Over the next year, the International Practice Group hopes to introduce you to further areas of the Group's expertise and to provide better service.

SINCERELY,

ROBERT W. HAMMESFAHR

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TERRORISM RISK INSURANCE ACT OF 2002

The federal Terrorism Risk Insurance Act of 2002 was passed in the closing session of the 107th Congress and signed into law by President Bush on 26 November 2002. The Act is effective immediately and, for the next three years, essentially provides reinsurance to limit major terrorism losses to property and casualty insurers. The stated purpose of the Act is to establish a temporary programme to provide for a shared system of compensation by the federal government and insurers for insured losses resulting from acts of terrorism. This article highlights key provisions of the Act for insurers, although the implementing regulations remain to be promulgated.

In general, for the transition period until 1 January 2003 and for the three years thereafter, property and casualty insurers have 90% protection for the first $100 billion of losses in excess of a calculated deductible, and complete protection beyond that.

KEY DEFINITIONS AND APPLICABILITY

The key terms of the Act are defined in section 102. An "act of terrorism" must be certified by the Secretary of the Treasury, in concurrence with the Secretary of State and Attorney General, as meeting four specific requirements, including that it is a violent act of terrorism that endangers life, property or infrastructure, causing damage within the U.S., or to air carriers or certain U.S. interests outside the United States. An act of terrorism will not be certified where committed in the course of war declared by Congress (with the exception of coverage for workers' compensation losses) or for property and casualty losses that do not exceed $5 million in the aggregate. The decision of the Treasury Secretary as to certification is final and not subject to judicial review.

An "insured loss" is any loss resulting from an act of terrorism that is covered by primary or excess property and casualty insurance. The "insurer deductible" is calculated by the value of an insurer's direct earned premiums over the calendar year preceding the relevant Programme Year, multiplied by an annually rising percentage for the three Programme Years. Finally, "property and casualty insurance" means any commercial line of property and casualty insurance, including excess, workers' compensation and surety insurance. It does not include federal crop, private mortgage, financial guaranty, medical malpractice, health or life insurance and does not include reinsurance or retrocessional reinsurance.

ESTABLISHMENT AND OPERATION OF THE PROGRAMME

Section 103 of the Act provides for the establishment and operation of the Terrorism Insurance Programme. The Programme is established within the Department of the Treasury and administered by the Secretary of the Treasury, who pays the federal government's share of compensation for an insured loss. Participation in the Programme is mandatory for insurance companies that receive direct earned premiums for property and casualty insurance.

Effective immediately, each insurer must make coverage for "insured losses" available in all of its property and casualty policies. Such coverage may not differ materially from coverage for non-terrorism losses by its terms, amounts or other coverage limitations.

Following an insured loss, an insurer must make a clear and conspicuous disclosure to the policyholder of the premium charged for insured losses and the federal share of compensation for them, before processing the claim in accordance with appropriate business practices, and then

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submitting a claim to the Treasury Department for payment of the federal share of compensation.

The federal share under the Programme generally will be equal to 90% of the insured losses exceeding the insurer's annual deductible, up to $100 billion. If the aggregate insured losses exceed $100 billion in a Programme Year, the Secretary will not make payment for any portion that exceeds $100 billion. Furthermore, no insurer that has paid its deductible will be liable for payment of any amount in excess of $100 billion. The Secretary will determine the pro rata share to be paid by each insurer that incurs insured losses under the Programme. For losses exceeding $100 billion, Congress will determine the procedures and sources for any excess payments.

The Act also provides the recoupment of federal compensation by way of policyholder surcharges, up to 3% of premiums.

REINSURANCE COVERAGE PERMITTED

The Act provides at section 103(g) that it does not limit or prevent insurers from obtaining reinsurance coverage for insurer deductibles or insured losses retained by insurers. Further, purchase of reinsurance will not affect the calculation of federal deductibles or retentions. As for existing reinsurance agreements, the Act provides at section 106 that nothing shall be construed to alter, amend or expand the terms of coverage under any reinsurance agreement in effect on the date of enactment, and the language of such agreement shall determine its terms and conditions.

GROUP LIFE INSURERS

The Act provides at section 103(h) that the Treasury Secretary must conduct a study on whether adequate and affordable catastrophe reinsurance for acts of terrorism is available for group life insurers. If not, Secretary, in consultation with the National Association of Insurance Commissioners, shall apply section 103 of the Act to providers of group life insurance. The Secretary also is required to further study the effect of terrorism on the availability of other insurance coverages, such as personal lines.

CURRENT TERRORISM EXCLUSIONS NULLIFIED

Section 105 of the Act is important as it nullifies and voids any terrorism exclusion in a property or casualty insurance policy in force at enactment of the Act, and preempts any State approval of such terrorism exclusions. A specific regime for the reinstatement of terrorism exclusions under certain conditions is provided.

LITIGATION MANAGEMENT AND PUNITIVE DAMAGES

Section 107, which was hotly disputed prior to enactment, sets the exclusive procedures for private parties recovering damages and remedies arising from acts of terrorism. An exclusive federal cause of action now exists for property damage, personal injury or death arising out of an act of terrorism. All state causes of action for such damages are pre-empted. The substantive law in any such action, however, generally will be derived from the law of the State in which the act of terrorism occurred.

Within 90 days of an act of terrorism, the Judicial Panel of Multidistrict Litigation must designate one or more U.S. district court(s) to have jurisdiction over all claims. Notably, any punitive damages that are awarded shall not count as insured losses under the Act. Finally, the United States will have subrogation rights to any payment made by the federal government under the Act.

Both insurers and insureds of property and casualty business, along with their brokers and agents, need to be aware of this important Act. It catapults them into that territory loathed by insurers where they do not know what they do not know about a cover they have to give. However, they need to deal with the provisions of the Act as soon as possible. As an initial step with regard to existing policies, insurers need to identify the relevant policies and notify their insureds of the available cover and the

extra premium to be charged. All insureds' responses have to be monitored carefully.

With regard to future business, issues of compliance are paramount. An audit trail will need to be established to be able to submit required data to the authorities. Considering that the Act will continue developing "organically" insurers need to keep themselves completely up to date on reporting requirements, administrative procedures and processes to be applied.

Although the Act does not apply to reinsurance, reinsurers will also be wise to consider how their commercial dealings, their programmes and their own exclusions may be impacted especially covers through fronting arrangements or captives (who are more likely to base their capital levels on net premiums). War and Terrorism risk specialists will need to consider their Difference in Conditions covers and opportunities arising from the inapplicability of the Act to personal lines, domestic or uncertified terrorism and other events not encompassed by the present definitions of the Act.

Various areas remain unclear including how the nullifications inter-play with nuclear, chemical and biological risks provisions and the status of non-cancelable standalone policies. What is clear is that we have not heard the last word on the long term effects and operation of the Act and there are bound to be concerns about solutions which may depend on unreliable pricing models. All parties involved are well advised to examine the immediate consequences of the Act, comply as fully as possible and watch out for the regulations and guidelines to follow.

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INVESTMENT SCANDAL CLASS ACTION IMMINENT IN ENGLAND

Following on the heels of the corporate scandals in the U.S., insurers doing business in the UK are facing potential multi-billion dollar losses arising from the alleged mis-selling, mismanagement and fraudulent collusion scandal concerning investment products known as "Split Capital Investment Trusts" or "Splits". Up to 50,000 investors are thought to have lost money and it has been speculated that overall losses might be in the region of £12Bn ($18Bn). Professional Indemnity, Financial Institutions, D&O and E&O lines may be severely impacted upon.

Matters are still unravelling, however a class action is to be filed imminently in which plaintiff lawyers will be seeking some £30M in damages on behalf of 1000 investors. This is almost certainly the "tip of the iceberg" as the new breed of English class-action lawyers are reportedly inundated with enquiries from thousands of disgruntled investors in "Splits" as well as other similar products. These lawyers are trying to take advantage of the new rules that make class actions easier to bring. A new "conditional fees" structure (which allows lawyers to obtain an "uplift" of their fees if successful, normally and in big part recoverable from their losing opponents) allows such actions potentially attractive financing.

It is strongly alleged that Splits were marketed as particularly "safe" investments but have in the event cost investors billions. The collapse of the market in these products has been allegedly caused by a combination of falling markets, over-borrowing of money and alleged collusion between a group known as the "magic circle" who reportedly purchased stakes in each other's funds, to keep prices artificially high in order to attract more investors. The market for the products has been likened to a massive pyramid selling scheme.

First in the line-of-fire will be the brokers and financial advisers who allegedly mis-sold these products to ordinary investors. The brokers allege that they themselves were misled by the fund managers operating the Splits. It is unclear to what extent such Splits were held in unbalanced portfolia or the investors were not warned about the actual risks. It is also unclear where the "buck" may ultimately stop; however it has been suggested that an action may also lie against the statutory regulator for failing to monitor the market properly. What is clear is that regulators are now more active in fining financial institutions, which have been selling products without taking into account the risk aversion of particular clients. Unfortunately, this is likely to be cold comfort for insurers and reinsurers who will likely face very complex claims handling and subrogation issues for many years to come.

It is important to understand that Splits issue different types of shares that carry different degrees of return. It is reported that investors will allege that they were sold "safe" shares in the investment fund known as "zeros". Zeros were purportedly "safe" as they take priority over other shares in the event the trust had to be wound up. Importantly, zeros did not however take priority over bank debt. It is reported that the trusts borrowed massively to "gear" their funds to enable them to increase their apparent value. Of course, the more the funds borrowed from the banks, the more vulnerable the funds became to falls in the stocks underlying their holdings and hence the riskier the investments became.

The "zero" investors will reportedly allege that highly-"geared" funds should not possibly have been sold as "low-risk" in circumstances where the lender banks have first claim to the bulk of trust assets.

In addition to "low risk" zeros, investors typically purchased other classes or "riskier" shares in addition to the zeros upon which they anticipated dividends. The details vary from trust to trust; however, for example, holders of "income" shares would have anticipated to receive dividends on their shares and their original capital when a trust winds up. Income shares rank lower than "zeros" in the event of a wind-up. Given that the banks and zero shareholders must be paid first, it is alleged that in many cases the "pot" of cash will run out thus leaving "income" shareholders looking for substantial or even total losses on their income shares.

The full details and extent of the alleged scandal are yet to emerge, although it seems that banks, fund managers, brokers, independent investment advisers, and accountants could all be implicated (some of course to a lesser extent than others) in the allegations and the fall-out from litigation that might continue for many years to come.

Complicated claims handling and subrogation issues may well arise. Insurers and Reinsurers will need to monitor matters closely and ensure their positions remain protected. Initially they should be looking at their potential exposure which as can be seen from the above may vary enormously depending on the type of insureds.

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PUNITIVE DAMAGES RUN AMOK

The Supreme Court of the United States is set to hear argument on 11 December 2002 in an important case for the future of punitive damages. Specifically, the Court will determine the constitutionality of the $145 million bad faith punitive damages verdict in *State Farm Mutual Automobile Insurance Co. v. Campbell,* 122 S.Ct. 2326 (June 3, 2002). The *Campbell* case is unusual because the trial court reduced the jury's $145 million

punitive damages verdict to $25 million, but on appeal, the Supreme Court of Utah reinstated the jury's $145 million award. *Campbell v. State Farm Mutual Automobile Ins. Co.*., 2001 WL 1246676 at *2 (Utah 2001).

Is this another case of U.S. punitive damages run amok? Yes. The $145 million punitive damage verdict is by far the largest punitive damage award ever assessed in Utah. What conduct supports this record-breaking verdict? State Farm failed to accept offers to settle the wrongful death suit against its policyholder, Campbell, for payment of the $50,000 automobile liability policy limits. In the wrongful death case, the jury held Campbell liable for $185,849 in damages. State Farm refused to post an appeal bond in excess of its $50,000 policy limit. Also, defence counsel retained by State Farm to defend Campbell allegedly told Campbell that "you may want to put for sale signs on your property to get things moving" after the excess of policy limits verdict was rendered. An appeal was taken. Campbell lost on appeal, and State Farm then voluntarily paid the entire judgment including amount in excess of the policy limit. State Farm's conduct is not sufficiently egregious to properly support $145 million in punitive damages.

Why did the jury award $145 million in punitive damages? In short, the runaway verdict resulted from a failed trial strategy. State Farm's defence, like that of many punitive damage defendants, apparently focused at trial on obtaining a liability defence verdict. Unfortunately, the defence failed to take critical steps necessary to protect the company from a substantial punitive damage verdict. Because a focused and aggressive punitive damages defence was not prosecuted at trial, the necessary record on key punitive damage defences was not made. A strong punitive damages defence record is needed to obtain substantial post-verdict relief. Furthermore, the case was tried in only two phases, a mistake that in practice encourages juries to act upon their biases against large corporations with substantial out-of-state operations.

Will the U.S. Supreme Court use this case to assert control over the punitive damages problem? Unfortunately, as a technical matter, the record in this case is poor. Many key defences were not prosecuted or adequately preserved in the record, and thus the Court may hold that these defences are not available on appeal. Because of the state of the record, the Court could hold that its decision to hear the case was improvidently granted, concluding the case without rendering any substantive decision.

If this case is ruled upon substantively, its facts provide the more plaintiff-oriented Justices on the Court with the opportunity to expand plaintiffs' ability to use punitive damages to reach deeply into defendants' pockets. A plaintiff-oriented decision could, for example, expressly permit punitive damage juries to consider nationwide conduct in assessing punitive damages. Furthermore, a plaintiff-oriented decision could expressly permit juries to consider evidence of other acts, without putting any meaningful time or place limitations on the allegedly similar conduct that could be presented to a jury. Alternatively, more defence-oriented Justices could ignore inadequacies in the record and render a substantive decision that further limits punitive damages. If this takes place, it would signal the extreme frustration of the defence-oriented Justices with runaway punitive damage verdicts.

This article was written by **Lori S. Nugent**, Chair of the Firm's Punitive Damages Department and a member of the Chicago office. For more information concerning the *Campbell* case or punitive damages, please contact Lori at +1 (312) 382.3103 or Lnugent@cozen.com. Lori has been quoted as an expert on punitive damages in numerous publications including the New York Times, the Los Angeles Times, Best's Review, and Business Insurance. Listed in *A.M. Best's Review* of "People to Watch in 2002" based on her punitive damages work, Lori also is co-author of *Punitive Damages: A State-by-State Guide to Law and Practice* (West Publishing Co. 2001).

RECENT ENGLISH ASBESTOS DECISIONS MAY HAVE FAR-REACHING IMPLICATIONS BEYOND ASBESTOS CLAIMS

Recent English cases concerning asbestos claims may have far reaching implications for insurers. These developments follow the path of liberalisation adopted by the English courts in 1999 as part of the Woolf Reforms so as to permit greater access to justice for claimants.

FAIRCHILD V GLENHAVEN - RELAXING THE CAUSATION STANDARD FOR LATENT INJURY CLAIMS

Thousands of victims from asbestos related cancer will be compensated following the House of Lord's ruling in *Fairchild v Glenhaven*. In effect, the House created a special exception for mesothelioma sufferers in respect of proving the casual links between their illness and their employer, although the principle will no doubt be developed by analogy in other areas. Until this significant change in the law, claimants had to demonstrate that a particular employer's breach of duty led to the exposure of the asbestos fibre that caused the claimant's condition. This test was difficult to establish where employees were exposed to asbestos while working for more than one employer.

In effectively reversing centuries old tort law, the House held that: where Claimants could prove that an employer had *materially increased the risk* that employees would develop mesothelioma due to inhaling asbestos fibres, then the Claimants will be taken in law to have proved that the defendants *materially contributed to their illness* and hence be fixed with liability, notwithstanding the fact it is impossible to prove strict factual causation according to the traditional "but for test". The House held that a strict application of the "but for" test in this case gave rise to injustice and was inappropriate.

Whilst their ruling was intended to be limited to the particular causation problems posed by mesothelioma, where the House expressly recognised that a single exposure to asbestos can eventually cause the onset of mesothelioma and subsequent exposure do not necessarily make the condition worse, the new principle is likely to be adopted in regard to other types of latent injury claims. *Fairchild* will almost certainly result in claimants attempting to apply this more relaxed causation standard to other cutting edge scientific and medical claims, such as toxic tort injuries, CJD diseases and radiation injury.

LUBBE V CAPE PLC - OPENING THE DOOR TO CLASS ACTIONS AGAINST PARENT COMPANIES OF OVERSEAS SUBSIDIARIES

Until adoption in 2000 of the Group Litigation orders as part of the overhaul of the English Civil Procedure Rules, successful class actions were unusual in England for a number of reasons. The new Group Litigation rules radically streamlined English class-action procedure and, coupled with reforms to the way in which lawyers can work and charge, have led to a rapid growth in the number of class actions lodged. Some of the actions will be familiar to insurers as they concern matters such as asbestos claims and other product liabilities. Other recent class actions include personal injuries arising from defective tractors, abuse in residential homes, defective package holidays and the failure of contraceptive devices. It is anticipated that various group actions will soon be launched in respect of an alleged £12bn investment product mis-selling and mismanagement scandal.

Following the House of Lords decision in *Lubbe and Others v Cape Plc* [2000] 1 WLR 1545, it is now clear that proceedings, including group actions (i.e., class actions), can be brought in English courts against U.K.-based parent companies of multinational corporations, arising from the actions of their subsidiaries in other jurisdictions. In *Lubbe*, the House allowed a group action by 3000 South African asbestos victims against Cape plc, a British public limited company which had historical ownership interests in various South African

asbestos mining companies. It is notable that the South African claimants were never employees of the parent.

The *Lubbe* group actions were allowed to proceed against the parent as the House concluded that the South African legal system did not provide "another available forum which is clearly or distinctly more appropriate than the English forum." Thus, the House set the stage for multinationals to be sued in England on *forum conveniens* grounds because of the non-availability of funding (legal aid or contingency), legal representation, expert advice and established court procedures for group litigation. In practice, these requirements are most likely to be present in underdeveloped nations.

As part of its decisions, and without ruling on the merits, the House also recognised that a relevant issue "concerns the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries." This will certainly set the stage for other group actions to be brought in English courts against U.K. parent companies of multinationals alleging a breach of duty arising out of the parent's control over its subsidiaries or the possible existence of an independent duty to supervise the operations of its subsidiaries. The extent to which a door has been opened for direct actions against U.K. parent companies and their directors will depend on any future rulings made in these anticipated group actions.

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FISH FRAUD

The maritime department of the firm's Seattle office recently convinced a state appeals court to overturn a $4 million judgment that had been entered against cargo underwriters on a claimed loss of 24 containers of shrimp from Thailand bound for the U.S. The insured, after successfully concluding a very favourable five-container transaction with a Hong Kong based supplier, entered into a second and larger transaction to purchase 24 containers of shrimp C[ost] & F[reight] Thailand. The insured agreed to pay 80% of the purchase price on receipt of original bills of lading, but did not attempt to restrict the language employed by the ocean carriers to identify and describe the condition of the goods. When the ocean carriers received sealed refrigerated containers, they accepted the shipper's paper work and, as is customary, issued bills of lading claused "shipper's load, stow and count, said to count shrimp." The 24 containers were carried by seven different carriers, on 10 separate vessels, through six different ports, eventually arriving in Los Angeles over a three-week span.

On receipt of the first 17 bills of lading, the insured paid the required deposit. Before paying the deposit on the remaining seven containers, the first of the containers arrived in Los Angeles. Instead of the ordered shrimp, the containers were found to have boxes packed with ice and a slim sprinkling of shrimp on the surface near the doors. As boxes were removed, those in the interior containers were found to contain either only ice, or ice and a mixture of inedible fish. The containers' seals were all intact and there was no evidence of tampering with the doors. The insured promptly refused to pay the deposits on the seven containers still at sea and refused to pay the balance owed on the 17 containers that had arrived. The seller disappeared with the deposit money and never sued the insured for payment of the balance due on the 24 containers, despite its legal right to do so in a C&F shipment. International investigations to

learn the whereabouts of the shrimp, the packers, the producers, and the sellers were to no avail.

The insured made a claim against its Marine Open Cargo Underwriters, asserting a right to coverage on the basis that the bills of lading issued by the ocean carriers constituted *prima facie* evidence of the existence of the goods, and therefore, that a loss had occurred during transit. In response, to underwriters' contention that the goods had never been shipped and that the bills of lading did not constitute *prima facie* evidence of the contents of sealed containers, the insured argued that an "unexplained shortage" clause entitled it to coverage even if the ordered shrimp had not actually been packed into the containers.

The trial court denied underwriters' motion for summary judgment and granted judgment in favour of the insured. Underwriters hired our Seattle office to handle the appeal, where the Washington Court of Appeals reversed the trial court, ordering that judgment be entered in favour of underwriters.

In doing so, the appellate court concluded that an insured in a policy of marine insurance has the burden of proving that a covered loss occurred during the period of coverage. The court then ruled that an ocean bill of lading does not constitute *prima facie* evidence on the contents within a sealed container. It constitutes *prima facie* proof only of the weight of the container. Finally, the court ruled that the unexplained shortage clause operated to cover shortages of goods that were actually shipped, requiring proof of the shipment of the goods. In this case, however, the court concluded that the overwhelming weight of the evidence established that there was not a shortage of goods, but rather a substitution of goods, the purpose of which was to perpetrate a fraud on the insured. The court concluded by noting that the policy provided insurance against all risk of physical loss or damage to the goods, but was not a bond to guaranty to seller's promise to ship the goods that the buyer had ordered.

The decision was published by the court. *Coast to Coast v. Assurances Generales,* ___ Wash. App. ___, 50 P.3d 662 (2002). A petition for review to the Washington Supreme Court was filed by the insured. Review by that court is discretionary. This case is the third in a string of key victories by Cozen O'Connor's Seattle maritime lawyers for London insurers of marine risks, the others being *Wolstein v. Yorkshire Insurance Company, Ltd.*, 97 Wash.App. 201, 985 P.2d 400 (1999) (marine builders' risk) and *Kimta AS v. Royal Insurance Company*, 102 Wash. App. 716, 9 P.3d 239 (2000), *rev. denied*, 142 Wn.2d 1029 (2001) (marine open cargo/war risks, free of capture and seizure warranty).

The lawyers who handled these cases are **Dick Allen**, now of the Firm's London office, and **Chris Nicoll**, a member of the Firm's Seattle office. For more information on these cases or on maritime matters, please contact Dick at +44(0)20.7864.2065 or rallen@cozen.com, or Chris at +1 (206)224.1254 or cnicoll@cozen.com.

MOULD CASES REQUIRE AGGRESSIVE DEFENCE

Mould cases continue to proliferate in North America. Below are defence strategies in this area of ever-increasing exposure for insurers.

RECENT JUDGMENTS IN TOXIC MOULD CASES

The recent explosion in toxic mould lawsuits means that insurers are being asked increasingly to defend policyholders against bodily injury and property damage claims. Approximately 9,000 toxic mould lawsuits were filed in the United States and Canada in the last 10 years. Some of the awards in these cases have been significant. They include a $14 million judgment in Florida against a contractor for alleged toxic mould-related construction defects at a courthouse and a $1.4

million recovery by the owners of a Californian beachfront home from the former owner for personal injuries and property damage allegedly due to mould contamination. These awards were dwarfed by the *Ballard v. Fire Insurance Exchange* case last spring, when a Texas jury returned a $32 million verdict for a homeowner in a first-party bad faith coverage dispute against an insurer that allegedly mishandled a claim for toxic mould exposure.

Combating these lawsuits requires insurers and other toxic mould defendants to defend themselves aggressively.

TAKE ADVANTAGE OF LIMITATION PERIODS

A key defence being asserted by mould defendants is that the time for bringing a mould claim has expired under a particular state's statute of limitations. California, Florida and New York courts have held that the statute of limitations starts to run as soon as the adult plaintiff knew or should have known of the alleged negligence that caused mould, not later when the plaintiff is formally diagnosed with a mould-related illness.

As a result, personal injury claims against condominium associations, building owners and property managers are being dismissed summarily before trial on the basis of evidence supporting the statute of limitations defence. It is therefore advisable early in the litigation for a mould defendant to pursue discovery of evidence that may support this defence.

Some states have tolling statutes that extend the applicable period of limitations for certain claims brought by minors. Because minors may be more susceptible than adults to mould injuries, defendants should try to include minors in any agreement to settle claims brought by the parents.

CHOSE EXPERTS WITH GREAT CARE

Another important line of defence in mould cases involves the use of experts. Mould plaintiffs typically claim personal injury or property damage due to building-related defects. This often necessitates the use of a variety of experts for each individual case. The experts may include air-quality specialists, general contractors, architects, building engineers, ventilation engineers and remediation experts.

Additionally, medical experts, including those in the fields of neurology, psychology, immunology and pulmonology, are retained to prove that the plaintiff's medical problem was caused by the mould. There is a raging debate as to whether mould can cause some of the claimed medical problems. In any case, mould defendants, with the assistance of their own experts, should aggressively seek to link a plaintiff's medical symptoms with non-mould factors.

There are two general categories of experts: consultants and testifying experts. The advantage of retaining a consulting expert is that, unlike with testifying experts, communications between the attorney and the consulting expert are generally confidential. A consulting expert can educate defence counsel about technical and complex issues related to mould and can assist in analysing and attacking the plaintiff's case, including by advising how to challenge experts presented by the plaintiff. A mould defendant also must retain testifying experts to contest the plaintiff's case.

The trial judge acts as the "gatekeeper" to ensure that a testifying expert is qualified and that the testimony is relevant, reliable and of assistance to the court or jury in deciding the case. Therefore, it is critical that a defendant try to preclude testimony by a plaintiff's expert who is unqualified or that otherwise fails to meet that criteria. Toxic tort cases are often decided on expert testimony. Therefore, it is advisable to retain experts who not only are qualified and credible,

but who also can explain complex scientific and technical issues in a way the jury will understand.

OPPOSE CERTIFICATION OF CLASS ACTIONS

The recent increase in class action filings on behalf of large groups such as tenants, homeowners and workers, along with the potential for large awards to the class, presents one of the biggest threats to insurers and other mould defendants. For example, in 1999, a class action seeking damages in excess of $100 million was filed in California on behalf of 65 workers. The defendant employer allegedly failed to disclose the presence of toxic mould at two apartments that the workers had renovated. In 2001, yet another mould class action, *Garcia v. Regents of the University of California*, was filed in California on behalf of students living in a housing unit.

A successful challenge to a class action can significantly decrease the cost of defending a toxic mould claim and increase the odds of a reasonable, early settlement. The defendant in such a case should vigorously challenge class certification by moving to dismiss the class at an early stage in the litigation. The basis of the motion would be that, since the circumstances of each individual plaintiff must be debated in mould cases, certifying a class would lead to unmanageable litigation.

While this defence was used effectively in non-mould toxic-tort class actions in several states, it also succeeded in the California toxic mould class action case of *Wheeler v. Avalonbay Communities*. In that case, a Los Angeles court denied class certification last year to former and current owners of apartment units against the building owner, management company and others. The court agreed with the defendants that, because of the nature of the toxic mould claims involved, "individualised proof of the elements of liability and causation" necessarily defeated class certification.

In June last year, a New York court also denied class certification to more than 500 apartment residents in *Davis v. Henry Phipps Plaza South* (first of numerous related lawsuits). However, the court agreed to a joint trial of seven cases involving alleged injuries caused by mould exposure after finding that certain issues could be addressed properly only "in the context of a joint trial involving multiple apartments."

AGGRESSIVE DEFENCE ESSENTIAL

Clearly, insurers face a substantial and ongoing threat from mould litigation. The multimillion-dollar awards resulting from and posed by these suits mandate aggressive defence tactics that are not for the faint of heart.

To discuss mould claims or defence strategies generally, please contact **Josh Kantrow** at +1(312) 382.3149 or jkantrow@cozen.com.

FORUM NON CONVENIENS DISMISSAL OF U.S. CLAIMANTS IN LIMITATIONS OF LIABILITY SUIT

The firm's Seattle maritime department recently prevailed upon the U.S. District Court for the Western District of Washington to dismiss claims filed by U.S. citizens against the Canadian owners of a tug and barge involved in a fatal collision in Canadian waters.

In August 1999 a 40-foot pleasure craft imprudently crossed behind a tug that was towing a gravel barge in the waters of English Bay near Vancouver, British Columbia, Canada. The tug was displaying proper navigational lighting to warn other traffic that it was towing something astern. The tug was also operating in its lane within a designated Traffic Separation Scheme. Despite this, the operator of the pleasure craft, a U.S. citizen, crossed astern of the tug and came into contact with the tow cable. The pleasure craft capsized. Five people were killed and others injured.

Lawsuits were filed in Vancouver and in Washington state courts. Our lawyers filed a suit in federal court, seeking limitation of liability under the Limitation of Liability Act. In the petition, we gave notice that we intended to ask the court to apply Canadian law to the liability and damages issues and to seek dismissal of all claims under the doctrine of *forum non conveniens*. The federal court imposed a stay on the state court proceedings pending resolution of the federal case.

The federal court recently granted the tug owner's motion to dismiss all claims filed in the limitation proceeding, ruling that despite the citizenship of the U.S. claimants, Canadian law governed all issues arising out of a collision in Canadian waters, and that the so-called public and private interest factors weighed overwhelmingly in favour of a Canadian forum, where the litigation had significantly progressed to that point.

This marks only the second time in which a court has agreed to dismiss claims filed in a shipowner's limitation of liability case.

The lawyers who handled this case are **Chris Nicoll** and **Larry Altenbrun**, both of the Firm's Seattle office. For more information on the case or on maritime matters generally, please contact Chris at +1(206) 224.1254 or cnicoll@cozen.com, or Larry at +1(206) 224.1292 or laltenbrun@cozen.com

RECENT VICTORIES & NOTEWORTHY CASES

CYBERINSURANCE

Lawyers in the Technology Area of the International Group recovered $300,000 for London market insurers in settlement of one of the most complex patent disputes following litigation through a Markman hearing involving mapping software technology. Also, for a European insurer, lawyers in the Technology Area obtained a settlement of a claim with no payment by the insurer after intervening and promoting settlement. The dispute involved hotly contested theft of trade secrets and patent infringement allegations in the highly competitive area of semi-conductor wafer technology. When we were retained, the insured had incurred defence costs of more than $8 million, and the opposing party sought over $16 million in damages.

Advertising liability, media and technology, error and omission claims require depth in technology knowledge, speed and trial skills. Highlighting our leading role in this area, a new edition of our book, @ Risk, version 2.0, was issued in September by Reactions as a replacement for the 1999 @ Risk and is available from the publisher Reactions at their website. Ten Cozen O'Connor lawyers wrote the book, which provides a definitive guide to legal issues of insurance and reinsurance of internet, e-commerce and cyber perils.

Rob Hammesfahr and **Andy Katz** spoke at the opening of A.M. Best's E-Fusion Annual Insurance Technology Conference on the topic - The Surge in Technology Claims: Privacy, Errors and Omissions, Media, IP and Cyber Crime. In a spirited session with chief information officers of many insurers and their major vendors, the top ten pitfalls of internet liabilities were discussed. The presentation was the subject of a question and answer story entitled - "E-Quicksand" in the September issue of Best's Magazine.

REINSURANCE

Lawyers in our international reinsurance practice area recently obtained over $3 million for a French reinsurer. The dispute involved three separate reinsurance treaties that were designed to work together,

with more than 10 years of coverage at issue. We informed the arbitration panel that the reinsurer intended to obtain rescission of the contracts in their entirety, based on the cedent's documents obtained through document reviews. The reinsurer stood firm in demanding aggressive discovery, and the cedent collapsed after being confronted with the evidence obtained and the relevant law.

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