Vol. 17, #10 January 14, 2003

Commentary

2002: The Year's Ten Most Significant Insurance Coverage Decisions

Asbestos And The Property / Casualty Industry — The Year In Review

By
Randy J. Maniloff

[Editor's Note: The author is a shareholder at Philadelphia-based Christie, Pabarue, Mortensen and Young, P.C., where he concentrates his practice in the representation of insurers in coverage disputes. The views expressed herein are solely those of the author and are not necessarily those of his firm or its clients. The author expresses his sincere appreciation to Amy Trojecki, Esquire for her insightful editing. Copyright 2003, the author. Replies to this commentary are welcome.]

The Property / Casualty Industry — The Year In Review

The conclusion of last year's Top 10 cases article was that 2001, on account of the events of September 11th, was without a doubt the most unique year in the insurance industry's history.[1] Thankfully, 2002 did not hand the industry (or mankind, for that matter) a similar event. The year, however, was hardly unremarkable. While 2001 was defined for the insurance industry by a single event, 2002, in contrast, was death by a thousand cuts — not to mention that the wound inflicted by September 11th remains far from healed.

For example, in looking ahead to the insurance industry's prospects for 2003, Robert P. Hartwig, Ph.D., chief economist for the Insurance Information Institute, had this to say, "[F]ull recovery is proving to be a slow and difficult process as insurers continue to be battered by unrestrained jury awards, surging asbestos claims, soaring medical inflation, high catastrophe losses, the crisis in corporate governance, loss of critical capacity, a weak investment environment and, of course, the extreme risk of terrorist attacks."[2] Dr. Hartwig also noted that in 2002, despite the absence of a terrorist attack and large natural disaster, insurers will be paying out $1.06 for every dollar they take in. He stated that, "In the current investment climate, that is a big loser from the industry's perspective."[3]

Some might say that there is nothing noteworthy about an industry that exists to pay claims feeling pressure to pay claims. Moreover, the ups and downs of the financial markets has always been an integral component for determining insurers' success. But 2002 was exceptional.

The biggest business story of the year was the hodgepodge of various corporate scandals. Coming on the heels of the dot-com implosion, which had already led to significant exposure for D&O carriers, Enron, *et al.* was surely an unwelcome sight. Writing in its mid-year outlook for 2002, Standard & Poor's stated that the industry's reserves for professional liability lines (directors and officers, errors and omissions and fiduciary liability) "in no way resemble adequacy."[4] S&P may have been right. Six months after S&P's pronouncement, *The Wall Street Journal's* influential "Heard on the Street" column questioned whether big sellers of D&O insurance will be subject to reserve increases to pay claims from mounting corporate accounting scandals — both those that generate televised perp walks and less publicized ones.[5]

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

Corporate meltdowns, those caused by both scandal and old-fashion economic forces, have the potential to impact more than just D&O insurers. According to Moody's Investors Service Inc., property-casualty insurers hold $8.8 billion of corporate bonds (2.9% of the industry's surplus capital) whose issuers are considered "troubled." As the result of a weak economy, insurers face tremendous potential exposure from the sale of credit derivatives and a new form of surety contracts — used to back up complex business transactions, such as the delivery of oil and gas by Enron.[6] And while it is a Life & Health industry issues, and not P&C, the economic slump has also done considerable damage to insurers in the variable annuity business.[7]

The biggest political story of the year was the war on terrorism. Here too, insurance played a role. On November 26, 2002, the President signed into law the Terrorism Risk Insurance Act of 2002 (Pub.L. 107-297), making the insurance industry victorious in the drawn out battle over whether the federal government should serve as the insurer of last resort in the event of another large scale terrorist attack.[8] Despite the enactment of the Act, however, insurers still face significant potential exposure before the "government backstop" kicks in, especially if the coverage was not priced appropriately in the first place. What's more, the Act had immediate effect and served to make all existing terrorism exclusions null and void. Thus, before the industry starts to collect premium for its share of any terrorism loss (and how that premium should be calculated is a subject of wide-ranging opinion, with such challenging task coming at the same time as January 1st renewals), terrorism insurance is currently right where it was on September 10, 2001 — being provided gratis.[9]

Construction defect litigation continued to make big headlines in 2002, including a report that home builders in the western United States are curtailing construction because they either can not obtain liability insurance or can no longer afford such insurance. The source of the problem, builders say, is a dramatic increase in construction defect lawsuits. California's loss ratios (losses to premium) for contractors' "completed operations" liability was 2.139 in 1999 and 2.950 (preliminary) in 2000.[10] Compare these staggering figures with the property/casualty industry's overall loss ratios for 1999 — 1.079, 2000 — 1.105 and 2001 — 1.16.

Considering this, it is not surprising that, in 2002, the California legislature stepped in. On September 20th, California Governor Gray Davis signed SB 800 — commonly called the "Right to Fix" legislation — into law. In general, SB 800 is designed to solve the housing crisis by, among other things, giving builders the right to fix problems before lawsuits can be filed. Despite its well-meaning intentions, it would be wise to reserve judgment on whether SB 800 will actually succeed.[11]

And then there's mold. Ironically, something that thrives in dark and hidden places had the brightest light shone on it in 2002. The year saw a slew of regulatory activity surrounding the issue, as well as many new mold coverage cases being filed and decided. More about this below, as the Texas Court of Appeals decision in *Ballard* is among this year's Top 10 most significant cases.

A unique aspect of 2002 was that certain events likely led to an increase in the number of individuals who are now keenly aware that the macro problems of the insurance industry can have serious consequences on their daily lives. Health and homes are two very personal matters. So when people can not procure or afford homeowners' insurance on account of huge insurer losses in this line,[12] or discover that their physician of choice has retired or moved because of the medical malpractice insurance crisis, insurance all of a sudden becomes an issue on many Main streets, USA. While it is unlikely that this will soon cause *Mealey's* to become available at newsstands, there is no doubt that, after 2002, many more individuals now realize that the global aspects of the insurance industry can quickly trickle down to the personal level.

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

And, Of Course, Asbestos

Three of the ten insurance coverage cases profiled below as this year's most significant have enormous potential consequences for asbestos litigation — and, interestingly, two of the three had absolutely nothing to do with asbestos. Asbestos is indeed the weed of the insurance industry. It was a big year for asbestos, both as a subject of insurance coverage and underlying litigation (and whether these two aspects of asbestos are really separate is questionable).

It seemed like hardly a week went by last year without a new report being issued on the impact of asbestos on the insurance industry, the U.S. economy, or both. The consensus appears to be that, when all is said and done, the total cost for all asbestos claims will be between $200 and $265 billion.[13] There were several significant asbestos events in 2002, such as new bankruptcies of asbestos defendants,[14] an ongoing rift within the plaintiffs' bar over how to apportion settlement dollars between those with serious injuries and "unimpaired" plaintiffs,[15] a (pre-election) Congressional hearing on the potential for a legislative solution,[16] general speculation that Republican control of Congress may increase the likelihood of a legislative solution, the U.S. Supreme Court's failure to step-in and halt consolidated asbestos trials in Virginia[17] and West Virginia,[18] arguments held before the U.S. Supreme Court on asbestos claims under the Federal Employers Liability Act, with the decision potentially having a wider impact,[19] a Texas asbestos plaintiffs' lawyer being sanctioned for forum shopping,[20] insurers continuing to take large reserves for asbestos and questions being asked whether it is enough,[21] a slew of big global settlements making use of Section 524(g) of the U.S. Bankruptcy Code[22] — including ones involving Halliburton[23] and Honeywell,[24] a significant asbestos ruling in the United Kingdom,[25] a decision by a New York trial judge that asbestos plaintiffs in New York County must meet minimum medical criteria before their cases will be placed on an active court docket,[26] more suits being filed against insurers for alleged conspiracy,[27] and on and on and on.

A brief word about the rash of proposed global asbestos settlements, and the extent of insurance for payment of asbestos claims generally. Honeywell International Inc. stated that it intends to take a $900 million after-tax charge to settle approximately 200,000 asbestos claims involving its former North American Refractories Company Unit (Narco). In making this announcement, Honeywell stated that the $900 million was calculated *after anticipated insurance recoveries*, and that it has $2 billion in Narco coverage remaining. Honeywell also stated that insurers have become increasingly contentious about paying claims.[28] Many of the other proposed asbestos settlements also contain provisions about insurance recoveries.

It is understandable that any asbestos defendant, and especially one whose stock is publicly traded, would want to attempt to put the best possible face on a bad situation by announcing that it has a significant amount of insurance remaining to cover asbestos claims. However, unless there is agreement between the company and all of its insurers on any such limits-determining issues as "number of occurrences," characterization of claims, stub periods, non-cumulation clauses, treatment of multiple SIRs, the amount of non-asbestos products exhaustion and whether the "occurrence" and "aggregate" limits of liability in any multiple-year policies are annualized, it is likely that the amount of a company's remaining insurance coverage for asbestos is a matter of uncertainty. Given the incredible complexity of large scale asbestos coverage determinations, in conjunction with heightened shareholder scrutiny of corporate pronouncements and filings, it is not unreasonable to wonder if there are suits waiting around the corner by disgruntled shareholders of settling defendants, in the event that the amount of insurance ultimately recovered is less than management projected.

Despite the mouthful above setting out many of the asbestos events that took place in 2002, the most significant one was not included on the list. Rather, the watershed asbestos event of the year was the $975 million settlement of past and future asbestos claims reached in June between

The St. Paul Companies and Western MacArthur Company, under policies issued by USF&G to MacArthur's Western Asbestos Company unit.[29] First, a $975 million settlement between one insurer and one asbestos defendant is a tremendous sum of money. The real significance of the settlement, however, was not the huge amount of money, but events that came afterwards. Subsequent to the settlement, St. Paul and two top executives were named as defendants in a shareholder suit, alleging that St. Paul failed to adequately disclose the extent of the Western Asbestos claims.[30]

Also subsequent to the St. Paul — Western MacArthur settlement, insurers Hartford, Home and Argonaut were sued by Western MacArthur, MacArthur Company and Western Asbestos Company (collectively "Western MacArthur") and various asbestos plaintiffs with significant unpaid judgments against Western MacArthur.[31] The suit includes several causes of action, including the allegation that Home and Hartford improperly treated all past asbestos claim payments as being subject to their policies' products aggregate limits, when, in fact, the insurers were allegedly aware that not all past claims were subject to such limit. Thus, despite the fact that Hartford and Home advised Western MacArthur in 1987 that their policies were exhausted, Western MacArthur is now attempting to reallocate certain allegedly mischaracterized products claims. Their goal is to make additional limits now available for products claims and have non-products claims treated as not being subject to any aggregate limit.

The collateral litigation that followed the St. Paul — Western MacArthur settlement is evidence that, when it comes to asbestos, even entering into a settlement, or exhausting its policies, is no guarantee that an insurer has bought finality.[32] If Western MacArthur is successful in re-opening policies that were thought to have been exhausted fifteen years ago (or even if they are not), it is likely that other asbestos defendants, with the right set of facts, will go the same route. Copycat suits mirroring the St. Paul shareholder suit are possible as well. For this reason, the St. Paul — Western MacArthur settlement, and its fallout, was the most significant asbestos event of 2002.

To put the present state of the property/casualty industry into real numbers, consider the following. Alice Schroeder, a property-casualty insurance analyst at Morgan Stanley, has concluded that P&C companies are facing a $120 billion shortfall in claims reserves, with $55 billion attributable to asbestos and similar environmental reserves. Such total number is equal to about 80% of the premiums that commercial insurers collect in a year.[33] While Ms. Schroeder stated that, despite the size of the deficiency, she is "not predicting the onset of Armageddon,"[34] a recent editorial in *The Wall Street Journal* laid out a potentially opposite scenario, albeit, based on a different premise.[35]

In an editorial entitled "Doomsday and Reinsurance," *the Journal's* editorial board noted that European reinsurers had an especially grim year on account of terrorism losses, floods, asbestos and the equity markets, where they keep 30% of their reserves (compared to 4% for U.S. companies). Moreover, the editorial noted that European reinsurers also face risks in the credit markets, in the form of corporate bonds, surety bonds and credit derivatives. While noting that they are not seeking to be alarmist, *the Journal's* editorial board concluded that, given how inter-related the world's financial system has become, "financial problems in one part of the world can quickly spread across borders and hurt everyone. Problems for European insurers would surely echo through U.S. stock and bond markets."[36] It certainly isn't everyday that something as inside baseball as reinsurance (and European, no less) is being talked about in the mainstream press as a cause of potential economic "doomsday" in this country.

The Year's Ten Most Significant Insurance Coverage Decisions

While there is much that can be said about the financial aspects of the property/casualty industry in general, including analyst reports, asbestos studies and the numerous other macro evaluations that are published with frequency, the fact remains that when it comes to insurers and

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

money, it is the minutiae of individual claims that determine how much of the premium received an insurer is allowed to keep. On that score, this article will examine the ten most significant insurance coverage decisions in 2002.

Of course, to single out ten insurance coverage decisions as the year's "most significant," out of the thousands that were handed down, across dozens of different policy types, is an impossible task. So, to be more accurate, what follows are summaries of ten almost exclusively liability insurance coverage decisions — primarily from state Supreme Courts that reversed an intermediate appellate court — that address issues that have the potential to affect a significant number of future disputes between policyholders and insurers. The following cases are listed in the order that they were decided.

1. *Fuller-Austin Insulation Company v. Fireman's Fund Insurance Company, et al.*, Superior Court of California, County of Los Angeles, Case No. BC 116835, Statement of Decision as to Phase 1B, Issues 2-7 and 9, February 26, 2002.

In *Fuller-Austin Insulation Company v. Fireman's Fund Insurance Company, et al.*, the Superior Court of California was required to address the impact of Fuller-Austin's bankruptcy filing on its in-progress insurance coverage action. In 1994, Fuller-Austin filed a coverage action against its liability insurers to establish their obligations for claims brought against Fuller-Austin arising out of exposure to asbestos-containing products installed or removed by Fuller-Austin. In 1998, while the coverage litigation was in progress, Fuller-Austin filed for Chapter 11 bankruptcy protection.

While the court issued a 37 page decision, it is only a few lines of the opinion that have gotten all the attention. The court held that Fuller-Austin's confirmed bankruptcy plan "served to establish [its] liability for asbestos-related injuries, the quantum of damages to which each asbestos victim is legally entitled, and the procedure for satisfying the liability."[37] The court further held:

> Consequently, now that Fuller-Austin's liability has been established, Joint Defendants policies are implicated and they are required to pay 'all sums' for each allowed claim — the allowed liquidated value or some higher value established through arbitration or trial, subject to the terms of the policies. Additionally, Joint Defendants are required to pay the aggregate value of Fuller-Austin's asbestos liability to the extent that these damages can be ascertained. Whether the amount of these pending and future claims can be calculated with reasonable certainty is an issue for the jury in the next trial phase.[38]

In other words, the court held that the bankruptcy judgment has established Fuller-Austin's present liability to pending and future asbestos claimants. This amount will be determined in the next phase of the trial, using expert testimony based on statistical projections of asbestos claims that are anticipated to be brought against Fuller-Austin's bankruptcy trust over the next 40 years.

What makes *Fuller-Austin*, an unpublished trial court opinion, so significant? For that, turn to *The Wall Street Journal*, which chronicled the *Fuller-Austin* decision in its "Heard on the Street" column.[39] *The Journal* reported that, according to Fuller-Austin's attorneys, the company has in excess of $1 billion in asbestos liabilities. Thus, if the decision is upheld, Fuller-Austin's insurers may have to pay the remaining $400 million in policy limits significantly sooner than they would otherwise, if the claims were being handled outside bankruptcy. In other words, even if the remaining $400 million of Fuller-Austin's insurance limits would ultimately be paid anyway, such payments would have likely been made in a drip and drab manner over the course of many years, enabling the insurers to earn money on their money in the meantime. As one A.M. Best analyst put it in *the Journal*, "It will mean a whole lot less time value of money on their [claims]

reserves." Another analyst noted that if the case becomes influential, an insurer with significant asbestos exposure might have to incur a large one-time boost in its claims reserve, cutting its earnings.

The December 3, 2002 issue of *Mealey's Litigation Report: Insurance* reported that on November 13, 2002, the California Supreme Court denied the insurers' petition for review of the trial court's ruling and that a trial on the remaining issues is scheduled for January 2003.

2. *Pro Con Construction, Inc. v. Acadia Insurance Company*, 147 N.H. 470, 794 A. 2d 108 (2002).

In *Pro Con Construction, Inc. v. Acadia Insurance Compan*y, the New Hampshire Supreme Court handed the insurance industry a victory in the ongoing and increasingly popular debate over the extent of coverage provided to an "additional insured," an issue that often arises in the context of coverage for construction defects.

Pro Con, a construction manager, hired several subcontractors for a project, including Decorative Concepts, an interior painting company. Pro Con was an "additional insured" under the commercial general liability policy issued to Decorative Concepts, but "only with respect to liability arising out of your [Decorative Concepts] ongoing operations performed for that insured [Pro Con]."

A Decorative Concepts employee was allegedly injured when he slipped and fell on an icy sidewalk while walking from his work area to a coffee truck parked on the site's lot. The employee brought suit against Pro Con for negligently failing to keep the sidewalk clear of snow and ice. Pro Con sought coverage under the CGL policy issued to Decorative Concepts. The insurer denied coverage on the basis that the circumstances did not trigger coverage under the "additional insured" endorsement. A coverage action ensued and the trial court granted Pro Con's motion for summary judgment. The Supreme Court of New Hampshire reversed.

The supreme court explained that, to warrant coverage under the applicable policy language, "some causal nexus must link Decorative Concepts' ongoing operations and the injuries."[40] The insurer argued that the only connection between the injuries and Decorative Concepts' ongoing operations was the fact that the injured person was a Decorative Concepts employee. The New Hampshire Supreme Court agreed, holding as follows:

> Decorative Concepts' ongoing operations consisted of interior painting. The injuries did not occur while the employee was engaged in any task related to Decorative Concepts' painting operations, . . . or near Decorative Concepts painting operations. Therefore, no nexus exists between the painting operations and the injuries, and thus the required causal connection between the injuries and Decorative Concepts' painting operations does not exist.[41]

The *Pro Con* court rejected the insured's argument that "the policy language can be reasonably interpreted to include all claims that would not have arisen 'but for' the employee's presence on the general contractor's premises."[42] The significance of the *Pro Con* decision is that the court rejected the more liberal "but for" test for those seeking coverage as an "additional insured," notwithstanding that several jurisdictions with substantial experience examining this issue, such as California, Illinois and Texas, have adopted easier-to-satisfy causation standards.[43]

3. *Baker, et al. v. Health Management Systems, Inc., et al.*, 98 N.Y. 2d 80, 772 N.E. 2d 1099 (2002) and *Stifel Financial Corporation v. Cochran*, 2002 Del. LEXIS 393.

In decisions coming only weeks apart, the highest courts of New York and Delaware, arguably the most important in matters concerning corporate law, reached exact opposite decisions on an issue concerning director indemnification. While the cases are not insurance coverage decisions

per se, it is likely that they have important implications for director's and officer's insurers. And these days, anything that can impact D&O insurers is not going unnoticed.

In *Baker v. Health Management Systems, Inc.*, the New York Court of Appeals, answering a certified question from the Second Circuit, held that the director/officer indemnification provisions of the New York Business Corporation Law do not entitle a director to the recovery of fees incurred in seeking indemnification from his corporation for fees incurred to defend underlying securities fraud litigation (so called "fees on fees"). The Delaware Supreme Court reached the opposite conclusion in *Stifel Financial Corporation v. Cochran*, holding that indemnification for expenses incurred by a corporate director in successfully prosecuting an indemnification suit against his corporation are permissible under Delaware General Corporation Law. The decisions can be reconciled on the basis that each court was interpreting a different statute, and brought different public policy views to bear on the issue.

In *Baker*, the dissenting opinion noted that the majority's decision

> puts a finger on the scale in favor of a corporation and its controlling directors in cases where an individual director, or minority group of directors, may have a legitimate independent legal position at odds with what the corporation would wish to portray as a common defense. Here, had appellant joined the other defendants, he could have been indemnified for all of the expenses of the underlying action when the case was settled years later. Because he was exonerated at the outset — having successfully asserted his own meritorious defense — he is now saddled with the considerable costs of enforcing his right of indemnification.[44]

Given the recent changes in the law placing corporate officers and directors at risk of incarceration for their wrongful actions, they may very well have no choice but to assert defenses that are at odds with their corporation, no matter the potential personal expense. It is likely that, regardless of whether a state follows the New York or Delaware rule concerning indemnification of "fees on fees," an attempt will be made by whomever is paying such fees to seek recovery from their D&O insurer. Thus, while *Baker* and *Stifel Financial* are not traditional insurance coverage decisions, it is likely that the cases have served to raise a red flag for D&O insurers concerning the "fees on fees" issue. Indeed, in *Baker*, the dissenting opinion agreed with the majority on one thing. "[W]e certainly join the Majority's concluding observation that director's would do well to provide for such indemnification in bylaws, employment contracts *and insurance, if they can*."[45]

4. *Quincy Mutual Fire Insurance Company v. The Borough of Bellmawr, et al.*, 172 N.J. 409, 799 A. 2d 499 (2002).

In *Quincy Mutual Fire Insurance Company v. The Borough of Bellmawr, et al.*, the Supreme Court of New Jersey handed environmental consultants a significant blow to an opportunity for generating new business from their insurance company clients.

In *Quincy Mutual*, the Supreme Court of New Jersey addressed a nuance of New Jersey's well-settled continuous trigger theory. The coverage case involved insurers' obligations for a settlement reached by the Borough of Bellmawr with the EPA concerning contamination of the Kramer Landfill. The Borough deposited municipal waste into the landfill beginning on May 1, 1978. Century Indemnity issued a CGL policy to the Borough from June 18, 1977 to June 18, 1978. Century argued that its policy could not triggered, despite the fact that it was on the risk at the time that the Borough first began to deposit waste into the landfill.

Century's argument was based on the testimony of its expert that "leachate could have been discharged from the Landfill only when its waste reached 'field capacity,' which is the maximum

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

amount of liquid a landfill can hold before liquid seeps through the bottom and contaminates the groundwater. Based on [the expert's] calculations, including analysis of available rainfall data and the height of the landfill, it would have taken approximately 185 to 200 days from the time the Borough began dumping for the Landfill to reach field capacity."[46]

Thus, Century's argument (which went unrebutted) was that it was not possible for waste deposited in the landfill on May 1, 1978 to generate contamination of the groundwater before June 18, 1978, the date that the Century policy expired. In other words, Century's policy could not be triggered because it was off the risk before any groundwater contamination could have possibly begun.

While the Appellate Division agreed with this analysis, the Supreme Court of New Jersey reversed, concluding that Century's policy, because it was on the risk on the date of the Borough's initial depositing of toxic waste into the landfill, was triggered. The supreme court concluded that, "The contaminated leachate . . . is not the product of some accidental leak. On the contrary, it represents the natural and unavoidable progression of the original dumping, which must be deemed the 'exposure' that is the starting point of an 'occurrence' that triggers coverage."[47]

From a scientific perspective, Century may have been absolutely right that there was no groundwater contamination during its policy period. However, the continuous trigger is a "legal fiction," created for convenience, and the supreme court in *Quincy Mutual* was not about to see that change. The court put it this way, "Requiring 'each insurer (or a court) to calculate the date when pollutants that were dumped into a landfill most likely leached into the groundwater in order to determine the start of the continuous trigger period' complicates an already complicated area of the law."[48]

5. *Goodyear Tire & Rubber Company, et al. v. Aetna Casualty & Surety Company, et al.*, 95 Ohio St. 3d 512, 769 N.E. 2d 835 (2002).

In *Goodyear Tire & Rubber Company, et al. v. Aetna Casualty & Surety Company, et al.*, the Supreme Court of Ohio handed down a hugely important decision for the world of asbestos — and the case had nothing to do with asbestos.

Goodyear was a coverage action concerning claims for pollution clean-up at twenty-two sites. Noting that the parties agreed that there was continuous pollution across multiple policy periods that gave rise to covered occurrences, the Supreme Court of Ohio was called upon to address an issue on which the parties could not agree — the appropriate method for allocating losses across the triggered policies.[49]

The *Goodyear* court noted that the policies at issue contained language that supported both the "all sums" and "pro rata" methods. The language provided that the insurer, "pay on behalf of the insured *all sums* which the insured shall become legally obligated to pay as damages because of . . . property damage to which this policy applies caused by an occurrence" and defined "property damage" as "injury to or destruction of tangible property *which occurs during the policy period*."[50]

Relying primarily on *Keene* and *J.H. France*, and without explaining how it was reconciling the *property damage during the policy period* aspect of the policies at issue, the *Goodyear* court adopted the "all sums" approach with the "picked" insurer bearing the burden (but having the right) of obtaining contribution from other triggered primary carriers.[51]

In addition to its "allocation" decision, the *Goodyear* court also briefly addressed "drop down," noting that, "In the event that this policy does not cover Goodyear's entire claim, then Goodyear may pursue coverage under other primary or excess insurance policies. The answer to the question of what insurance may be tapped next is dependent upon the terms of the particular policy that is put into effect by Goodyear."[52]

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

It is likely that the geatest impact of *Goodyear* will be felt in the asbestos context, where losses almost invariably also trigger multiple consecutive policies. It is not uncommon for asbestos defendants — for various reasons — to have some holes in their insurance program. In a jurisdiction that has adopted a pro rata allocation method, such coverage gaps can saddle an insured with a devastating uninsured share, as well as leaving underlying plaintiffs with unfunded settlement shares. Policyholders confronting such a situation will likely rely on *Goodyear* as a basis to assert that they need not stand for any uninsured periods that are triggered for their asbestos claims. Given that Cuyahoga County, Ohio has emerged as one of the top five venues for asbestos filings,[53] it is easy to see why *Goodyear* is an extremely significant asbestos coverage decision, even if the case had nothing at all to do with asbestos.[54]

6. Dart Industries, Inc. v. Commercial Union Insurance Company, 28 Cal. 4th 1059, 52 P. 3d 79 (2002).

Like *Goodyear*, *Dart Industries, Inc. v. Commercial Union Insurance Company* has nothing to do with asbestos, but will likely end up making the most noise in that arena. In *Dart*, the Supreme Court of California examined what an insured must prove in order to establish its rights under a lost or destroyed insurance policy. The dispute involved CGL policies that were allegedly issued to Rexall Drug Company, a predecessor to Dart Industries. Dart was one of several pharmaceutical companies that manufactured and marketed DES, a synthetic estrogen used to prevent miscarriages. Dart was named as a defendant in actions brought by adult women whose mothers had ingested DES while the claimants were in utero, and who, when they reached child bearing age themselves, developed precancerous and cancerous lesions as well as deformities of their reproductive organs, resulting in infertility or miscarriages.[55]

Following settlements with certain of its insurers and a lengthy procedural history, the issue that made its way to the Supreme Court of California was whether Dart was entitled to defense and indemnity under a lost policy issued by Commercial Union from September 1, 1946 to September 1, 1951. The *Dart* court held that a claimant seeking coverage under an insurance policy that has been lost or destroyed without fraudulent intent on the insured's part has the burden of proving: (1) the fact that it was insured under the lost policy during the period in issue, and (2) the substance of each policy provision essential to the claim for relief. The insurer has the burden of proving the substance of any policy provision essential to the defense.[56]

The *Dart* court held that there was sufficient evidence to support the trial court's finding that the policy in question covered injuries arising from DES ingestion during the policy period, and that, therefore, Commercial Union had a duty to defend and indemnify Dart. In reaching this decision, the Supreme Court of California reversed the decision of the California Court of Appeal, which had held that Dart must prove the material provisions of the policy by introducing evidence of the specific language used in those provisions. Instead, the supreme court adopted the following requirement for insureds that are seeking coverage under a lost insurance policy:

> When, as here, it is undisputed that there was an insurance policy covering the relevant time period and that the policy was lost in good faith and not recovered after diligent search, there is no reason either in the law of contract or of evidence why secondary evidence that attests to the substance but not the precise language of an insurance policy should be insufficient as a matter of law to establish the insurer's contractual obligations.[57]

While an important issue in many lost policy cases is the court's determination of the proper burden of proof — "preponderance of the evidence" or "clear and convincing evidence" — such issue was not before the supreme court in *Dart*. The supreme court was constrained to apply a preponderance of the evidence standard, on the basis that it was the law of the case.[58]

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

There is no question that when it comes to securing coverage under a lost insurance policy, the Supreme Court of California adopted a less stringent standard than did the Court of Appeal. While *Dart* has been hailed as a significant victory for policyholders (the case was the subject of a front page story in *Business Insurance*[59]), the court noted that it was precluded from examining the appropriate burden of proof and substituting its own determination of the credibility of Dart's key witness for that of the trial court.

Dart's real significance will likely come into play in the asbestos context. As has been widely reported, the bankruptcy of large asbestos defendants has caused the need for plaintiffs to cast a wider net in their search for new asbestos defendants. Thus, many companies, usually smaller ones, are for the first time seeing their names on an asbestos complaint. First order of business for these new defendants will be to attempt to compile their complete coverage history. Given that this could mean finding policies dating back to the 1940's and 1950's, it is virtually inevitable that many of these new defendants will be confronted with lost policy issues (and their insurer likely telling them that the burden is on the insured to prove the policy).

While there are lots of ancient cases that address lost deeds, wills and notes, lost insurance policy case law from the modern era, and especially from state supreme courts, is not overly abundant. Thus, *Dart*, coming from the Supreme Court of California, is likely to be cited in many future lost policy disputes. And, while the *Dart* court was forced by the law of the case to apply a "preponderance of the evidence" standard, it is possible that, over time, that procedural nuance may get lost, leaving policyholders to erroneously contend that, in a lost insurance policy case, the Supreme Court of California *held* that a preponderance of the evidence standard applies.

Incidentally, another important lost policy-related decision in 2002, but with much less fanfare than *Dart*, was *Security Insurance Company v. Lumbermens Mutual Casualty Company.*[60] In *Security Insurance*, a Connecticut trial court held that pro-rata time on the risk was the appropriate method for allocating both defense and indemnity in the context of numerous asbestos bodily injury claims that triggered several successive years of policies as a result of a continuous trigger. Most significantly, for allocation purposes, the court required the insured to stand for several triggered years in which it had allegedly purchased insurance, but had lost or destroyed the policies. In 2002, the Connecticut Supreme Court agreed to hear *Security Insurance v. Lumbermens Mutual,*[61] making it perhaps the first supreme court to address the specific question whether an insured's obligation to stand for uninsured periods applies to long-expired policies that the insured can no longer locate. In other words, is the allocation outcome different when the insured can not locate a long-expired policy, as opposed to an insured that made a conscious decision not to purchase insurance?

7. *Freidline v. Shelby Insurance Company*, 774 N.E. 2d 37 (Ind. 2002).

In *Freidline v. Shelby Insurance Company*, the Indiana Supreme Court, which has twice declined to enforce the absolute pollution exclusion — even in the context of *traditional* environmental pollution — handed insurers a victory in a "bad faith" case.

In *Freidline*, the Indiana Supreme Court upheld the decision of the Court of Appeals that the absolute pollution exclusion did not apply to preclude coverage for bodily injury caused by exposure to carpet glue fumes. No surprise there, given that the Indiana Supreme Court has not applied the absolute pollution exclusion in the context of gasoline and hazardous waste.[62]

However, the supreme court reversed the appeals court's decision that the insurer had acted in "bad faith" in disclaiming coverage. The *Freidline* court was impressed by the insurer's effort to attempt to distinguish Indiana absolute pollution exclusion precedent from the instant matter. The insurer argued that the prior cases dealt with insureds whose business operations all involved the handling and use of toxic or polluting substances, so that the pollution exclusion would virtually negate coverage. On the other hand, Freidline, the insurer argued, owned an

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

office building — an operation that does not use toxic or caustic substances. The insurer also pointed out that the claim involved bodily injury, while the prior Indiana cases involved environmental clean-up.[63]

The *Freidline* court concluded that while it still disagreed with the insurer's decision to disclaim coverage under the absolute pollution exclusion, the insurer nonetheless had a "rational, principled basis for denying liability."[64] As such, the Indiana Supreme Court held that the insured failed to establish by clear and convincing evidence that the insurer breached its duty to act in good faith.[65]

While the *Freidline* court reached a pro-insurer decision, it also issued the following caution, presumably intended for any insurer that might read too much into the decision: "We do observe, however, that an insurer who, after making an independent determination that it has no duty to defend, fails to protect its interest by either filing a declaratory judgment action for a judicial determination of its obligations under the policy or hiring independent counsel and defending its insured under a reservation of rights, does so at its own peril."[66]

8. *King v. Dallas Fire Insurance Company*, 85 S.W. 3d 185 (Tex. 2002).

As the saying goes, everything is bigger in Texas. In *King v. Dallas Fire Insurance Company*, the Supreme Court of Texas made it clear that that includes the duty to defend. In *King*, the court addressed whether an employer's alleged negligent hiring, training and supervision constitute an "occurrence" under the terms of a CGL policy, even though an injury was caused by an employee's intentional conduct.

The facts are simple. Carlyle King was the sole proprietor of a construction company. While working at a job site, one of King's employees was confronted by an employee of another company about some missing and damaged electrical wiring. King's employee responded by assaulting the other employee, causing serious injury. The victim sued King, on the basis of *respondeat superior*, as well as for King's own negligence in hiring, training and supervising his employee. It was alleged that King was negligent in failing to run a criminal background check, in failing to determine whether his employee had a propensity for violence or in failing to provide any training on how to peaceably and responsibly handle work generated construction site situations.[67]

Dallas Fire argued that it did not owe King a duty to defend, on the basis that there was no "occurrence," because the actions of King's employee were intentional. King responded that he, himself, did not intend the injury, and that his only contribution to the injury was perhaps negligently hiring, training and supervising his employee. The trial court and Texas Court of Appeals both concluded that Dallas Fire did not owe King a duty to defend. The Supreme Court of Texas reversed.

The supreme court stated that in deciding if there was an "occurrence," it must determine from whose standpoint to view the injury-triggering event — the insured's, the victim's or the actor's. The *King* court noted that numerous courts nationally have addressed the issue of whether an employer's negligent hiring, training and supervision is an "occurrence" when an employee's intentional conduct causes an injury, and that they are generally split.[68] The court concluded that the policy language, case law and the history behind the CGL policy all support the conclusion that the insured's standpoint controls in determining whether there has been an "occurrence" that triggers the duty to defend.[69]

Adding to the significance of the *King* decision is that the Supreme Court of Texas reached the opposite conclusion as the Fifth Circuit, which, the court noted, uses a "related to and interdependent" rule to decide the issue. "According to this reasoning there would be no cause of action against the employer but for the employee's intentional acts and therefore there is no "occurrence" to invoke the policy."[70]

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

There are two winners in *King* and cases like it — Mr. King and the plaintiff in the underlying tort suit. Without this decision, the underlying plaintiff likely has a serious injury and no source for adequate compensation. King's employee likely does not present a source of recovery for the underlying plaintiff. From *his* perspective, the intentional conduct did not constitute an "occurrence." Thus, he has no insurance. Moreover, he may not have adequate assets worth pursuing. However, with King's insurer now obligated to defend King, the underlying plaintiff has succeeded in adding an insurance company as a "party" to the case. Even if the plaintiff may ultimately be unable to establish liability against King on his "negligent hiring, training and supervision" theory, the case is likely to settle before it gets that far. The plaintiff's counsel is able to use as leverage the insurer's responsibility for on-going defense costs, as well as the ever-present risk that he will be able to establish liability on King, in an effort to secure an insurer-funded settlement.

King is a common fact pattern. A person causes an intentional injury. As a result, any insurance that he may have had has likely been lost. And he may also have no assets worth pursuing. Thus, the victim is left with no possible source of adequate recovery for what may be a serious injury. Enter the "negligent bystander." In an attempt to bring a needed deep pocket into the case (or any pocket, for that matter) the plaintiff's counsel, like counsel in *King*, may add a negligence cause of action against a party that allegedly should have prevented the injury from happening in the first place.

For example, the owner of a bar will likely be accused of negligently failing to prevent the bar fight; parents, schools and religious organizations will likely be accused of negligently failing to prevent a sexual assault; and building owners will likely see a "negligent security" cause of action brought against them for anything tortious that happens to an invitee while on their premises. By pursuing such causes of action, even if they can not ultimately be won, the plaintiff in the underlying action may trigger an insurer's duty to defend, and, hence, succeed in adding a party to the case that actually has some money to make the case worthwhile enough to pursue. Is it gaming the system or zealous advocacy? It probably depends who you ask.

9. *Porterfield v. Audubon Indemnity Company*, 2002 Ala. LEXIS 331.

In *Porterfield v. Audubon Indemnity Company*, the Alabama Supreme Court, answering a Certified Question from the Middle District of Alabama, addressed the applicability of the absolute pollution exclusion in the context of a claim involving non-traditional environmental pollution. To give an idea how pervasive pollution exclusion decisions are, the *Porterfield* court noted that in the nine-month period subsequent to the District Court's certification order, almost 60 pollution exclusion cases were released by various state and federal courts.[71] So what makes *Porterfield* stand out in a crowded field?

In *Porterfield*, the court examined whether the absolute pollution exclusion bars coverage for claims for physical and mental injury allegedly suffered by children, as a result of allegedly inhaling and ingesting lead contained in paint, blinds, water, pipes and soil on premises under the control of the insured. Following a lengthy review of the history of pollution exclusion case law, both in Alabama and nationally, the *Porterfield* court held that the exclusion was inapplicable. The court stated, "[I]n the specific context of the separation of particles of lead paint from the interior surfaces of a residential apartment, the terms 'discharge,' 'dispersal,' 'release,' or 'escape' are reasonably susceptible to two or more constructions and there is reasonable doubt or confusion as to their meaning."[72]

In reaching its decision, the *Porterfield* court concluded that lead paint qualifies as a "pollutant" under the terms of the absolute pollution exclusion clause, agreeing with those courts that recognize it to be a chemical and an irritant and/or a contaminant. The court, however, found that whether such pollutant was discharged, dispersed, released or escaped was ambiguous. The

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

Porterfield court noted that the two prior Alabama federal court decisions enforcing the absolute pollution exclusion did not address the "discharge" element of the exclusion.

Porterfield is significant because it represents another example of a court that has relied on the "discharge" aspect of the absolute pollution exclusion to decline to enforce it, notwithstanding that the injury at issue was caused by a substance that the court concluded is a "pollutant." In reaching its decision, *Porterfield* followed to the letter the 2001 decision from the Pennsylvania Supreme Court in *Lititz Mutual Insurance Company v. Steely*, which also involved lead paint.[73]

Porterfield is also significant because this "discharge" argument has begun to appear in cases involving the applicability of the pollution exclusion to mold, a burgeoning aspect of coverage law. For example, in *Lexington Insurance Co. v. Unity/Waterford-Fair Oaks, Ltd.*,[74] a 2002 Texas federal district court decision, the insured argued that the pollution exclusion was inapplicable, citing the testimony of the insurer's mold expert that mold and mold spores exist at *de minimis* levels in all apartment environments. Thus, the insured argued that the mold that caused extensive damage to the apartments was simply already present and thrived because of the moisture and was neither released, discharged, or dispersed, and nor did it escape within the meaning of the policy language. While the *Unity/Waterford-Fair Oaks* court disagreed, this argument is likely to be made in future cases addressing the applicability of certain pollution exclusions in the context of mold claims.[75]

10. *Ronald Allison/Fire Insurance Exchange v. Fire Insurance Exchange/Mary Melinda Ballard and Ronald Allison*, 2002 Tex. App. LEXIS 8957.

In June 2001, a Texas jury awarded Melinda Ballard in excess of $32 million after concluding that her homeowners' insurer acted in an unfair, deceptive and fraudulent manner when evaluating a mold property damage claim. As most people in the P&C industry know, the *Ballard* decision generated tremendous publicity and is credited by many as a major factor in the current mold litigation craze. Late in the year, the Court of Appeals of Texas, Third District, Austin, rendered a decision in the *Marbury v. Madison* of mold litigation.

The bottom line is that the appeals court in *Ballard* reduced the jury's award from $32 million to $4 million and change, plus prejudgment and postjudgment interest, attorney's fees and statutory interest. It should be noted that the insurer also paid Ballard over $2,000,000 for her claims before trial. While one insurance trade association stated that the decision "should have a positive effect on the [Texas] insurance market and help quell the national mold hysteria,"[76] the decision may have no impact on mold litigation overall. The *Ballard* decision is long, multiple-issue and fact-intensive. In the interest of space, what follows is a brief discussion of why, despite the large reduction in the jury's award, the ultimate impact of the *Ballard* decision is questionable.

First, even with the $28,000,000 haircut that Mrs. Ballard took, when did a $6,000,000 *homeowners' claim* (plus interest and what could be sizeable attorney's fees) stop being a lot of money? Is that *really* going to make plaintiffs' attorneys pause before thinking that they can cash in on mold claims?

Second, the biggest potential exposure that insurers face with mold claims is that they make ideal "bad faith" claims.[77] In *Ballard*, the Texas Court of Appeals *affirmed* (albeit, grudgingly) the jury's award that the insurer failed to attempt in good faith to effectuate prompt, fair and equitable settlement of claims after its liability had become reasonably clear. Thus, the *Ballard* decision threw no cold water on the primary facet of mold claims that makes them so attractive to policyholder counsel.

The main reason for the reduction in the verdict amount was the appeals court's decision to reverse the jury's decision that the insurer's conduct was committed "knowingly or fraudulently."

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

Having done so, the appeals court was required to reverse the jury's awards for punitive damages ($12,000,000) and mental anguish ($5,000,000). Also, with the large reduction now comes a need to address whether the jury's $8.9 million award of attorney's fees is still reasonable. Thus, while it was the court's decision on the "knowingly or fraudulently" aspect of the case that led to the majority of the large reduction in the verdict, it is likely that most policyholder counsel are satisfied when they can simply prove "bad faith." On that point, Mrs. Ballard prevailed.

Third, while the *Ballard* court affirmed the decision of the trial court that precluded admission of Ballard's expert testimony on causation between exposure to mold and bodily injury, several other appellate courts around the country have upheld the admission of such testimony.[78] Until any scientific consensus on this controversial subject is reached, the bodily injury — causation issue is likely to remain one that is made on a case-by-case basis.

The biggest impact of the *Ballard* decision may be that it leads to a change in the media's reporting about mold, which, until now, has been decidedly hysteria-based. If so, it could result in mold skepticism growing in people's minds, with such skepticism accompanying them to jury duty. While it is easy to generate a headline saying that the large reduction in the *Ballard* verdict may signal a change in the mold epidemic, the ultimate impact of the case remains to be seen.

ENDNOTES

1. Randy J. Maniloff, "2001: A Case Odyssey — The Year's Ten Most Significant Insurance Coverage Decisions," *Mealey's Litigation Report: Insurance*, Vol. 16, Iss. 13 (2/5/02), at p. 33.

2. Chad Bray, "Insur 2003 Written Premiums Likely Up 12.3% — Trade Group," *Dow Jones Newswires*, December 19, 2002. See also Christopher Oster, "Insurers Continue to be Haunted by Past Messes," *The Wall Street Journal*, December 5, 2002 at C1.

3. John Hillman, "Report Shows P/C Market is Improving, But Recovery Period to Linger into 2003," *BestWire Services*, December 23, 2002.

4. Standard & Poor's, "U.S. Property/Casualty Insurance Midyear Outlook 2002: Negative Fundamentals Outweigh Higher Pricing," May 28, 2002.

5. Christopher Oster, "Chubb Might Need to Increase Reserves to Pay 'D&O' Claims," *The Wall Street Journal*, November 21, 2002, at C1.

6. Christopher Oster and Henny Sender, "Risky Business: Certain Bets May Come to Haunt Insurers," *The Wall Street Journal*, October 30, 2002, at C1.

7. Christopher Oster, "With Annuity Losses Mounting, Once-Powerful Player Bails Out," *The Wall Street Journal*, December 23, 2002 at A1. (The economic slump was at the heart of the decision by Swedish insurer Skandia Insurance Company to sell its variable annuity business to Prudential Financial, taking a $496 million loss on the sale.); See also Christopher Oster, "Why No One Wants an Insurer Under the Tree," *The Wall Street Journal*, December 24, 2002 at C1.

8. Others aspects of the terrorism-insurance issue saw activity in 2002. The World Trade Center "number of occurrences" litigation was active, with certain of the District Court's decisions in favor of the insurers now before the Second Circuit Court of Appeals. In addition, several courts concluded that the jurisdictional provision of the Air Transportation System and Stabilization Act, section 408(b), which confers on the Southern District of New York, "original and exclusive jurisdiction over all actions brought for any claim . . . resulting from or related to the terrorist-related aircraft crashes of September 11, 2001" does not apply to collateral insurance and reinsurance disputes. See *SR International Business Insurance Co. Ltd. v. World Trade Center Properties, LLC, et al.*, 2002 U.S. Dist. LEXIS

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

15272 (S.D.N.Y. Aug. 19, 2002); *Canada Life Assur. Co. v. Converium Ruckerversicherung (Deutschland) AG*, 2002 U.S. Dist. LEXIS 6924 (S.D.N.Y. April 19, 2002).

9. It would be well beyond the scope of this article to describe the nuts and bolts of the Terrorism Risk Insurance Act of 2002. There is no shortage of excellent resources on the internet that delve into the details of the Act. For example, see the excellent resource page set up by the Virtual University of the Independent Insurance Agents and Brokers of America at *http://vu.iiaa.net/Terrorism.htm.*

10. Robert Gavin, "Home Builders Face Insurance Woes," The *Wall Street Journal*, February 27, 2002, at B7. *The Wall Street Journal*, in its February 27, 2002 article, did not state that the loss ratios it was citing were specifically for contractors' "completed operations" liability. This was determined by independent verification with ISO.

11. SB 800 is extremely cumbersome, even for legislation. It's biggest shortcoming is that it does not address what is at the core of the construction defect/insurance crisis — unrealistic expectations by policyholders concerning what is intended to be covered under a CGL policy for damages arising in the course of their work.

12. Christopher Oster, "Hit with Big Losses, Insurers Put Squeeze on Homeowners," *The Wall Street Journal*, May 14, 2002, at A1.

13. Stephen J. Carroll, et al., "Asbestos Litigation Costs and Compensation, An Interim Report," Rand Institute for Civil Justice, 2002, at vii.

14. An October 2, 2002 letter from Jennifer L. Biggs, Chairperson of the Mass Torts Subcommittee of the American Academy of Actuaries to Senator Orrin Hatch, Ranking member of the Judiciary Committee, updating and clarifying her September 25, 2002 testimony to the Judiciary Committee, lists the following 2002 asbestos bankruptcies: A.P. Green; A-Best; AC&S; ARTRA (Synkoloid); Harbison Walker; Kaiser Aluminum and Chemical; North American Refractories/RHI; Plibrico; Porter Hayden; and Shook & Fletcher. In addition, add one more to that list. On August 19, 2002, Asbestos Claims Management Corporation (the former National Gypsum Corporation) filed a Chapter 11 petition for relief in the United States Bankruptcy Court for the Northern District of Texas-Dallas Division.

15. Greg Hitt, "Asbestos Makers, Litigants: Uneasy Allies," *The Wall Street Journal*, May 28, 2002, at A4; Susan Warren, "As Asbestos Mess Spreads, Sickest See Payouts Shrink," *The Wall Street Journal*, April 25, 2002, at A1.

16. A hearing before the Senate Judiciary Committee on "Asbestos Litigation" was held on September 25, 2002, with testimony coming from various stakeholders in the litigation. Transcripts of the testimony are available on the Judiciary Committee's website at *http://judiciary.senate.gov.*

17. *In re Hopeman Brothers, Inc.*, 569 S.E. 2d 409 (Va. 2002), cert. denied *Hopeman Brothers, Inc. v. Acker, et al.*, 2002 U.S. LEXIS 9202.

18. *Mobil Corp. v. Gaughan*, 563 S.E. 2d 419 (W.V. 2002), cert. denied *Mobil Corp. v. Adkins*, 123 S. Ct. 346 (2002).

19. *Norfolk & Western Railway Co. v. Freeman Ayers, et al.*, 122 S. Ct. 1434 (2002). See Susan Warren, "High Court to Weigh Two Key Issues of Asbestos Litigation," *The Wall Street Journal*, November 6, 2002, at B1.

20. On November 7, 2002, the court in *San Juan Costa, et al. v. Aluminum Company of America, et al.*, District Court of Nueces County, Texas, 28th Judicial District, No. 02-1053-A ordered counsel from the law firm of Provost & Umphrey to pay a $500,000 sanction for "forum shopping" with respect to the filing of asbestos cases, holding that counsel deliberately circumvented a local rule; in bad faith abused the judicial process; interfered with the administration of justice; and disrespected and threatened the integrity of the judicial system. See "Texas Judge Imposes $500,000 Sanction Against Plaintiff Firm For Forum Shopping," *Mealey's Litigation Report: Asbestos*, Vol. 17, Iss. 20 (11/15/02); Susan Warren, "Law Firm Is Fined $500,000 for 'Forum Shopping' in Texas," *The Wall Street Journal*, November 18, 2002, at B3.

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

21. Fitch Ratings, "Asbestos: Impact on the U.S. Insurance Industry," July 25, 2002; Joanne Wojcik, "Asbestos Funding Uncertain," *Business Insurance*, June 10, 2002, at 1. In 2002, Allianz increased its asbestos reserves for Fireman's Fund by $750 million and Chubb did the same in the third quarter, to the tune of $625 million. Christopher Oster, "Chubb, Hartford Take Asbestos Hits," *The Wall Street Journal*, October 31, 2002, at A6. Lorraine Gorski, "Allianz Adds $750 Million to Fireman's Fund's Asbestos Reserves, BestWeek Reports," *BestWire Services*, September 16, 2002.

22. An excellent article in the year-end issue of *Business Insurance* recaps the terms of several of the year's major proposed asbestos settlements, such as Halliburton, Honeywell, Babcock & Wilcox Co., Sealed Air Corp., the Combustion Engineering Unit of ABB and Shook & Fletcher Insulation Co. Douglas McLeod, "Several big deals struck to settle asbestos claims," *Business Insurance*, December 23, 2002/December 30, 2002, at p. 1. The article notes that London may object to some settlements if their documentation requirements for approving claims are not followed.

23. In December 2002, Halliburton Company agreed to pay $4 billion in cash and stock to settle more than 300,000 asbestos claims. As part of the deal, Halliburton will place its engineering and construction unit, Kellogg Brown & Root Inc., and DII Inc., its former Dresser Industries, Inc. unit, under bankruptcy court supervision. Susan Warren, "Halliburton to Pay $4 Billion in Cash, Stock in Settlement," *The Wall Street Journal*, December 19, 2002, at A3. The deal is considered controversial in that Halliburton intends to maintain ownership in the bankrupt units, leaving some bankruptcy experts to wonder if it is permissible under bankruptcy law. Susan Warren, "Halliburton Considers Novel Step for Asbestos Claims," *The Wall Street Journal*, December 13, 2002, at A3.

24. Andy Pasztor and Susan Warren, "Honeywell Plans to Take Charge of $1.9 Billion on Restructuring," *The Wall Street Journal*, December 20, 2002, at B4.

25. On June 20, 2002, the House of Lords held in *Fairchild v. Glenhaven & Others* that when an injured asbestos claimant has an evidentiary difficulty in proving the necessary casual link between the injury suffered and a breach of duty by more than one former employer, each of the former employers are jointly liable for the entirety of the loss. As for the potential consequences of the decision, see Carolyn Aldred, "Asbestos Ruling Raises Questions," *Business Insurance*, July 1, 2002, at 1. For a general look at European asbestos liabilities, see John Coppock, et al., "Asbestos Causes New Panic, But True Picture Unknown," *Dow Jones Newswires*, November 1, 2002.

26. Dave Lenckus, "Asbestos Claimants Must Meet Medical Criteria: N.Y. Judge," *Business Insurance Daily News*, *www.BusinessInsurance.com*, December 20, 2002.

27. *Harold Meninger, et al. v. The Travelers Insurance Company, et al.*, Circuit Court of Kanawha County, West Virginia, No. 02-C-1057 and *Tom Boson, et al. v. Union Carbide Corporation, et al.*, District Court of Nueces County, Texas, 148th Judicial District, No. 02-4151-E.

28. Pasztor and Warren, *supra.*, note 24.

29. "$975 Million Agreement to Settle Asbestos Claims Accepted by St. Paul Cos.," *Mealey's Litigation Report: Insurance*, Vol. 16, Iss. 30 (6/11/02), at p. 3.

30. *Brian Barry, On behalf of himself and all others similarly situated v. The St. Paul Companies, Inc., et al.*, United States District Court, District of Minnesota, No. 02-3825.

31. *Lila Mitchell, et. al v. Argonaut Insurance Company, et al.*, Superior Court of California, Alameda County, No. 2002067900.

32. In the October 2002 issue of *The American Lawyer*, Roger Parloff writes about the recent surge in asbestos claims being brought against insurers, alleging that such insurers conspired with the asbestos manufacturers to suppress information about the dangers of asbestos and to reduce and delay settlements. Parloff's article is aptly titled "Infinite Liability." Speaking of Mr. Parloff, if you only read one everything-you-need-to-know article about asbestos litigation, make it his that appeared in the March 4, 2002 issue of *Fortune* — "The $200 Billion Miscarriage of Justice."

33. Christopher Oster, "Property-Casualty Firms Show Big Shortfall in Claims Reserves," *The Wall Street Journal*, October 1, 2002, at C7.

34. *Id.*

35. Also in the "real numbers" category, consider the following question asked by "Heard on the Street" on December 30, 2002: "Prices are rising faster than they have in more than a decade. Aggressive competitors have been pushed into bankruptcy situations. Overly generous policy terms are becoming a thing of the past. So why aren't the stocks of property-casualty insurers soaring?" Christopher Oster, "Property Insurers' Shares are Casualty of Uncertainty," *The Wall Street Journal*, at C1.

36. Review and Outlook, "Doomsday and Reinsurance," *The Wall Street Journal*, November 29, 2002.

37. *Fuller-Austin* at 6.

38. *Id.* at 7-8.

39. Christopher Oster, "Insurers Could See Payout Timeline For Asbestos-Related Claims Shrink," *The Wall Street Journal*, April 23, 2002, at C3.

40. *Pro Con* at 110.

41. *Id.*

42. *Id.*

43. See *Acceptance Insurance Co. v. Syufy Enterprises*, 81 Cal. Rptr. 2d 557 (Cal. App. 1999); *Admiral Insurance Co. v. Trident NGL, Inc.*, 988 S.W. 2d 451 (Tex. App.—Houston 1999, writ den.); *Liberty Mutual Ins. Co. v. Westfield Ins. Co.*, 703 N.E.2d 439 (Ill. App. 1998).

44. *Baker* at 1106.

45. *Id.* (italics added).

46. *Quincy Mutual* at 501-502.

47. *Quincy Mutual* at 512.

48. *Quincy Mutual* at 513, quoting *Quincy Mutual*, 338 N.J. Super. at 412 (Wecker, J., dissenting).

49. The *Goodyear* court also addressed "late notice" and a form of the pollution exclusion. On that point, the court held that, "A pollution exclusion clause in an insurance contract that bars coverage for expected or intended 'emission, discharge, seepage, release or escape' of contaminating materials is triggered when the policyholder expects or intends that the contaminants will migrate from the location in which they were first deposited." *Goodyear* at 520. The court rejected the insurers' argument that the provision should be construed to mean that if the policyholder intentionally placed contaminants into a landfill, that act is enough to forfeit coverage. The other big allocation decision of 2002 came from the New York Court of Appeals in *Consolidated Edison Company of New York, Inc. v. Allstate Insurance Company, et al.*, 774 N.E.2d 687 (N.Y. 2002). However, because *Con Edison's* adoption of pro rata allocation was consistent with the widely-held view of allocation in New York prior to the decision (i.e., *Stonewall*), the case was not included herein.

50. *Goodyear* at 515. (italics added).

51. *Goodyear* at 516.

52. *Goodyear* at 517.

53. Stephen J. Carroll, *supra.,* note 13 at 36.

54. Of course, merely because there are a significant number of asbestos cases filed against a company in Ohio does not automatically mean that Ohio law will apply to a coverage dispute between such company and its insurer(s). There are numerous factors that can determine which state's law governs a coverage dispute.

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

55. *Dart* at 83.

56. *Dart* at 87-88.

57. *Dart* at 89.

58. *Dart* at 88, n.4. In her concurring opinion, characterized as being done *reluctantly* and *grudgingly*, Justice Brown noted that if the trial court should have applied a clear and convincing evidence standard, she would have affirmed the Court of Appeal's judgment "without hesitation." *Dart* at 94-95.

59. Roberto Ceniceros, "Insured wins in lost-policy ruling," *Business Insurance*, August 26, 2002, at 1.

60. 2001 Conn. Super. LEXIS 1387.

61. *Mealey's Litigation Report: Insurance*, Vol. 16, Iss. 43 (9/17/02), at p. 17.

62. *American States Insurance Company v. Kiger*, 662 N.E. 2d 945 (Ind. 1996) (gasoline); *Seymour Manufacturing Company, Inc. v. Commercial Union Insurance Company*, 665 N.E. 2d 891 (Ind. 1996) (hazardous waste).

63. *Freidline* at 42.

64. *Id*.

65. *Id*.

66. *Id.* at n. 6. (citation omitted).

67. *King* at 187.

68. *King* at 190.

69. *King* at 188.

70. *King* at 190-191.

71. *Porterfield* at [*32]. The *Porterfield* court also had this to say about the enormous body of case law addressing the pollution exclusion: "Our review and analysis of the entire body of existing precedent reveals that there exists not just a split of authority, but an absolute fragmentation of authority. Cases may be found for and against every issue any litigant has ever raised, and often the cases reaching the same conclusion as to a particular issue do so on the basis of differing, and sometimes inconsistent, rationales." *Porterfield* at [*33].

72. *Porterfield* at [*50].

73. In *Lititz Mutual Insurance Company v. Steely*, 785 A. 2d 975 (Pa. 2001), the Pennsylvania Supreme Court held that lead paint is unambiguously a "pollutant," citing its hazards as a cause of lead poisoning. However, notwithstanding the backdrop of its 1999 decision in *Madison Construction Company v. Harleysville Mutual Ins. Co.,* 735 A. 2d 100 (Pa. 1999), that the absolute pollution exclusion is clear and unambiguous — even in the context of non-traditional environmental pollution — the Supreme Court in *Lititz Mutual* declined to enforce the absolute pollution exclusion. The *Lititz Mutual* court held that "the continual, imperceptible, and inevitable deterioration of paint that has been applied to the interior surface of a residence is not a discharge ("a flowing or issuing out"), a release ("the act or an instance of liberating or freeing"), or an escape ("an act or instance of escaping")." *Lititz Mutual* at 982.

74. 2002 U.S. Dist. LEXIS 3594 (N.D. Tex).

75. For example, in *Leverence v. United States Fidelity & Guaranty*, 462 N.W. 2d 218 (Wisconsin App. 1990), occupants alleged that their homes retained excessive moisture within their exterior walls.

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com

This moisture allegedly promoted mold, mildew, fungus, spores and other toxins that were a continuing health risk and adversely affected the value of the homes. The Wisconsin Court of Appeals agreed with the decision of the trial court, which had ruled that the pollution exclusion did not apply because the cause of the bodily injuries and property damage was water vapor trapped in the walls, which, in turn, caused the growth of microorganisms. The trial court had held that "*no contaminants were released*, but, rather, formed over time as a result of environmental conditions." *Leverence* at 232 (italics added).

76. "TX Appellate Court Slashes Ballard Mold Award; Decision Could Bring Sanity to Mold Debate, Alliance Says," Alliance of America Insurers, *http://www.allianceai.org/documents/spotlight/Ballard.htm.*

77. Randy J. Maniloff, "Mold: The Hysteria Among Us, Exposure to Mold Causes Bad Faith Claims Against Insurers," *Environmental Claims Journal*, Vol. 14, No. 3, Summer 2002.

78. *New Haverford Partnership, et al. v. Stroot, et al.*, 772 A. 2d 792 (Del. 2001); *Mondelli v. Kendel Homes Corporation, et al.*, 631 N.W. 2d 846 (Neb. 2001); *Gifford, et al. v. Matejka*, 2001 Wash. App. LEXIS 1560. ■

© Copyright 2003 LexisNexis, Division of Reed Elsevier Inc., King of Prussia, PA • www.mealeys.com