

Commentary

Clear Eye For The Claims Guy:

5th Annual Look Back At The Year's Ten Most Significant Insurance Coverage Decisions

By
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An insurance claims manager says to a customer, "Thank you for your patronage, Mr. Smith. I wish we had twenty policyholders just like you." "Gee, it's nice to hear you say that," Mr. Smith replied. "But I have to admit, I'm kind of surprised. As you know, I make many claims and my premium payments are always late." "That's OK," the claims manager replied. "We'd still like twenty customers just like you. The problem is, we have two hundred."¹

Insurance is about one thing — claims. So it shouldn't come as a surprise to anybody that there

are a lot of them. One consequence of so many claims is that a large number of decisions addressing insurance coverage — likely in the thousands — are collectively issued each year by all levels of state and federal courts. I am once again grateful to *Mealey's Litigation Report: Insurance* for the opportunity to make the case for ten decisions from this huge pool from the year gone by that are likely to play a significant part in shaping the insurance coverage landscape in the years ahead.

As stressed in prior editions of this commentary, there is nothing scientific or democratic about the method used to select these cases. It is an entirely subjective process based generally on the following criteria. Each decision (i) is (for the most part) from a state supreme court or circuit court of appeal; (ii) addresses a coverage issue that has the potential to affect a large number of future claims; and (iii) either alters a previously held position or sheds light on a burgeoning issue.

The following were the ten most significant insurance coverage decisions in 2005 (listed in the order that they were decided):

General Agents Insurance Company of America v. Midwest Sporting Goods Company — Illinois Supreme Court put the kibosh on an insurer's attempt to recover defense costs following a declaration that the insurer had no duty to defend. But the California and Montana Supreme Courts disagreed. The

Texas Supreme Court allowed reimbursement in the indemnity context in *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools*.

State Fire and Tornado Fund of the North Dakota Insurance Department v. North Dakota State University — North Dakota Supreme Court addressed a key coverage issue concerning Hurricane Katrina five months before the first raindrop in New Orleans. It doesn't get much more prescient than this.

Nav-Its, Inc. v. Selective Insurance Company of America — New Jersey Supreme Court finally ended its silence on the absolute pollution exclusion. The high court limited the exclusion to the Swamps of Jersey. An absolute pollution exclusion honorable mention goes to *The Quadrant Corporation, et al. v. American States Insurance Company*, in which the Supreme Court of Washington told policyholders: How do you like them apples? Bonus case — Judge Alito on the sudden and accidental pollution exclusion.

Liberty Mutual Insurance Company v. Treeddale, Inc. — Liberty Mutual got back up on the horse after *Spaulding Composites* and sought to enforce its non-cumulation clause. Third Circuit's response: Money does not grow on *Treeddale*. Honorable mention to *Hirald v. Allstate Insurance Company* — New York Court of Appeals addressed a non-cumulation clause.

The Goodyear Tire & Rubber Co. v. Dynamic Air, Inc. — Minnesota Supreme Court ruled that a party insured by an insolvent insurer remained liable for any portion of the claim between the maximum amount available from the guaranty association (\$300,000) and the liability limit of the insolvent insurer's policy. This question will soon be decided by the New Jersey Supreme Court.

Chelsea Associates, LLC v. Laquila-Pinnacle — New York Appellate Division gave insurers one more reason to adopt ISO's recent additional insured endorsements that preclude coverage for an additional insured's sole negligence.

BP America, Inc. v. State Auto Property & Casualty — Supreme Court of Oklahoma issued a treatise on the distinction between the phrases "any insured" and "the insured" as used in policy exclusions.

Taurus Holdings, Inc. v. USF&G — Florida Supreme Court addressed whether liability policies issued to gun manufacturers were triggered for suits by municipalities. The court's comprehensive discussion of the phrase "arising out of" also made the decision significant.

Hooters of Augusta v. American Global Insurance Company — Eleventh Circuit fired the latest (but not most significant) shot in the see-saw battle over the availability of advertising injury coverage for junk faxes. The real shelling over this issue took place in Illinois.

The Ten Most Significant Insurance Coverage Decisions In 2005

General Agents Insurance Company of America, Inc. v. Midwest Sporting Goods Company, et al., 215 Ill. 2d 146, 828 N.E.2d 1092 (2005); *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 2005 Tex. LEXIS 418

In *Midwest Sporting Goods*, the Illinois Supreme Court answered whether an insurer that reserved its rights to do so was entitled to reimbursement of its costs to defend an insured in an underlying action in which it was later judicially determined that no duty to defend was owed.

General Agents Insurance Company of America (Gainsco) funded the defense of *Midwest Sporting Goods* in an underlying action brought by the City of Chicago alleging that *Midwest* created a public nuisance by selling guns to inappropriate persons. *Midwest Sporting Goods* at 1093. Gainsco funded the defense subject to a reservation of rights, specifically informing the insured that such rights "include[ed] the right to recoup any defense costs paid in the event that it is determined that the Company does not owe the Insured a defense in this matter." *Midwest Sporting Goods* at 1095.

Gainsco filed an action seeking a declaration that it did not owe *Midwest Sporting Goods* a defense in the underlying *City of Chicago* litigation and that Gainsco was entitled to recoup all defense costs paid to *Midwest's* counsel in the litigation. It was ultimately determined that Gainsco did not owe a defense to *Midwest* because the plaintiffs in the underlying litigation were seeking damages for economic loss and

not bodily injury. That decision was affirmed by the Illinois Appeals Court and Midwest did not seek further review. *Midwest Sporting Goods* at 1094–1095.

Having established that no duty to defend Midwest was owed, the trial and appeals courts also held that Gainsco, which reserved its right to recoup defense costs, was now entitled to their recovery. That issue made its way to the Illinois Supreme Court.

Midwest argued before the Supreme Court that the Gainsco policy contained no provision allowing for the recovery of defense costs. Gainsco's position was that this argument must fail because, following the courts' determination that no duty to defend was owed, there was no contract governing the parties' relationship. *Midwest Sporting Goods* at 1097.

The court acknowledged that other jurisdictions allow an insurer to recover defense costs from its insured where the insurer provides a defense under a reservation of rights, including the right to recoup defense costs, the insured accepts the defense and a court subsequently determines that the insurer did not owe a defense. *Midwest Sporting Goods* at 1100. Nonetheless, the Illinois Supreme Court determined to follow the minority position.

Among other cases, *Midwest Sporting Goods* relied on *Terra Nova Insurance Company v. 900 Bar, Inc.*, 887 F.2d 1213 (3rd Cir. 1989), in which the court explained that, despite what other courts may think, unjust enrichment is not an appropriate theory to support the recovery of defense costs:

A rule permitting such recovery would be inconsistent with the legal principles that induce an insurer's offer to defend under reservation of rights. Faced with uncertainty as to its duty to indemnify, an insurer offers a defense under reservation of rights to avoid the risks that an inept or lackadaisical defense of the underlying action may expose it to if it turns out there is a duty to indemnify. [footnote omitted]. At the same time, the insurer wishes to preserve its right to contest the duty to indemnify if the defense is unsuccessful. Thus, such an offer is made at least as much for the insurer's own benefit as for the insured's. If the insurer could recover defense

costs, the insured would be required to pay for the insurer's action in protecting itself against the estoppel to deny coverage that would be implied if it undertook the defense without reservation.

Midwest Sporting Goods at 1102, quoting *Terra Nova* at 1219-1220.

The Illinois Supreme Court also rejected Gainsco's argument that, following the lower courts' decision that no duty to defend existed, there was no contract governing the parties' relationship. The Supreme Court noted that the problem with this argument was that Gainsco was defining its duty to defend based on the outcome of the declaratory judgment action, yet an insurer's duty to defend arises as soon as damages are sought. *Midwest Sporting Goods* at 1103.

Despite its conclusion, the Illinois Supreme Court did not rule out the possibility of an insurer recovering defense costs under different circumstances: "Certainly, if an insurer wishes to retain its right to seek reimbursement of defense costs in the event it later is determined that the underlying claim is not covered by the policy, the insurer is free to include such a term in its insurance contract. Absent such a provision in the policy, however, an insurer cannot later attempt to amend the policy by including the right to reimbursement in its reservation of rights letter." *Midwest Sporting Goods* at 1103.

Whether insurers would take the Illinois Supreme Court's advice and include a provision in their policies that permits recovery of defense costs seems questionable. Any insurer with such a policy would be at a competitive disadvantage in the marketplace. And even if the policy's premium were reduced to address this problem, the insurer's ability to actually recover significant defense costs in an appropriate case would be by no means a guaranty. Recovery of defense costs would be tied to the insured's financial ability to re-pay. Thus, insurers would be accepting less premium, but with no assurance of realizing the benefit of their bargain. However, by noting that recovery of defense costs — even in the absence of a specific policy provision affording such right — is the majority view, *Midwest Sporting Goods* may still influence some insurers' views on this issue. Not to mention that three weeks before *Midwest Sporting Goods*

was decided, the Montana Supreme Court upheld an insurer's right to recover defense costs.² What's more, the California Supreme Court addressed the issue last year and held that an insurer was entitled to defense cost reimbursement.³

It certainly was a busy year for courts addressing reimbursement. In *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, the Texas Supreme Court, in a landmark decision,⁴ addressed the issue in the indemnity context. *Frank's Casing* involved coverage for a drilling platform fabricated by Frank's Casing Crew and Rental Tools that collapsed several months after being installed in the Gulf of Mexico. Frank's Casing had a \$1 million primary liability policy and a \$10 million excess policy from London companies and Lloyd's. The primary insurer retained counsel for Frank's Casing. The excess insurers issued reservation of rights letters, asserting that certain of the underlying plaintiffs (ARCO) claims were not covered. *Frank's Casing* at *2-*3.

After the second day of trial in the underlying action, Frank's Casing's in-house counsel contacted ARCO and requested that it make a settlement demand within the excess policy's limits. ARCO responded with a \$7.5 million demand, which Frank's Casing communicated to the excess underwriters, accompanied by a demand that they accept the offer, thus "Stowerizing" the excess insurers. *Frank's Casing* at *4.

Under *G.A. Stowers Furniture Company v. American Indemnity Company*, 15 S.W.2d 544 (Tex. App. 1929), an insurer's refusal to accept a settlement demand is unreasonable if (1) the claim against the insured is within the scope of coverage; (2) the demand is within the policy limits; and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. *Frank's Casing* at *14.

The excess insurers agreed that the case should be settled for this amount and stated that they would fund the settlement up to \$7.5 million, less any contribution from the primary carrier, if Frank's Casing expressly agreed that all coverage issues would be resolved at a later date. Frank's Casing refused and sent a second letter demanding that the excess insurers accept ARCO's settlement offer. The excess insurers

advised Frank's Casing that they would pay \$7.5 million to settle the case, less any contribution from the primary carrier, and seek reimbursement from Frank's Casing. And that's what they did. *Frank's Casing* at *4-*5.

The Texas Supreme Court's opinion addressing the propriety of the insurers' right to reimbursement of the settlement payment is lengthy and complex. In addition to the majority opinion, there are three concurring opinions. At its core, the *Frank's Casing* court held that, under the following circumstances, an insurer has a right to reimbursement if it has timely asserted a reservation of rights, notified the insured that it intends to seek reimbursement and paid to settle claims that were not covered: (1) when an insured has demanded that its insurer accept a settlement offer that is within policy limits, or (2) when an insured expressly agrees that the settlement offer should be accepted. *Frank's Casing* at *11.

The various opinions in *Frank's Casing* provided several rationales for the result. Even the majority opinion relied on more than one reason. The principal basis for the majority opinion was that the insured should not be allowed to use a *Stowers* demand to create coverage that otherwise did not exist. The court stated: "[D]enying a right of reimbursement once an insured has demanded that an insurer accept a reasonable settlement offer from an injured third party can significantly tilt the playing field. The insurer would have only two options. It could refuse to settle and face a bad faith claim if it is later determined there was coverage. Or it could settle the third-party claim with no right of recourse against the insured if it is determined there was no coverage, which effectively creates coverage where there was none." *Frank's Casing* at *16-*17.

Elaborating on its fairness theme, the majority in *Frank's Casing* stated:

When there is a coverage dispute and an insured demands that its insurer accept a settlement offer within policy limits, the insured is deemed to have viewed the settlement offer as a reasonable one. If the offer is one that a reasonable insurer should accept, it is one that a reasonable insured should accept if there is no coverage. The insured knows that

if the case is not settled, a judgment may be rendered against it for which there is no insurance coverage. *** Requiring an insured to reimburse its insurer for settlement payments if it is later determined there was no coverage does not prejudice the insured. The insured's substantial exposure to a judgment against it greater than the settlement amount has been eliminated, at its insistence, and by its own admission the settlement amount was reasonable. *** From the insured's point of view, it is in precisely the same position it would have been in absent any insurance policy, except that the insurer is now the insured's creditor rather than the injured third party.

Frank's Casing at *14-*15.

Frank's Casing is the kind of decision that causes policyholder counsel to have meltdowns. Of course, for insurers, it is equally top popping for "[i]nsurance coverage [to] be created where none exists merely because an insured could not afford to pay a judgment if the case were tried or to fund a settlement demand from an injured third party." *Frank's Casing* at *15.

Insurers are frequently confronted with offers to settle cases that make sense to all concerned, yet are clouded by uncertainties over the availability of coverage. *Frank's Casing* enables the insurer and insured to eliminate the risk of an excess verdict by settling the underlying action while maintaining the status quo concerning potential coverage. As the court stated, "From the insured's point of view, it is in precisely the same position it would have been in absent any insurance policy, except that the insurer is now the insured's creditor rather than the injured third party." *Id.* And, in fact, having the insurer and not the injured third party as its creditor may actually place the insured in a better position. After all, if there are uncertainties over the availability of coverage, an insurer may be more willing than the injured third party to use this dispute as the basis to reach a compromise with the insured. Thus, the insured's reimbursement obligation may be less than the amount paid by the insurer to settle the underlying action.

***State Fire and Tornado Fund of the North Dakota Insurance Department v. North Dakota State University*, 694 N.W. 2d 225 (N.D. 2005)**

There is little doubt that Hurricane Katrina was the story of the year for the insurance industry (and the nation as well). The Gulf Coast is promising to rebuild and insurance dollars stand to play a significant role in that process. How significant? It depends in whose crystal ball you are looking. The industry's actual exposure still remains anyone's guess. Towers Perrin's projection of "insured losses" runs as high as \$55 billion.

While Katrina's final price tag is a long way off, this much is certain — the nuts and bolts of the adjusting process is an arduous task. Each Hurricane Katrina insurance claim will have unique features, but a common one that has emerged in the first few months since Katrina made landfall is the inter-play between damage caused by wind and rain versus flooding. The issue is this: In the case of a hurricane, private insurance typically covers damage caused by wind and rain, but not flooding. Instead, flood damage is covered by policies issued by the National Flood Insurance Program — a government subsidized insurance program that is administered by FEMA.

However, it has been reported that only one-fifth of homes and businesses in Mississippi in the areas most at risk for flooding were covered by flood-insurance policies. In the case of Louisiana, just less than half of such properties were covered. Thus, many people that purchased homeowners and business property policies are nonetheless uninsured for their flood losses. The prospect of significant uninsured losses did not go down as easy as a Pat O'Brien's Hurricane. To the contrary, no time was wasted in bringing litigation to preclude insurers from relying on their policies' flood exclusions to disclaim coverage.

The most well-publicized of these several suits has been the one brought by the Attorney General of Mississippi. See *Jim Hood, Attorney General for the State of Mississippi v. Mississippi Farm Bureau Insurance, et al.*, Chancery Court of Hinds County, Mississippi, No. G2005-1642. The most ambitious is the one filed in federal court in Mississippi against several major oil companies, asserting that these companies are responsible for global warming, which allegedly created the conditions to enable Hurricane Katrina to form. Therefore, so the argument goes, the oil companies are responsible for the damage that Katrina caused. I am not making

this up. See *Ned Comer, et al. v. Nationwide Mutual Insurance Company*, United States District Court for the Southern District of Mississippi, No. 1:05-cv-00436. In still another suit it is alleged that the flood exclusion is inapplicable because the dominant and efficient cause of the loss was the breach of the levees in New Orleans. See *Gladys Chehardy, et al. v. Louisiana Insurance Commissioner J. Robert Wooley, et al.*, 19th Judicial District Court, East Baton Rouge Parish, Louisiana, No. 5364541. And just as this article was going to press it was reported that Mississippi Senator Trent Lott and his wife have sued State Farm seeking coverage for their Pascagoula home that was destroyed by Katrina. According to *The Wall Street Journal Online*, "The suit argues that the policy's definition of hurricane and its use of the term 'storm system' contemplates not only damage from hurricane winds, but also . . . 'storm surge.'"⁵

In the first-party property context, some courts have adopted the doctrine of "efficient proximate cause," which provides that if a covered peril causes an excluded peril, coverage is available even for the damage caused by the excluded peril. This is a principal argument being made by those seeking to preclude the applicability of the flood exclusion. For example, in the Mississippi Attorney General's suit, he alleges that the flood exclusion contradicts Mississippi common law, "which mandates that full coverage be provided if the proximate and efficient cause of the damage (i.e., hurricane wind) is covered . . . even if other 'non' covered causes also contributed to the loss." Hood complaint at ¶27. As Mr. Hood stated in a November 19th Op-Ed in *The New York Times*: "It's true that many of these policies exclude specific types of water damage unrelated to hurricane winds, like the damage caused by tidal waves or windblown rain. But to extend such exclusions to the damage caused by a storm surge, which is the direct consequence of hurricane winds, is unconscionable and illegal, at least here in Mississippi."⁶

One flaw in these various "efficient proximate cause" arguments is that homeowners and business property policies very likely contain language stating that flood damage is excluded, *regardless of how it was caused*. This is referred to as an "anti-concurrent causation" clause. One common example of such language is as follows: "We will not pay for loss or damage caused directly or indirectly by any of the following. Such

loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." See ISO Form CP 10 30 04 02.

So while there are no doubt various theories that can be advanced as to what caused Katrina's flood damage, such arguments will not obviate the flood exclusion under a policy that states that flood damage is excluded, regardless of the cause.

Another flaw in the argument that "efficient proximate cause" precludes the applicability of flood exclusions for Katrina claims was pointed out by the Supreme Court of North Dakota in *State Fire and Tornado Fund of the North Dakota Insurance Department v. North Dakota State University*. The North Dakota high court addressed coverage for damage caused by a severe rainstorm that struck Fargo in June 2000. Water on the surface of the ground outside the FargoDome began cascading through its loading dock doors and more than eight feet of water eventually covered the floors of the Dome. Significant amounts of water from the FargoDome made its way to a NDSU heating plant and computer center through a 4,295 foot-long steam tunnel. NDSU's insurers disclaimed coverage on the basis that the water damage was excluded by their policies' flood and surface water exclusions. NDSU challenged these determinations, arguing that the water lost its status as "surface water" when it entered the steam tunnel, heating plant and computer center.

The Supreme Court of North Dakota did not agree. Instead, the court held that "surface water does not lose its character as surface water simply by being artificially channeled underground." *North Dakota State University* at 233. After examining several courts nationally that have confronted the surface water issue, the North Dakota high court agreed with the lower court's reasoning:

Similar to the Smith case, this Court finds that the water that entered the FargoDome was surface water. Prior to entering the FargoDome, the rainwater accumulated in the Fargo area without forming a definite body of water. The subsequent traverse into the Steam Tunnel did not change the water's character by following a defined watercourse,

in part because the Steam Tunnel was never meant to carry water, unlike the trenches in Heller. It would be no different than if surface water had entered the first floor of a house and percolated into the basement through a stairwell. It would be absurd to classify a stairwell as a channel, or that the water's character had changed from surface water to water within a system. In the same fashion water entering the Steam Tunnel did not change the character of the surface water which inundated the FargoDome.

North Dakota State University at 232-233.⁷

Turning to the argument being made in the Katrina context, NDSU asserted that the lower court failed to consider all of the events in the chain of causation leading to water entering and damaging the steam tunnel, the heating plant and the computer center. According to NDSU, there were four "links" in the "chain of causation:" (1) the "rain;" (2) the "accumulation of surface water that occurred on and around the NDSU campus;" (3) the "water diversion into the basement of the FargoDome, which could not be flood or surface water;" and (4) the "non-excluded water that suddenly entered NDSU's otherwise dry, underground Steam Tunnel." NDSU claimed that a jury should have been allowed to determine which of these events was the efficient proximate cause. *North Dakota State University* at 234.

The Supreme Court of North Dakota did not agree and rejected the insured's argument that the lower court erred in failing to apply the "efficient proximate cause" doctrine. The court stated: "The fact that the water took 9 to 10 hours to reach the IACC [computer center] and Heating Plant is irrelevant. The length of time was merely a result of one continuous flowing of the water. *** The undisputed facts establish that surface water, an excluded peril under both insurance policies, was the only cause of water damage to the steam tunnel, the heating plant, and the IACC." *North Dakota State University* at 235.

In reaching this decision, the *North Dakota State University* court was persuaded by the Supreme Court of Washington's decision in *Kish, et al. v. The Insurance Company of North America*, 883 P.2d 308 (Wash. 1994). In *Kish*, the court examined claims by several

insureds against several insurers for damage to their homes when flood waters overtopped the protective dikes surrounding the Stanwood sewage lagoon in Stanwood, Washington. Each of the policies at issue contained an exclusion for loss resulting directly or indirectly from water damage, which was defined, in part, to include flood and overflow of a body of water. The coverage case went to trial on the issue of the "efficient proximate cause" of the damage to the plaintiffs' houses, which the jury concluded was "record breaking rainfall in the Stillaguamish basin."

The insurers argued on appeal that the trial court erred in ruling that rain was a distinct covered peril from the excluded peril of flood and, thus, sending the case to the jury for a finding of "efficient proximate cause" as between the two. The Supreme Court of Washington agreed. Reversing the trial court, the Supreme Court stated: "The efficient proximate cause rule applies only where two or more independent forces operate to cause the loss. 'When, however, the evidence shows the loss was in fact occasioned by only a single cause, albeit one susceptible to various characterizations, the efficient proximate cause analysis has no application.'" *Kish* at 311 (citation omitted). The *Kish* court held that rain and flood are not distinct perils, and, therefore, the trial court erred in sending the "efficient proximate cause" question to the jury. "We believe the average purchaser of insurance would expect that the term 'flood' would encompass rain-induced flood. Rain is a well-recognized and common part of a flood." *Kish* at 312.⁸

***Nav-Its, Inc. v. Selective Insurance Company of America*, 183 N.J. 110, 869 A.2d 929 (2005)**

When it comes to a review of the year's most significant insurance coverage decisions, the pollution exclusion is like eating potato chips — you can't have just one. That's why, in addition to this year's selection of *Nav-Its*, there is also an honorable mention being given to the Washington Supreme Court's decision in *The Quadrant Corporation, et al. v. American States Insurance Company*. And, just for fun, on the eve of his confirmation hearings, how could I resist taking a quick look at Judge Alito's 1991 opinion in *Northern Insurance Company of New York v. Aardvark Associates, Inc.* where he addressed that pivotal litmus test issue for Supreme Court nominees — the sudden and accidental pollution exclusion.

The New Jersey Supreme Court was in on the ground floor when it comes to the “sudden and accidental” pollution exclusion. Its controversial 1993 decision in *Morton International, Inc. v. General Accident Insurance Company*, 629 A.2d 831 (N.J. 1993) was one of the earlier state supreme courts to address the issue. But it has been a much different story for the “absolute” pollution exclusion. Curiously, despite the absolute pollution exclusion being the subject of hundreds of court decisions nationally since the early 1990s, and the New Jersey Supreme Court’s fondness for insurance coverage issues — especially environmental — the New Jersey high court has been a very late-bloomer on the subject.

In April, the New Jersey Supreme Court finally spoke up on the absolute pollution exclusion. In *Nav-Its, Inc. v. Selective Insurance Company of America*, the court held that the absolute pollution exclusion contained in a commercial general liability policy did not apply to preclude coverage for bodily injury caused by exposure to toxic fumes.

The facts of the case are simple. Nav-Its, a construction contractor, hired a subcontractor to perform painting, coating and floor sealing work at a shopping center. A physician with office space in the shopping center was allegedly exposed to fumes that were released while the coating/sealant work was being performed. As a result, he allegedly suffered from nausea, vomiting, lightheadedness, loss of equilibrium and headaches. He sought medical treatment and eventually filed suit against several parties, including Nav-Its. *Nav-Its* at 930.

Nav-Its sought coverage for the physician’s claims from Selective, its commercial general liability insurer. Selective disclaimed coverage. The suit by the physician was resolved in arbitration. Nav-Its filed suit against Selective, seeking a declaratory judgment that Selective was obligated to defend and indemnify it in the physician’s suit. *Id.*

At issue in the coverage action was the applicability of the pollution exclusion contained in the Selective policy, which, in general, precluded coverage for bodily injury arising out of an actual exposure or threat of exposure to the corrosive, toxic or other harmful properties of any “pollutants” arising out of the discharge, dispersal, seepage, migration, release or escape of such

“pollutants.” The policy defined “pollutants” as “any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” *Nav-Its* at 931-932.

The physician’s claim against Nav-Its — bodily injury caused by exposure to toxic fumes — was clearly precluded by the language of Selective’s pollution exclusion. However, just as a number of courts addressing the absolute pollution exclusion have done, the New Jersey Supreme Court approached the issue from a more global perspective, stating, “The central question presented in this case is whether we should limit the applicability of the pollution exclusion clause to traditional environmental pollution claims.” *Nav-Its* at 933.

The over-arching issue whether the absolute pollution exclusion applies solely to “traditional” environmental pollution claims, argued by many to mean leaching landfills or damage arising in other industrial contexts, or, alternatively, and more broadly, as the language of the exclusion states, to *any* solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste (i.e., “non-traditional” environmental pollution), has been the deciding one in numerous opinions addressing the exclusion. Courts have generally placed themselves in one of these two camps for purposes of interpreting the scope of the absolute pollution exclusion. In *Nav-Its*, the New Jersey Supreme Court placed the Garden State in the one that gives the edge to policyholders — limiting the applicability of the absolute pollution exclusion to traditional environmental pollution.

Borrowing from its earlier decision in *Morton*, the *Nav-Its* court relied on the exclusion’s drafting history to reach its decision: “[W]e are confident that the history of the pollution-exclusion clause in its various forms demonstrates that its purpose was to have a broad exclusion for traditional environmentally related damages. . . . Notably, we have not been presented with any compelling evidence that the pollution exclusion clause in the present case, when approved by the Department of Insurance, was intended to be read as broadly as Selective urges.” *Nav-Its* at 936-937. “[T]he available evidence most strongly suggests that the absolute pollution exclusion was designed to serve the twin purposes of eliminating

coverage for gradual environmental degradation and government-mandated cleanup such as Superfund response cost reimbursement.” *Nav-Its* at 936, citing Jeffrey W. Stempel, “Reason and Pollution: Correctly Construing the ‘Absolute’ Exclusion In Context and in Accord with Its Purpose and Party Expectations,” 34 *Tort & Ins. L.J.* 1, 29-32 (1998).

In adding itself to the list of states that limit the applicability of the absolute pollution exclusion to so-called traditional environmental pollution, the New Jersey Supreme Court stated: “The drafters’ utilization of environmental law terms of art (‘discharge, dispersal, . . . release or escape of pollutants’) reflects the exclusion’s historical objective — avoidance of liability for environmental catastrophe related to intentional industrial pollution.” *Nav-Its* at 937, citing *Motorists Mutual Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 681 (Ky. Ct. App. 1996).⁹

Prior to *Nav-Its*, the New Jersey Appellate Division had been split on the issue, with cases adopting both absolute pollution exclusion schools of thought. Naturally, the New Jersey Supreme Court stated that it “disapprove[d] of any contrary view expressed in our case law.” *Nav-Its* at 939. Given that absolute pollution exclusion claims come upon us as frequently as toll booths on the Garden State Parkway, *Nav-Its* is likely to affect a significant number of New Jersey claims in the years ahead.

The decision in *Nav-Its* could also pave the way for collateral coverage litigation in the form of choice of law disputes. Consider this. When it comes to the applicability of the absolute pollution exclusion to non-traditional environmental pollution, the Pennsylvania Supreme Court took the exact opposite approach as *Nav-Its*, holding in *Madison Construction Company v. Harleysville Mutual Ins. Co.*, 735 A.2d 100 (Pa. 1999) that the exclusion precluded coverage for bodily injury caused by exposure to fumes from a cement curing agent. Given that some New Jersey policyholders no doubt conduct business in neighboring Pennsylvania and vice-versa, the stage is likely set for policyholders and insurers in some pollution-related claims with these dual-state contacts to have different ideas about which state’s law applies.¹⁰

Besides relying on the exclusion’s drafting history, the *Nav-Its* court also noted that its conclusion was con-

sistent with the highest courts in California, Illinois, Massachusetts, Ohio, New York and Washington. *Nav-Its* at 938. That statement, made on April 7, included a citation to the Washington Supreme Court’s decision in *Kent Farms v. Zurich Insurance Co.*, 998 P.2d 292 (Wash. 2000). Three weeks later, the Washington Supreme Court decided *The Quadrant Corporation, et al. v. American States Insurance Company*, 110 P.3d 733 (Wash. 2005), which interpreted *Kent Farms* differently than *Nav-Its*.

In *Quadrant Corporation*, the Washington Supreme Court held that the absolute pollution exclusion precluded coverage for claims by a tenant in an apartment building that was overcome by fumes and became ill after a restoration company applied sealant to a nearby deck. The building owners had argued that, following the Supreme Court’s decision in *Kent Farms*, the pollution exclusion could not be applied to exclude coverage for an occurrence that was not a traditional environmental harm. *Quadrant Corporation* at 735.

In its 2000 decision in *Kent Farms*, the Washington Supreme Court held that the absolute pollution exclusion did not apply to claims for injury to a fuel deliveryman that was doused with fuel, including into his lungs and stomach, while attempting to re-attach a hose to prevent the spill of thousands of gallons of fuel. The *Quadrant Corporation* court was not persuaded that its decision was compelled by its earlier one in *Kent Farms*. Rather, the *Quadrant Corporation* court noted that, in *Kent Farms*, the deliveryman was not polluted by diesel fuel and the diesel fuel was not acting as a pollutant when it struck him.

Thus, the *Quadrant Corporation* court concluded that *Kent Farms*’s discussion of traditional environmental harms was limited by the facts of the case. *Quadrant Corporation* at 743. “Where the exclusion specifically includes releases or discharges occurring on the owner’s property or as the result of materials brought onto the property at the behest of the insured, and a reasonable person would recognize the offending substance as a pollutant, the policy is subject to only one reasonable interpretation and the exclusion must not be limited.” *Id.*

Based on the *Quadrant Corporation* court’s analysis of Washington law, it is now clear that the *Nav-Its*

court erred when it included *Kent Farms* on its list of other state high court decisions that were in agreement. Similar to the insured in *Quadrant Corporation*, *Nav-Its* erroneously read *Kent Farms* as limiting the absolute pollution exclusion to traditional environmental harms. *Nav-Its* at 939. But it was likely harmless error. If *Nav-Its* had been decided three weeks after *Quadrant Corporation*, instead of before, it would not have changed the New Jersey Supreme Court's decision.

There is nothing out of the ordinary about an absolute pollution exclusion decision that addresses coverage for bodily injury caused by exposure to fumes. That's a common pollution exclusion scenario. What makes *Quadrant Corporation* worthy of an honorable mention here is its lesson that, even after a state's highest court has issued an opinion that some would argue defines the boundaries of the absolute pollution exclusion and resolves the competing camps debate, it still may not be the last word on the subject.¹¹ When it comes to the absolute pollution exclusion, apparently there is no fat lady.

Lastly, look for fireworks on C-Span later this month when Supreme Court nominee, Judge Samuel Alito, goes before the Senate Judiciary Committee and is asked to explain his opinion in *Northern Insurance Company of New York v. Aardvark Associates, Inc., et al.*, 942 F.2d 189 (3rd Cir. 1991). Addressing the applicability of the sudden and accidental pollution exclusion to claims by the EPA for the recovery of CERCLA response costs to clean up waste disposal sites, Judge Alito held that "in accordance with the decisions of the Superior Court of Pennsylvania, . . . the exception for 'sudden and accidental' discharges applies only to discharges that are abrupt and last a short time. We reject Aardvark's argument that this phrase, under Pennsylvania law, includes other discharges that are unintended and unexpected." *Aardvark* at 193–194. Fasten your seat-belts. If there are grounds to filibuster the nomination, this could be it.

***Liberty Mutual Insurance Company v. Treesdale, Inc., et al.*, 418 F.3d 330 (3rd Cir. 2005)**

In *Treesdale*, the Third Circuit addressed a simple issue with enormous financial consequences: whether a non-cumulation clause contained in a series of Liberty Mutual umbrella policies served to reduce Liberty's

maximum potential exposure for an insured's asbestos bodily injury claims from \$26 million to \$5 million.

Treesdale manufactured an asbestos containing product that resulted in it being named as a defendant in several thousand suits brought by steel workers that were exposed to the open hearth part of steel mills. Liberty Mutual issued primary liability policies to *Treesdale* from 1975 to 1985. Each policy contained a bodily injury limit of \$500,000 per occurrence and in the aggregate. There was no dispute that all of these policies were exhausted by judgments or settlements and coverage was no longer available under them. *Treesdale* at 332.

Liberty Mutual also issued ten one-year umbrella policies to *Treesdale*, covering the same period as the primary policies. Eight of these policies contained a limit of liability of \$2 million per occurrence and in the aggregate. The last two policies were each subject to a \$5 million limit per occurrence and in the aggregate.

Each of the Liberty Mutual umbrella policies contained the following "Non-cumulation of Liability — Same Occurrence" provision:

Non-Cumulation of Liability — Same Occurrence — If the same occurrence gives rise to personal injury, property damage or advertising injury or damage which occurs partly before and partly within any annual period of this policy, each occurrence limit and the applicable aggregate limit or limits of the policy shall be reduced by the amount of each payment made by the company with respect to each occurrence, either under a previous policy or policies of which this policy is a replacement, or under this policy with respect to previous annual periods thereof.

Treesdale at 333. Liberty Mutual sought a declaration that, pursuant to this Non-cumulation of Liability — Same Occurrence provision, once it paid \$5 million, the highest limit of liability under any of the umbrella policies, it had no further duty to defend or indemnify *Treesdale*. Needless to say, *Treesdale* counter-claimed, asserting that Liberty Mutual was obligated to defend or indemnify it until the limit of liability of each and every umbrella policy was exhausted — a total of \$26 million in coverage. *Id.*

Before even reaching the potential applicability of the non-cumulation clause, the court was obligated to determine whether all of the asbestos claims arose from a single occurrence, as Liberty asserted, or multiple occurrences, as Treesdale asserted. Despite numerous arguments to the contrary by Treesdale, the Third Circuit affirmed the decision of the District Court that, based on *Appalachian Ins. Co. v. Liberty Mutual Ins. Co.*, 676 F.2d 56 (3rd Cir. 1982) and its “cause” test, in conjunction with the policy language, the asbestos claimants’ injuries stemmed from a common source, the manufacture and sale of the asbestos-containing products. Thus, “the injuries arising from this common source must be treated as resulting from a single occurrence.” *Treesdale* at 335, quoting the District Court’s opinion.¹²

Having concluded that all of the asbestos bodily injury claims constituted a single occurrence, the *Treesdale* court turned its attention to the non-cumulation clause. The court explained the math that Liberty Mutual argued was dictated by its non-cumulation clause:

[T]he Non-Cumulation provision ensures that if an occurrence has been covered by one policy in a line of successive policies issued by Liberty Mutual, then only one occurrence limit will apply. Thus, claims paid by Liberty Mutual for one occurrence under the 1975-1976 [umbrella] policy would correspondingly reduce the occurrence limit of the successive policies. The highest liability Liberty Mutual had under any one [umbrella] policy was \$5,000,000. Liberty Mutual claims that it has already paid \$5,000,000 in asbestos settlements and or judgments on behalf of Treesdale under the [umbrella] policies. Therefore, it contends that it has no further duty to Treesdale.

Treesdale at 339. The court accepted Liberty’s position without comment and then spent the remainder of its time addressing Treesdale’s various arguments against the applicability of the clause.

Treesdale argued that, because Pennsylvania law (*J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993)) allows the insured to choose under which of several triggered policies it is to be indemni-

fied, Treesdale can select the last policy first and then access additional policies in reverse chronological order. Therefore, there is never a “payment made under a previous policy,” and, hence, the non-cumulation clause is not applicable. The Third Circuit characterized this argument as “very creative” but “not very meritorious.” *Treesdale* at 340. “[I]t is simply not reasonable to think that the Non-Cumulation provision would allow recovery under all of the [umbrella] policies for the same occurrence simply by allowing an insured to engage in an alchemistic manipulation of the relevant chronology. Such an interpretation violates the provision’s very purpose and allows it to be read entirely out of the policy by an illogical and tortured reading of the policy’s provisions.” *Treesdale* at 341–342.

The Third Circuit also rejected each of Treesdale’s additional arguments. In response to the argument that none of the Liberty Mutual umbrella policies is a replacement for any other umbrella policy, the court held that “renewal” and “replacement” mean the same thing. *Treesdale* at 342-343. In response to the argument that the non-cumulation clauses are invalid “escape clauses,” the court held that while they limit the dollar amount recoverable, they do not eliminate coverage. *Treesdale* at 343-344. And in response to the argument that the non-cumulation clause frustrates Treesdale’s reasonable expectations, the court held that the reasonable expectations doctrine can not be invoked when the policy language is clear and unambiguous, which Treesdale conceded it was. *Treesdale* at 344-345.¹³ In the end, Treesdale was unable to convince the court that Liberty’s maximum liability under the umbrella policies was \$26 million and not \$5 million.

The ending was much different for Liberty Mutual in *Spaulding Composites Company v. Aetna Casualty and Surety Co., et al.*, 819 A.2d 410 (N.J. 2003), *cert. denied* 540 U.S. 1142 (2004), where the New Jersey Supreme Court declined to apply a non-cumulation clause in the context of a claim for environmental property damage that triggered multiple consecutive policy periods. There the court held as follows:

At the heart of a non-cumulation clause is the notion of a “single occurrence” with multiple year effects. Underlying that notion is the “single occurrence” language of the

clause that states that damage “arising out of continuous or repeated exposure to substantially the same general conditions shall be construed as arising out of one occurrence.” What the non-cumulation clause seeks to avoid is the “cumulation” of insurance policy limits when only one insured act or “occurrence” is involved. *Owens-Illinois* clearly rejected the idea that in an environmental exposure case, successive policies are triggered by a “single” occurrence. As Judge Brotman underscored in *Chemical Leaman, supra*, the New Jersey Supreme Court in *Owens-Illinois* held that under the continuous trigger theory it was propounding, progressive indivisible property damage *should be* treated as an occurrence within each of the years of a CGL policy. On its face, this language appears to direct treatment of progressive property damage as distinct occurrences triggering per-occurrence limits in each year of a policy. So viewed, the “single occurrence” language does not implicate “cumulation” of policy limits for damage arising out of a single occurrence and is therefore inapplicable by its own terms.

Spaulding Composites at 421-422.¹⁴

The New York Court of Appeals also had occasion to address a non-cumulation clause last year. In *Hirald, et al. v. Allstate Insurance Company*, 2005 N.Y. LEXIS 2698, New York’s high court, in its trademark brevity, held that only one policy out of three issued by Allstate to a landlord was obligated to provide coverage for an underlying claim for bodily injury caused by residential exposure to lead paint. Each policy was subject to a \$300,000 limit of liability and the underlying plaintiffs obtained judgments totaling approximately \$700,000.

While the Court of Appeals paused briefly before reaching its decision, it ultimately concluded that the policy language was controlling:

If each of the successive policies had been written by a different insurance company, presumably each insurer would be liable up to the limits of its policy. Why should plaintiffs recover less money because the same insurer

wrote them all? Some courts have held that successive policy limits may be cumulatively applied to a single loss, where the policies do not clearly provide otherwise. But here, the policies do clearly provide otherwise. The non-cumulation clause says that “regardless of the number of . . . policies involved, [Allstate’s] total liability under Business Liability Protection coverage for damages resulting from one loss will not exceed the limit of liability . . . shown on the declarations page.” That limit is \$300,000, and thus Allstate is liable for no more.

Hirald at *4-*5 (citations omitted).

Needless to say, it doesn’t take an actuary to figure out that non-cumulation clauses have an enormous impact on the amount of insurance dollars available to feed the asbestos beast. While they are not going to be at issue in every asbestos coverage case, *Treesdale* and *Hirald* certainly provide encouragement to any insurer that is in a position to apply a non-cumulation clause to limit the extent of coverage available for asbestos bodily injury (or any long tail) claims. However, Liberty Mutual certainly needs no encouragement when it comes to the enforcement of its non-cumulation clause.¹⁵

For a policyholder rebuttal to the applicability of non-cumulation clauses, addressed in the context of both *Treesdale* and *Hirald*, see Marc Mayerson’s blog — *InsuranceScrawl.com*. Insurance coverage wonks can get lost for hours in this extremely well-done and easy to navigate blog. But don’t just take my word for it. *The Wall Street Journal* recently featured InsuranceScrawl in its “Guide to the Blogs Insiders Read to Stay Current,” describing it as “influential” and a “must read.”

***The Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237 (Minn. 2005)**

In *Dynamic Air*, Goodyear sought to recover nearly \$2 million in damages for an alleged malfunction in a pneumatic conveyance system purchased from Dynamic Air, Inc. Dynamic Air had \$1 million in primary liability insurance and \$6 million in excess-umbrella insurance from Reliance Insurance Company. Shortly after Goodyear filed suit, Reliance became insolvent and the Minnesota Insurance

Guaranty Association (MIGA) took over Reliance's obligation to defend Dynamic Air against Goodyear's claims. *Dynamic Air* at 240.

With MIGA's authorization and without admitting liability, Dynamic Air made an offer of judgment in the amount of \$300,000, the statutory maximum available from MIGA. Dynamic Air then moved to dismiss Goodyear's claims as moot, asserting that the offer of judgment was made in the full amount of Dynamic Air's potential liability under MIGA. *Id.* Goodyear disagreed that the \$300,000 payment precluded it from pursuing Dynamic Air for the difference between that amount and the \$2 million in alleged damages.

With the parties' agreement, the district court certified the following (reformulated) question to the Minnesota Supreme Court:

Whether, under Minn. Stat. §60C.09, subd. 3, a party insured by an insolvent insurer may be liable to a claimant for any portion of the claim that constitutes the difference between the \$300,000 statutory maximum available from the Minnesota Insurance Guaranty Association and the liability limit of the insolvent insurer's policy.

Id.

While the language of the MIGA Act did not expressly answer the question, it was nonetheless the basis for the court's decision. Minn. Stat. §60C.05, subd. 1(a) provides that MIGA shall "be deemed the insurer to the extent of its obligation on the covered claims."

Dynamic Air interpreted this provision to mean that MIGA is deemed the insurer to the extent of the *insolvent insurer's* obligation on the covered claims. According to Dynamic Air, because the insolvent insurer's obligation on the covered claim is equal to the limits of coverage under the insurance policy, the statutory protection is measured by the limits of the policy with the insolvent insurer. Thus, Dynamic Air argued that once MIGA made its payment, the Act's limitation on "payment of a covered claim" necessarily ended the insured's liability to the claimant to the extent of the limits of the policy. *Dynamic Air* at 243. Goodyear had a different take on the interpretation

of Minn. Stat. §60C.05, subd. 1(a). According to Goodyear, "MIGA is deemed the insurer only to the extent of MIGA's obligation on the covered claims." *Id.* (emphasis in original).

The court agreed with Goodyear and concluded as follows: "Applying rules of grammar and giving the words of this section their common and approved meanings, we conclude that the word 'its' does not refer to the insolvent insurer, but rather to MIGA. Thus, the association is deemed the insurer only to the extent of MIGA's limited payment obligation of \$300,000." *Id.* (citations omitted).¹⁶

The *Dynamic Air* court also concluded that neither the MIGA Act nor its legislative history abrogated the common law rule that, because the loss sustained by the insured arises from the insured's dealings with a third party, nothing prevents the third party from pursuing its claims against the insured, even if the insurer is not capable of indemnifying the insured. "The only remedy available to the insured is to assert a claim against the assets of the insolvent insurer." *Id.* at 244-245. Lastly, in answering the certified question, the court made clear that it was not addressing any issue related to the amount of a claim in excess of the limit of liability of the policy issued by the insolvent insurer. *Id.* at 240, n.2.

The New Jersey Supreme Court is presently considering the issue in *Dynamic Air*. See *Johnson v. Braddy*, 869 A.2d 964 (N.J. Super. App. Div. 2005), *appeal granted* 875 A.2d 952 (N.J. 2005). The New Jersey Appellate Division reached the same conclusion as the Minnesota Supreme Court: "In view of our State's strong public policy of affording injured parties an opportunity to recover the full amount of their damages, we believe that if the Legislature had intended to immunize tortfeasors from liability for damages in excess of the Guaranty Association's \$300,000 maximum liability, it would have included a provision in the Guaranty Act expressly stating this intent." *Braddy* at 967. The *Braddy* court noted that only a handful of courts nationally have addressed this issue, including, coincidentally, the Minnesota Court of Appeals in a 1993 opinion that reached the opposite conclusion. *Braddy* at 966, n.3, citing *Minnesota Mining & Manufacturing Co. v. H&W Motor Express Co.*, 507 N.W.2d 622 (Minn. Ct. App. 1993). Obviously, the continuing validity of *H&W Motor Express* is now in doubt.

***Chelsea Associates, LLC, et al. v. Laquila-Pinnacle, et al.*, 21 A.D.3d 739, 801 N.Y.S.2d 15 (2005)**

When it comes to coverage for additional insureds, it's the oldest story in the book. A subcontractor is obligated by agreement to name the general contractor as an additional insured under the subcontractor's commercial general liability policy. The subcontractor complies. An employee of the subcontractor is later injured on the worksite and brings suit against the general contractor for failure to maintain a safe premises. The general contractor seeks coverage as an additional insured under the subcontractor's policy. The subcontractor's insurer declines coverage because it asserts that the general contractor's liability clearly did not arise out of the subcontractor's work, as required by the additional insured endorsement. Coverage litigation ensues, often brought by the general contractor's own insurer seeking to shift its liability to the subcontractor's insurer. The insurer for the subcontractor frequently loses this case because the court concludes that coverage for the general contractor, as an additional insured under the subcontractor's policy, is not precluded by a finding of negligence (even sole negligence) on the general contractor's part.

The number of cases that follow this pattern are too numerous to count. While last year's decision by the New York Appellate Division in *Chelsea Associates, LLC v. Laquila-Pinnacle* is simply another one that can be added to this long list, its timing makes it significant.

First, a quick look at *Laquila-Pinnacle*, followed by the timing issue. *Laquila-Pinnacle* was a concrete subcontractor that had been hired by Turner Construction Company, the general contractor on a high-rise apartment project. As required by its contract, *Laquila-Pinnacle* procured general liability insurance naming Turner as an additional insured. A laborer employed by *Laquila-Pinnacle* commenced an action against Turner, among others, for injuries sustained when, en route to his work, he tripped on plywood being used as a temporary ramp near the entrance to the job site. *Laquila-Pinnacle* at 740.

The additional insured endorsement contained in *Laquila-Pinnacle's* policy was a common one and provided as follows:

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" performed for that insured by you or on your behalf.

Laquila-Pinnacle at 741.

The majority concluded that coverage for Turner as an additional insured was afforded under this coverage grant. The court stated: "It is further undisputed that [Laquila-Pinnacle's employee] was injured as he was entering the job site, en route to his work assignment. The 'contract could not be performed, of course, unless [the subcontractor's] employees could reach and leave their workplaces on the job site,' and therefore the 'instant injuries, occurring during such a movement, must be deemed as a matter of law to have arisen out of the work.' Any negligence by the Turner group is not material to an additional insured endorsement." *Laquila-Pinnacle* at 740-741.

The dissent, making the common counter-argument to decisions like this, stated that the majority's decision improperly focused not on the cause of the accident but upon the general nature of the operation in the course of which the injury was sustained. "[S]uch an interpretation reads out of the clause the key words pertinent to its application here: 'but only with respect to liability arising out of [Laquila's] work.'" *Laquila-Pinnacle* at 742.

Now, a word about the timing of this New York Appellate Division decision. In July 2004, Insurance Services Office, Inc., in an effort to stem the tide of unintended additional insured coverage, introduced changes to its various additional insured endorsements. At the heart of these changes was the preclusion of coverage for an additional insured's sole negligence — something that many courts around the country, based on the language of certain previous ISO endorsements, have not hesitated to provide. ISO set out to eliminate coverage for an additional insured's sole negligence by amending its endorsements to specify that coverage is only available for their vicarious or contributory negligence (when the named insured is also one of the negligent parties). The amended language of the additional insured endorsements provides in relevant part as follows (ISO

Form CG 20 10 07 04) (underlined text added and bracketed text deleted):

Section II — Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability [arising out of your ongoing operations performed for that insured] for “bodily injury,” “property damage” or “personal and advertising injury” caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

Laquila-Pinnacle is precisely the situation that the new additional insured language is intended to address. The opinion confirmed that *Laquila-Pinnacle*, the named insured, played no part in the laborer's injuries. As a concrete subcontractor, it was obviously not responsible for the placement of plywood used as a temporary ramp that led from the sidewalk to the building. Thus, under the amended additional insured endorsement, Turner, an additional insured, would not have been afforded coverage from its subcontractor's insurer because the “bodily injury” to the laborer was *not caused, in whole or in part*, by *Laquila-Pinnacle's acts or omissions* in the performance of its ongoing operations for Turner.¹⁷ It hardly seems unfair for Turner to be denied coverage under *Laquila-Pinnacle's* policy and have to look to its own policy. After all, Turner played a part in the cause of the injury and *Laquila-Pinnacle's* insurer likely received no premium, or very little, to name Turner as an additional insured.

Despite the fact that ISO has amended its additional insured endorsements to limit coverage for an additional insured to its vicarious or contributory negligence, insurers — likely for various reasons — are sometimes slow to incorporate new forms into their underwriting practices. Not that there hasn't been enough writing on the wall for insurers to see that the use of additional insured endorsements that contain an “arising out of” trigger places them at real risk for

providing free coverage for potentially huge losses, *Laquila-Pinnacle* will perhaps be the push that some need to make certain that they are now using the July 2004 version of ISO's additional insured endorsements. And, if not, there are a dozen more reasons — all from 2005 alone.¹⁸

BP America, Inc. v. State Auto Property & Casualty, 2005 Okla. LEXIS 65

In *BP America*, the Supreme Court of Oklahoma answered certified questions from the Northern District of Oklahoma concerning the meaning of the phrase “any insured” contained in the Auto Exclusion of a commercial general liability policy. The exclusion at issue provided as follows:

This insurance does not apply to:

g. Aircraft, Auto Or Watercraft

“Bodily injury’ or ‘property damage’ arising out of the ownership, maintenance, use or entrustment to others of any . . . ‘auto’ . . . owned or operated by or rented or loaned to any insured. Use includes operation and ‘loading or unloading’ . . . ”

BP America at **3.

The court provided a sparse (and somewhat confusing) description of the facts of the underlying litigation. *BP America* was listed as an additional insured under a general liability policy issued to a construction company. A construction company employee was driving a dump truck that was involved in a multi-car accident resulting in several fatalities. *BP America* sought coverage under the general liability policy. The CGL insurer presumably declined to provide coverage on the basis of the policy's Auto Exclusion.

BP America argued that only negligent insureds should be denied coverage. Since the construction company, and not *BP America*, was responsible for the accident, *BP* argued that the Auto Exclusion, which precludes coverage for “bodily injury” arising out of the ownership, maintenance, use or entrustment to others of any “auto” owned or operated by or rented or loaned to *any insured*, did not apply to it. The textual argument for *BP's* position was that “any,”

as used in the Auto Exclusion, should be read not to mean “all,” but, rather, “the.” The insurer countered that the Auto Exclusion “cannot be interpreted to allow coverage to an innocent insured when all automotive liability coverage of any insured is specifically disallowed.” *BP America* at **11. The Supreme Court of Oklahoma sided with the insurer:

The overwhelming number of courts, addressing policy language similar to that at issue here, determines, as a matter of law, that the term “any insured” in an exclusionary clause is unambiguous and expresses a definite and certain intent to deny coverage to all insureds — even to innocent parties. These jurisdictions recognize that to impose liability on the insurer would raise coverage where none was intended and no premium was collected.

BP America at **11-**12. “Furthermore, adopting the position advanced by the insured would require that we unilaterally convert a general liability policy — without motor vehicle coverage — into an automotive liability policy. This we will not do.” *BP America* at **18.

The *BP America* court next addressed whether the inclusion of a severability clause in the liability policy renders the Auto Exclusion ambiguous. The policy’s severability (“Separation of Insureds”) clause provided as follows:

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately as to each insured against whom claim is made or ‘suit’ is brought.

BP America at **20.

BP America argued that, even if the Auto Exclusion is clear when read in isolation, the inclusion in the policy of a severability clause renders the exclusion

ambiguous. “The assertion rests on an argument that if, under the severability clause, each insured is treated as having a separate policy, only the negligent insured should be denied coverage.” *BP America* at **21.

While noting that the majority/minority split is not as dramatic on the severability issue as the interpretation of the exclusion, *BP America* nonetheless concluded that “most courts addressing the issue of whether a severability clause will render a clear and unambiguous exclusionary provision doubtful determine that the clear language of the exclusion must prevail.” *BP America* at **26.

Failure to so hold results in the specific terms of the exclusionary clause being overridden by a more general severability provision. Furthermore, it requires the court to ignore and treat as superfluous, the term “any” in the policy language. It also ignores the purpose of the severability clause - to afford each insured a full measure of coverage up to the policy limits, rather than to negate bargained-for and plainly-worded exclusions.

BP America at **24. The majority view is that, in the context of exclusionary language relating to “any insured,” the severability clause’s only effect is to alter the meaning of the term “the insured” to reflect who is seeking coverage. *BP America* at **26.

Cases that address the distinction between the phrases “any insured” or “an insured” and “the insured,” as used in a policy exclusion, are not unique, as evidenced by *BP America* citing nearly 60 of them from around the country in reaching its decision. And as for the potential effect of a policy’s severability clause on the exclusion, *BP America* cited approximately 50 cases nationally. Obviously, these are staggering numbers of cases to be cited by a court in its analysis of a single issue. Therein lies the significance of the Supreme Court of Oklahoma’s decision in *BP America*.

The phrase “any insured” is seen in a variety of policy exclusions. As a result, the question whether an exclusion containing this phrase applies to so-called “innocent insureds” arises with regularity. But despite the exclusion’s clear meaning, some insurers might still eschew coverage litigation when their case rests on the seemingly technical distinction between the phrase

“any insured” and “the insured.” Not to mention that all policyholders speak Latin and are quick to invoke *contra proferentem* — the rule of construction that if the policy language is ambiguous, it must be construed against the insurer, as its drafter. However, given the results of the comprehensive survey of this issue undertaken by the Supreme Court of Oklahoma in *BP America*, some insurers that were otherwise hesitant to pursue litigation based on this distinction may now be more comfortable doing so.¹⁹

***Taurus Holdings, Inc., et al. v. United States Fidelity and Guaranty Company, et al.*, 2005 Fla. LEXIS 1781, on remand 2005 U.S. App. LEXIS 25650**

Suits by municipalities against gun manufacturers, seeking recovery for the various costs of gun violence, have been commonplace over the past few years and are continuing today. New York City's on-going lawsuit against the gun industry, before Judge Weinstein, has had no shortage of publicity. Indeed, a significant Motion to Dismiss was denied last month. See *City of New York v. Beretta USA Corp. et al.*, 2005 U.S. Dist. LEXIS 30363. In addition, not long ago the United States Supreme Court refused to hear an appeal of a D.C. Circuit decision to allow a suit by the District of Columbia and individual gun victims to proceed against gun manufacturers. See *District of Columbia v. Beretta USA Corp., et al.*, 126 S. Ct. 399 (2005).²⁰

In *Taurus Holdings*, the Supreme Court of Florida addressed a certified question from the Eleventh Circuit: Whether the products — completed operations exclusion contained in several insurers' commercial general liability policies issued to a gun manufacturer precluded coverage for suits brought by municipalities seeking to recover the cost of medical and other services incurred as a result of gun violence in their communities.

On one hand, *Taurus Holdings* is a case about guns and presents a very narrow, but significant, coverage issue. After all, there are limited claims in which the particular issue will arise. On the other hand, the Florida high court's interpretation of the commonly used insurance policy phrase “arising out of” gives the case tremendous reach in the future.

The municipalities filed complaints against Taurus Holdings seeking compensation for expenses incurred

as a result of gun violence in their communities. Among other things, the complaints alleged that the gun manufacturers failed to make guns safe and prevent foreseeable misuse; failed to provide appropriate warnings about the dangers of guns; and designed, manufactured and marketed guns in excess of the demand that might be expected from legitimate consumers, thereby guaranteeing that the surplus would enter the illegal firearms market. The complaints alleged negligence; negligence in supervision, marketing, distribution, advertising and entrustment; public and private nuisance; failure to warn; false advertising and unfair and deceptive trade practices. The municipalities sought compensation for expenses they incurred for police protection, hospital costs, emergency medical services and prosecution of violent crimes involving the use of handguns. *Taurus Holdings* at *3-*4.

Taurus Holdings sought defense and potential indemnity coverage for the suits from its liability insurers, which disclaimed coverage on the basis of the following representative products — completed operations exclusion:

All bodily injury and property damage occurring away from premises you own or rent and *arising out of* your product or your work except:

- a. products that are still in your physical possession; or
- b. work that has not yet been completed or abandoned.

The policy defines “your product” as follows:

Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

1. you;
2. others trading under your name; or
3. a person or organization whose business or assets you have acquired.

Taurus Holdings at *4-*5 (italics added).

Taurus argued that the phrase “arising out of” contained in the products — completed operations exclusion was ambiguous. The district court initially agreed with Taurus, concluding that the underlying suits alleged damages caused by tortious business practices. *Taurus Holdings* at *6. Taurus continued with that argument before the Supreme Court, relying on a Florida appeals court decision that held that a products exclusion was not applicable because the liability arose out of a distributor’s on-premises negligence in delivering the wrong product to a customer (an herbicide instead of an insecticide) and not out of the product delivered. “The court focused on proximate cause, stating that the herbicide was not the cause of the damage, but ‘merely the incidental instrumentality through which the damage was done.’” *Taurus Holdings* at *16, quoting *Florida Farm Bureau Mutual Insurance Company v. Gaskins*, 405 So. 2d 1013, 1015 (Fla. 1st DCA 1981).

Despite the decision in *Gaskins*, the Florida Supreme Court concluded that the majority position nationally is to interpret the phrase “arising out of” more broadly than mere proximate cause. The court stated: “The general consensus [is] that the phrase ‘arising out of’ should be given a broad reading such as ‘originating from’ or ‘growing out of’ or ‘flowing from’ or ‘done in connection with’ — that is, it requires some causal connection to the injuries suffered, but does not require proximate cause in the legal sense.” *Taurus Holdings* at *18, quoting *Fed. Insurance Co. v. Tri-State Insurance Co.*, 157 F.3d 800, 804 (10th Cir. 1998).

To its credit, the *Taurus Holdings* court undertook an independent review of case law nationally to verify that this was indeed the “general consensus.” In concluding that the law in most states is consistent with the broad interpretation of the phrase “arising out of” in other Florida cases, the *Taurus Holdings* court cited decisions from ten other jurisdictions (including seven opinions quoted by these courts) and two insurance treatises. On the minority side, the court cited six opinions.²¹ Following this analysis, the court stated:

[W]e agree with the majority of states and conclude that the phrase ‘arising out of your product’ in the products-completed operations hazard exclusions at issue is unambiguous. “The term ‘arising out of’ is broader in meaning than the term ‘caused by’ and

means ‘originating from,’ ‘having its origin in,’ ‘growing out of,’ ‘flowing from,’ ‘incident to’ or ‘having a connection with.’” [T]his requires more than a mere coincidence between the conduct (or, in this case, the product) and the injury. It requires “some causal connection, or relationship.” But it does not require proximate cause.

Taurus Holdings at *32-*33 (citations omitted). Thus, the court held that coverage was excluded because “[t]he bodily injuries alleged all originated from Taurus’s products — that is, the discharge of their manufactured guns.” *Taurus Holdings* at *33.²²

The court also rejected Taurus’s argument that, despite the broad interpretation of “arising out of,” the products — completed operations exclusion precludes coverage only for defective products. The court concluded that the word “any” in the definition of “your product” connotes a scope extending beyond merely defective products. *Taurus Holdings* at *26. But, despite this conclusion, the court suggested that it may have been sympathetic to Taurus’s argument:

“[I]n order to limit the . . . exclusion provision to defective products, we would need to read into the text a requirement that is simply not there.” *Brazas Sporting Arms, Inc. v. Am. Empire Surplus Lines Ins. Co.*, 220 F.3d 1, 6 (1st Cir. 2000). But, as we previously have emphasized, “we cannot place limitations upon the plain language of a policy exclusion simply because we may think it should have been written that way.” *Deni Assocs.*, 711 So. 2d at 1139. The plain language of the exclusion in this case excludes coverage for all product-related injuries, not merely defective products.

Taurus Holdings at *26.

Taurus Holdings is likely to be seen by the insurance public at large as a case about coverage for gun liabilities. For example, on September 26, the excellent insurance news website, InsuranceJournal.com, published a story about *Taurus Holdings* that did not even mention the crux of the case — the phrase “arising out of.” In fact, the story re-stated the exclusion at issue in a manner that would have no doubt affected the court’s

analysis. The InsuranceJournal.com story stated: "The Florida justices based their ruling on policy clauses that exclude coverage for bodily injury and property damage occurring away from the gun makers' premises and *resulting from* [instead of "arising out of"] products outside their physical possession (*italics added*)."²³

Given the frequency in which the phrase "arising out of" is at the heart of a coverage dispute, the Florida Supreme Court's decision in *Taurus Holdings* is going to have applicability in the years to come in cases that have nothing whatsoever to do with firearms.²⁴ Moreover, the thoroughness of the court's analysis of the phrase "arising out of," as evidenced by its national survey of the majority and minority positions, is likely to make it an attractive case for courts outside of Florida to rely upon on this issue.²⁵

***Hooters of Augusta, Inc. v. American Global Insurance Company*, 2005 U.S. App. LEXIS 26765 (11th Cir.)**

Junk faxes cause insurance coverage disputes. That much is clear. Whether they cause "advertising injury" is much less certain. The availability of coverage for liability for sending junk faxes (i.e., violating the Telephone Consumer Protection Act) under the "advertising injury" portion of a commercial general liability policy has been the subject of numerous decisions since 2002. Courts have bounced back and forth on this issue.

Initially, junk fax coverage decisions were almost unanimously in favor of policyholders. Then, in late 2004, the insurers scored a victory in *American States Insurance Company v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. 2004) (Illinois law), *rehearing denied* 2005 U.S. App. LEXIS 1352. But the momentum for insurers was short-lived, as the Eighth Circuit concluded in *Universal Underwriters Insurance Company v. Lou Fusz Automotive Network, Inc.*, 401 F.3d 876 (8th Cir. 2005) that coverage was available. The insurers struck back, scoring a Fourth Circuit victory in *Resource Bankshares Corp. v. St. Paul Mercury Insurance Company*, 407 F.3d 631 (4th Cir. 2005). Then, in a rare state court decision on the issue, the policyholders re-took the momentum after the Illinois Court of Appeals declined to follow the 7th Circuit's decision in *Capital Associates* and found coverage. See *Valley Forge Insurance Company v.*

Swiderski Electronics, Inc., 834 N.E.2d 562 (Ill. App. 2005). The Northern District of Illinois broke the Illinois tie between *Capital Associates* and *Swiderski Electronics* when it held in *St. Paul v. Brunswick Corp.*, United States District Court for the Northern District of Illinois, No. 04 C 7751 (November 22, 2005, Memorandum Opinion and Order) that coverage was not available. The latest court to weigh in on this tennis match of a coverage issue was the Eleventh Circuit in an unpublished opinion in *Hooters of Augusta, Inc. v. American Global Insurance Company*.

For starters, *Hooters* was not the most significant junk fax coverage decision handed down in 2005. In fact, from the standpoint of potential precedent, it was arguably the least significant. However, because it was the latest decision at the time of this writing, it was selected to demonstrate the current state of this coverage issue.

The court addressed coverage for Hooters for its liability for sending unsolicited fax advertisements in violation of the Telephone Consumer Protection Act (TCPA), 42 U.S.C. §227. Hooters had purchased advertising space on weekly flyers faxed to a database of Atlanta businesses. One of the faxes was sent to an Augusta attorney. He sued Hooters for violation of the TCPA and was granted class certification. The TCPA made it unlawful "to use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." The TCPA allowed for an award of \$500 in damages for each violation, trebled, in the court's discretion, if the defendant willfully or knowingly violated the statute. *Hooters* at *2-*4.

A jury returned a verdict against Hooters for knowingly and willfully violating the TCPA. The court exercised its discretion to treble the damages and entered judgment against Hooters for nearly \$12 million. Following a settlement that reduced the judgment to \$9 million and certain procedural maneuvers that led to the coverage litigation, the district court found coverage and entered a final judgment in the amount of \$5 million (the policy limit) plus post-judgment interest. *Hooters* at *5-*6.²⁶

The Eleventh Circuit addressed whether Hooters's TCPA liability qualified as "advertising injury," defined in relevant part under an umbrella liability

policy as “oral or written publication of material that violates a person’s right of privacy.” *Hooters* at *7. The court held that it did:

American Global first argues that Hooters’s conduct violated no right of “privacy” because a fax sent in violation of the TCPA would not constitute a common-law tort for invasion of privacy under Georgia law. American Global’s reading may be one reasonable interpretation, but, undeniably, it is at least as reasonable to interpret “privacy” more broadly to include aspects of privacy protected by other sources of law, including state privacy statutes and federal law. Indeed, the statutory notion of being free from intrusive and unsolicited facsimile transmissions is at least arguably embodied in the common law right to privacy under Georgia law. An essential element of the right to privacy, Georgia’s courts have recognized, is “the right ‘to be let alone,’” or “the right to seclusion or solitude.” Notably, the insurance policy contains no language explicitly limiting the scope of the term “privacy” or, for that matter, alerting non-expert policyholders that coverage depends on the source of law underlying the relevant privacy right.

Hooters at *9-*10 (citation omitted).

Interestingly, in reaching its decision, the *Hooters* court quickly dismissed *Capital Associates* (Seventh Circuit) and *Resource Bankshares* (Fourth Circuit) because these courts “interpreted similar advertising-injury provisions as extending only to a particular species of privacy violation — violations of a right to secrecy of personal information, not intrusions into a private domain.” *Hooters* at *17. The *Hooters* court stated “We do not need to discuss the Seventh and Fourth Circuit opinions at length, since American Global does not contend that the insurance contract’s reference to ‘violations of privacy’ does not encompass intrusions into a person’s private domain. Rather, American Global’s argument is that a violation of the TCPA is not the kind of intrusion into seclusion that the policy covers.” *Hooters* at *18.

While the *Hooters* court did not address whether invasion of privacy means violation of a right to

secrecy of personal information or intrusion into a private domain, this is the issue on which TCPA coverage decisions often turn. For this reason, *Hooters* is unlikely to carry as much weight in the future as such decisions as *Capital Associates* and *Swiderski Electronics*, where this issue was addressed. See *Capital Associates* at 942-943 (“The structure of the policy strongly implies that coverage is limited to secrecy interests. It covers a ‘publication’ that violates a right of privacy. In a secrecy situation, publication matters; otherwise secrecy is maintained. In a seclusion situation, publication is irrelevant. A late-night knock on the door or other interruption can impinge on seclusion without any need for publication. *** [The TCPA] condemns a particular means of communicating an advertisement, rather than the contents of that advertisement--while an advertising-injury coverage deals with informational content.”) Compare to *Swiderski Electronics* at 573-574 (“[T]he word ‘publication’ would not convey to the average, normal, reasonable person an intention to include only communications sent to a third party.”).

InsuranceScrawl.com [see *Treesdale* write-up for more information] had this to say about the Illinois Court of Appeals’s decision in *Swiderski Electronics*: “The Seventh Circuit opinion [*Capital Associates*], written by Judge Easterbrook, not only reject[ed] the policyholder’s claim but in fact belittle[d] it. In part because the prior Seventh Circuit decision, purporting to apply Illinois law, was so comprehensive and sweeping, the Illinois appellate decision is important because it categorically reject[ed] it.”

Tort reform advocates are fond of pointing out that the asbestos system is run amok because most of the plaintiffs are *not truly injured*. Not truly injured. It doesn’t get more *not truly injured* than plaintiffs in an underlying TCPA suit. But as long as insurance dollars are available to fund statutory damages under the TCPA, there is no reason to expect this make-believe tort to go away anytime soon. Speaking of which, ISO has responded to this license to print money by adopting Form CG 00 67 03 05, which excludes coverage for advertising injury arising out of violation of the TCPA, CAN-SPAM Act of 2003 or any statute, ordinance or regulation that prohibits or limits the sending, transmission, communication or distribution of material or information.

Incidentally, while preparing the write-up of this case, I took a peek at Hooters's website (for research purposes) and found an interesting position statement by the company in defense of criticism that its business concept exploits women. The company states, in part: "Claims that Hooters exploits attractive women are as ridiculous as saying the NFL exploits men who are big and fast. Hooters Girls have the same right to use their natural female sex appeal to earn a living as do super models Cindy Crawford and Naomi Campbell. To Hooters, the women's rights movement is important because it guarantees women have the right to choose their own careers, be it a Supreme Court Justice or Hooters Girl." www.hooters.com/company/about_hooters. It certainly isn't everyday that one sees the words *Supreme Court Justice* and *Hooters Girl* in the same sentence.

Endnotes

1. From the jokes page on qualityininsurance.com.
2. See *Travelers Casualty & Surety Co. v. Ribi Immunochem Research*, 108 P.3d 469, 480 (Mont. 2005) ("We likewise conclude the District Court properly determined that Travelers may recoup its defense costs expended on Ribi's behalf for those claims outside the CGL policy's pollution exclusion provision. Travelers timely and explicitly reserved its right to recoup defense costs when it notified Ribi of the reservation prior to the payment of the defense costs in [various] letters. Travelers expressly reserved its right to recoup defense costs if a court determined that it had no duty to provide such costs. Travelers also provided specific and adequate notice of the possibility of reimbursement. Ribi implicitly accepted Traveler's defense under a reservation of rights when it posed no objections. Under these circumstances, the District Court appropriately concluded that Travelers may recoup its defense costs.>").
3. See *Scottsdale Insurance Company v. MV Transportation*, 115 P.3d 460, 471 (Calif. 2005) ("[W]e conclude that an insurer under a standard CGL policy, having properly reserved its rights, may advance sums to defend its insured against a third party lawsuit, and may thereafter recoup such costs from the insured if it is determined, as a matter of law, that no duty to defend ever arose because the third party suit never suggested the possibility of a covered claim.").
4. See James L. Cornell, "Insurance Carriers May Sue Insureds for Reimbursement," 43 *Houston Lawyer* 53 (July/August 2005).
5. Liam Plevin, "Lott Sues Insurer for Storm Damages," *The Wall Street Journal Online*, December 16, 2005.
6. In a November 27 letter to the *Times's* editor, Ernst Csizar, President and Chief Executive of Property Casualty Insurers Association of America, responded to Mr. Hood's Op-Ed and stated, in part: "The lawsuit brought by Mississippi's attorney general, Jim Hood, attempts to retroactively rewrite insurance policies to force companies to pay for flood losses that have been expressly excluded from standard insurance policies for decades. *** Insurers will take all appropriate steps under the law to defend the sanctity of their contracts. At the same time, we will continue to pay every covered claim as quickly as possible to help hurricane victims get back on their feet after the disaster."
7. The *North Dakota State University* court also noted with approval a recent decision from the Texas Court of Appeals, holding that rain from Tropical Storm Allison which rushed into the convention center in downtown Houston, broke through an interior basement wall, flowed into a parking garage, then into the pedestrian tunnel system and finally into the Bank of America building, damaging the building's electrical equipment and forcing a law firm to relocate, causing it to seek coverage for lost business income and extra expenses, was excluded by the policy's exclusion for "losses due to flood, surface water, overflow of any body of water, or from water under the ground surface." See *Valley Forge Insurance Co. v. Hicks, Thomas & Lilienstern, LLP*, 2004 Tex. App. LEXIS 11301.
8. In reaching this conclusion, the *Kish* court was also influenced by the fact that the plaintiffs lived on a nationally recognized floodplain and knew that flood would be excluded by any insurance they

purchased, as exemplified by the existence of the National Flood Insurance Program. The court noted that one plaintiff previously had flood insurance, another was advised of its existence and a third had sued her agent for failing to advise her of the need for flood insurance. A similar argument may arise in the Mississippi Attorney General's suit. In his November 19th *New York Times* piece, Attorney General Hood stated: "For years these companies have sold policies that insure Gulf Coast residents against loss from the effects of hurricane winds. The people who bought these policies reasonably believed that they were covered for damage ranging from a blown-off roof to a four foot surge of water in the house." But despite what Mr. Hood told readers of the *Times* about what Mississippi residents reasonably believed, the Mississippi Insurance Department's web site contains an "Insurance Consumer's Hurricane Checklist" (revised August 1998) that states: "Before the Storm . . . Check your policy's coverages. Remember that homeowners' policies do not cover flood damage caused by rising water. Check the special maps kept by your county that show flood plains. If you live in a flood-prone area, contact your agent about obtaining insurance, which is written by the National Flood Insurance Program." See <http://www.doi.state.ms.us/publish/hurricane.pdf>.

9. For an examination of *Nav-Its*, from the perspective of the policyholder's counsel in the case, as well as the pollution exclusion in general, see Ellis I. Meadoway, Arthur H. Jones, Jr. and Trevor J. Cooney, "Nav-Its follows Morton's Legacy: Insurance Industry Held Accountable for Presentations to Regulatory Authorities," *Coverage*, July/August 2005.
10. Incidentally, New York's view on the pollution exclusion and non-traditional environmental pollution is the same as *Nav-Its* (see *Belt-Painting Corp. v. TIG Insurance Co.*, 795 N.E.2d 15 (N.Y. 2003)). Thus, potential choice of law disputes are more likely to relate to South Jersey policyholders and operations than to those that are located in Giants territory.
11. This is true for several reasons, including courts' use of the vague term "traditional environmental pollution" to define the boundary of the absolute pollution exclusion. But this situation need not be limited to insurers as policyholders have also benefited from it. See *Lititz Mutual Insurance Company v. Steele*, 785 A.2d 975 (Pa. 2001) (Despite the Pennsylvania Supreme Court's 1999 decision in *Madison Construction* — that the absolute pollution exclusion is not limited solely to traditional environmental pollution — the Pennsylvania Supreme Court in *Lititz Mutual* held that the pollution exclusion nonetheless did not bar coverage for lead-based paint. Even after concluding that lead-based paint was a pollutant, the court found another rationale to avoid the applicability of the pollution exclusion: "One would not ordinarily describe the continual, imperceptible, and inevitable deterioration of paint that has been applied to the interior surface of a residence as 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 981.).
12. *Treesdale* was far from the only asbestos "number of occurrences" decision in 2005. In no particular order, see *Uniroyal, Inc. v. American Re-Insurance Co.*, *Mealey's Litigation Report: Insurance*, November 1, 2005; *Kvaerner U.S. Inc. v. OneBeacon Insurance Company*, 2005 Phila. Ct. Com. Pl. LEXIS 377; *The Goodyear Tire and Rubber Company v. Hartford Accident and Indemnity Company*, United States District Court for the Western District of Pennsylvania, No. 97-933 (April 14, 2005, adopting the Magistrate's Report and Recommendation of March 11, 2005); *Appalachian Insurance Co. v. General Electric Co., et al.*, 796 N.Y.S.2d 609 (A.D. 2005). And "number of occurrences" arose in other contexts as well. For example, see *Owners Insurance Co. v. Salmonsens*, 2005 S.C. LEXIS 329 (synthetic stucco); *Nicor, Inc. v. Associated Electric and Gas Insurance Services Limited*, 2005 Ill. App. LEXIS 1175 (gas meter regulators containing mercury); and *Sunoco, Inc. v. Illinois National Insurance Company*, 2005 U.S. Dist. LEXIS 18407 (E.D. Pa.) (MTBE at various sites).
13. In a subsequent decision in the *Treesdale* litigation, the Third Circuit addressed an issue that is inside baseball to coverage lawyers not practicing in Pennsylvania. The court held that Pennsylvania's Vale Doctrine [*Vale Chemical Co. v. Hartford Accident & Indem. Co.*, 516 A.2d 684 (Pa. 1986)] did not apply to the federal court action. "Vale did not announce substantive principles of law for Pennsylvania courts

- to apply in insurance coverage disputes. Rather, *Vale* addressed procedural and jurisdictional issues. *Vale* stands for the proposition that an injured claimant is an indispensable party in a suit to determine insurance coverage under Pennsylvania's Declaratory Judgment Act. Without the joinder of the indispensable party, the state court lacks subject matter jurisdiction over the declaratory judgment action. However, since *Vale* is a procedural and jurisdictional ruling, *Erie* does not require the district court to apply Pennsylvania law to resolve Appellants' motion to intervene under Fed.R.Civ.P. 24(a)." *Liberty Mutual Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 229 (E.D. Pa. 2005).
14. See "2003: The Year's Ten Most Significant Insurance Coverage Decisions," *Mealey's Litigation Report: Insurance*, January 7, 2004 (Suggesting that, despite its defeat, Liberty may not view *Spaulding Composites* as the last word on its non-cumulation clause, given that it may have seen the court's decision as one dictated by New Jersey's particular view on trigger and allocation.).
 15. Besides *Spaulding Composites* and *Treesdale*, see *Liberty Mutual Ins. Co. v. Black & Decker Corp.*, 383 F. Supp. 2d 200 (D. Mass. 2004); *O-I Brockway Glass Container v. Liberty Mutual Ins. Co.*, 1994 U.S. Dist. LEXIS 21007 (D.N.J.); *Air Products & Chemicals, Inc. v. Hartford Accident & Indemnity Co.*, 1989 U.S. Dist. LEXIS 7435 (E.D.Pa.); *Endicott Johnson Corp. v. Liberty Mutual Ins. Co.*, 928 F. Supp. 176 (N.D.N.Y. 1996), and there are no doubt many others.
 16. As further support that the MIGA Act does not provide the same level of protection to insureds that the policy issued by the insolvent insurer would afford had the insurer remained solvent, the court pointed to the notice that insurers are required to provide with every application for property and casualty insurance in Minnesota: "The financial strength of your insurer is one of the most important things for you to consider when determining from whom to purchase a property or liability insurance policy. It is your best assurance that you will receive the protection for which you purchased the policy. If your insurer becomes insolvent, you may have protection from the Minnesota Insurance Guaranty Association * * * but to the extent that your policy is not protected by the Minnesota Insurance Guaranty Association or if it exceeds the guaranty association's limits, you will only have the assets, if any, of the insolvent insurer to satisfy your claim." *Dynamic Air* at 243-244.
 17. In *Dillon Companies, Inc. v. Royal Indemnity Company*, 369 F. Supp. 2d 1277 (D. Kan. 2005) the court interpreted the phrase "acts or omissions" in a manner that suggests that even the use of ISO's July 2004 additional insured endorsements is no guarantee that disputes over this issue will not continue.
 18. *American Casualty Co. v. General Star Indemnity Co.*, 125 Cal. App. 4th 1510 (2005); *Garamendi v. Golden Eagle Insurance Co.*, 2005 Cal. App. Unpub. LEXIS 7082; *AIU Insurance Company v. Clarendon America Insurance Company*, 2005 Cal. App. Unpub. LEXIS 2285; *LaFarge Midwest v. Frankenmuth Mutual Insurance Co.*, 2005 Mich. App. LEXIS 1947; *Mikula v. Miller Brewing Co.*, 701 N.W.2d 613 (Wis. App. 2005); *City of St. Paul v. Penn-America Ins. Co.*, 2005 U.S. Dist. LEXIS 14975 (D. Minn. 2005); *Ingalls Shipbuilding v. Fed. Ins. Co.*, 410 F.3d 214 (5th Cir. 2005); *Meridian Mut. Ins. Co. v. Cont'l Bus. Ctr.*, 2005 U.S. Dist. LEXIS 6406 (E.D. Pa. 2005); *Dillon Cos. v. Royal Indem. Co.*, 369 F. Supp. 2d 1277 (D. Kan. 2005); *Landpen Co., L.P. v. Maryland Casualty Co.*, 2005 U.S. Dist. LEXIS 2145 (S.D.N.Y. 2005); *Koala Miami Realty Holding Co. v. Valiant Ins. Co.*, 2005 Fla. App. LEXIS 14844; and *Roy Anderson Corp. v. Transcon. Ins. Co.*, 358 F. Supp. 2d 553 (S.D. Miss. 2005).
 19. For an example of another decision from 2005 that addressed the phrase "any insured," as well as the impact of a severability of interests provision, see *United National Insurance Company v. Union Pacific Railroad Company*, United States District Court for the Southern District of Texas, No. H-04-0614 (May 27, 2005, Memorandum and Order) (employee exclusion).
 20. And in yet even more gun cases in 2005 that involved Baretta, California juries found actor Robert Blake non-guilty in the shooting death of his wife, but civilly liable to the tune of \$30 million.
 21. No Florida voting machines were used to reach this tally.

22. The insurers also argued that the underlying complaints did not allege “bodily injury,” but, rather, reimbursement for economic loss, which is not covered. That issue was not before the Florida Supreme Court. Thus, the court assumed for purposes of its discussion that the complaints alleged bodily injury that would be covered absent the products — completed operations exclusion. *Taurus Holdings* at *5, n.1.
23. See “Fla. Supreme Court Rules Liability Insurance Does Not Cover Gun Manufacturers’ Damages,” <http://www.insurancejournal.com/news/south-east/2005/09/26/60155.htm>.
24. Coincidentally, just one month before *Taurus Holdings* was decided, the Eleventh Circuit, applying Florida law, was required to interpret the phrase “arising out of” as used in a Sexual Misconduct Exclusion. See *Guideone Elite Insurance Company v. Old Cutler Presbyterian Church*, 420 F.3d 1317 (11th Cir. 2005). It raises an interesting question whether the Eleventh Circuit’s decision would have been different if it were obligated to follow *Taurus Holdings*. Although, the facts of *Old Cutler Presbyterian* were so horrific that it seems possible that the Eleventh Circuit, intent on finding coverage, would have found a way to do so even if obligated to follow *Taurus Holdings*.
25. This past year also saw the New York Court of Appeals address the meaning of the phrase “arising out of” as used in a policy exclusion and New York’s high court, like Florida’s, interpreted it broadly. See *Maroney v. New York Cent. Mut. Fire Ins. Co.*, 2005 N.Y. LEXIS 2716 (“As used in a homeowners liability policy’s automobile exclusion clause, ‘the words ‘arising out of’ have broader significance . . . and are ordinarily understood to mean originating from, incident to, or having connection with.’ We conclude that, in the uninsured premises realm, the phrase ‘arising out of’ similarly requires only that there be some causal relationship between the injury and the risk for which coverage is provided.”).
26. The Eleventh Circuit reversed the district court’s conclusion that the policy provided coverage for post-judgment interest. The court concluded that the obligation to pay post-judgment interest was tied to the duty to defend, which, for American Global, never materialized, because the underlying litigation was already concluded when the primary coverage was exhausted. *Hooters* at *24-*28. ■