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What's Hot and What's in Store in the World of Claims

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I. INTRODUCTION

The United States has long had a reputation for being a litigious society, limited only by the imagination of the plaintiffs' bar. Indeed, the U.S. tort problem has been perceived by the World Economic Forum as serious enough to pose a significant risk to the rest of the world.[1] Tort reform in the U.S. has had minimal effects. Instead, jury awards and court costs continue to rise and further stress the economy. In the same vein, settlements are rising and businesses are bracing for more lawsuits in the coming year.

As the U.S. approaches mid-term elections, the impact of the election of President Obama and a Democratic-led Congress are being re-evaluated. President Obama's perceived failure to restart the ailing U.S. economy and to reduce unemployment may take a toll on the Democratic stronghold. And if history serves as a guide, any change in political climate will likely have an effect on litigation trends in the U.S.

Although there has been a decrease in securities class action lawsuits overall in the first half of 2010, a weak economy and creative plaintiffs' attorneys provide fertile ground for continuing the trend of increased litigation in the U.S. Over the last 12 months, the U.S. has experienced an increase in class action lawsuits claiming breach of fiduciary duty as well as those alleging product/operations defect. Product recall lawsuits are on the rise and suits involving new technology and energy concerns such as hydraulic fracturing are being filed. Further, the trend continues of plaintiffs using litigation to supplant or supplement regulation and legislation of environmental and toxic hazards including suits against utilities over greenhouse gas emissions, and other environmental concerns.

II. UNCERTAINTIES IN TODAY'S LITIGATION CLIMATE

According to a survey of general counsel, 42% of companies anticipate facing more legal disputes in 2010, up from 34% a year earlier. [2] This includes 56% of insurance companies anticipating an increase in legal disputes, up from 35% a year earlier. Respondents typically cited the weak economy for the anticipated increase.[3]

In addition to an increase in the number of suits, awards in such suits are predicted to be higher as well. Available data indicates that average jury awards were just over $1 million in 2007 and 2008, more than 60% higher than the 1999 average. The highest jury awards are in product liability suits.[4]

Jury awards are typically higher in jurisdictions referred to by the American Tort Reform Foundation as "Judicial Hellholes." These are jurisdictions "where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits."[5] The nation's top six "Judicial Hellholes" for 2009-2010 are: South Florida; West Virginia; Cook County (Chicago), Illinois; Atlantic County, New Jersey; New Mexico Appellate Court and New York City. New Mexico and New York are new to this list. Falling off the "Judicial Hellhole" list were Los Angeles County, California; Clark County, Nevada; and Macon and Montgomery Counties, Alabama. Others on what is referred to as a "watch list" include California; Alabama; Madison County, Illinois; Jefferson County, Mississippi; Texas Gulf Coast and Rio Grande Valley, Texas.[6] It comes as no surprise that these "hellholes" are a favored venue for the plaintiffs' bar.

In June 2010, the Pacific Research Institute, a not for profit free-market organization, and the Manufacturers' Alliance, a public policy economic research organization for manufacturers, released their 2010 U.S. Tort Liability Index which ranks states according to the tort costs and

risks imposed on businesses. States were also ranked according to their tort rules and laws focused on reducing lawsuit abuse and containing tort costs.[7] The best liability climates for businesses, according to the study, were Alaska, Hawaii and North Carolina, followed by South Dakota, North Dakota, Maine, Idaho, Virginia, Wisconsin and Iowa. The worst liability states were the large industrial states, specifically New Jersey, New York, Florida, Illinois, Pennsylvania, Missouri, Montana, Michigan, Connecticut and California.[8]

The Obama administration has also influenced U.S. litigation trends by its judicial and executive branch appointments. In two years, President Obama has appointed two justices to the Supreme Court, Sonia Sotomayor and Elena Kagan, and may even have an opportunity to make a third appointment. Further, the administration has moved to the left with the appointment of Linda Jackson (formerly with the New Jersey Department of Environmental Protection) to head the U.S. Environmental Protection Agency, and former New York City health commissioner, Margaret Hamburg, as chief of the Food and Drug Administration. The administration has appointed David Michaels, a former professor of occupational and environmental health, to head OSHA.[9] These appointments seem to mark a change from the often private industry-associated appointees of more conservative administrations. How and when President Obama fills the numerous vacancies on the U.S. Court of Appeals and at the U.S. District Court levels may also affect U.S. litigation trends.

U.S. Supreme Court decisions will continue to shape the course of how certain types of litigations are handled on a large scale basis. In Wyeth v. Levine[10], the U.S. Supreme Court determined that a state law tort action challenging labeling on a Wyeth drug is not preempted by federal law even though the Food and Drug Administration ("FDA") approved the label.[11] Notwithstanding that decision, the issue of preemption of federal laws by state laws is at the

forefront of the Supreme Court's docket for the 2010-2011 term and will likely shape the direction of federal preemption.

In addition, the Supreme Court has accepted significant cases involving speech and religion, job discrimination, sentencing, prosecutorial immunity, right to counsel and privacy, among others. The Supreme Court also continues its strong interest in business, with nearly half of the 52 cases accepted for review by the U.S. Supreme Court being considered business-related. Robin Conrad, Executive Vice President of the National Chamber Litigation Center, recently noted four recurring themes in the business challenges before the Roberts Court: federal preemption, arbitration, securities and workplace issues. "All of those issues remain high priorities of the business community," she said.[12]

Court watchers are anxiously awaiting the new Supreme Court term as the composition of the Roberts Court has changed with the confirmations of Justices Sotomayor and Kagan. Justice Anthony Kennedy has evolved as the most powerful "swing vote" jurist in recent history and Supreme Court arguments are being tailored to Justice Kennedy. The direction that the Roberts Court will take is uncertain. One thing we can count on is significant legal commentary and strong interplay between the U.S. Supreme Court decisions and the outcome of the mid-term elections.

III. EMERGING ISSUES

Looking to the future, there are a number of areas where tort litigation is expanding.

A. Regulation and Litigation Surrounding Hydraulic Fracturing.

With clean up of the Gulf of Mexico barely underway, energy companies are bracing for a no-holds-barred attack by environmentalists on what the industry says is the next major breakthrough in natural resource extraction.[13] Although only two lawsuits have been filed in

Pennsylvania, a report released in September, 2010 by the environmental advocacy group, Riverkeeper, links hydraulic fracturing to contamination in seven states other than Pennsylvania: Ohio, Wyoming, West Virginia, Texas, Louisiana, Arkansas, and Colorado.[14]

Hydraulic fracturing, "fracking," involves injecting water, sand and a cocktail of chemicals at high pressure into rock formations thousands of feet below the earth's surface to extract natural gas. The chemicals that make up that "fracking" fluid are cause for concern. They may include, among other chemicals, barium, strontium, benzene, glycol-ethers, toluene, 2-(2-methoxyethox) ethanol, and monylphenols. All have been linked to health disorders at high levels of exposure.[15]

The U.S. Environmental Protection Agency ("EPA") is set to launch a long term scientific study of the effects of hydraulic fracturing on drinking water and public health. In the meantime, while lawsuits have been filed in Pennsylvania, the Obama administration has decided against pressing for a temporary halt to Marcellus Shale drilling in Pennsylvania and New York.[16] Representative Maurice Hinchey (D-NY) requested that the drilling in New York wait until the Delaware River Basin Commission ("DRBC") completes a cumulative environmental impact statement. However, appropriations for the DRBC to study the cumulative effects of drilling in the Delaware Water Basin, which provides drinking water to 5% of the country's population, are not likely to be approved before the November elections. Fracking is causing a showdown of competing interests: supporting the economic needs of the region and our nation's need to secure energy reserves versus protecting the environment.

The practice of hydraulic fracturing has been used since the late 1980s. By 1990 there were 8,000 coal bed methane wells throughout the U.S., but the State and the EPA underground injection programs did not regulate the practice. In 1997 the EPA undertook a study to evaluate

the dangers of hydraulic fracturing. In 2004, EPA concluded its study and found: "based on the information collected and reviewed, EPA has concluded that the injection of hydraulic fracturing fluids into [coal bed methane] poses little or no threat to [underground sources of drinking water] and does not justify additional study at this time."[17] The EPA conclusions were widely criticized. The New York Times said the conclusions "white-washed the industry" and were "politically motivated."[18] The Times further sought to expose the "Halliburton Loophole," an exclusion contained in the Safe Drinking Water Act's ("SDWA") definition of underground injection, named after one of the leading companies performing hydraulic fracturing. Excluded from regulation under the SDWA is "the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas or geothermal production activities."[19] The Fracturing Responsibility and Awareness of Chemicals (FRAC) Act, recently introduced to the Committee on Environment and Public Works by Senator Robert Casey (D-Pa), would widen the definition of "underground injection" to include hydraulic fracturing. The Act would also require that anyone engaging in hydraulic fracturing disclose the chemical constituents (but not the proprietary chemical formulas) used in the fracturing process.

Companies participating in hydraulic fracturing are reluctant to provide information concerning the chemicals used in the process citing trade secret confidentiality. The House Energy and Commerce Committee had requested that fourteen oil and gas service companies supply data on chemicals used in the drilling process. They also requested information about the disposal of the tainted fluid after it is pumped back out of the ground, among other issues. The Committee had made the request to some of the nation's biggest energy and gas producers, including Encana Corporation, Occidental Petroleum Corporation, Chesapeake Energy

Corporation, BP America, ConocoPhillips and ExxonMobil Corporation. The Committee requested that the companies notify lawmakers by July 26, 2010 if they would comply on a "voluntary basis."[20]

In early September 2010, in furtherance of its investigation, the EPA sent letters to nine drilling companies requesting detailed information about the chemicals contained in fluids used in the hydraulic fracturing process.[21] The EPA sent letters to BJ Services, Complete Production Services, Halliburton, Key Energy Services, Paterson-UTI Energy, RPC Inc., Schlunberger, Superior Well Services and Rutherford International. The Agency asked the companies to respond to its request within seven days and to voluntarily provide the information within thirty days. The Agency warned that if it did not receive sufficient data in response to the letter it would explore legal alternatives to compel submission of the needed information. The industry estimates that 90% of the more than 450,000 operating natural gas wells in the United States rely on hydraulic fracturing.[22] The EPA is expected to publish the results of its investigation by year end 2012.

The EPA has been conducting a series of public hearings on hydraulic fracturing which has become a controversial topic in Pennsylvania, West Virginia and parts of western New York where potentially huge reserves of previously unreachable natural gas has drilling companies angling for access.[23]

The most recent fracturing lawsuit, filed on 14 September 2010, was filed on behalf of thirteen Susquehanna County, Pennsylvania families who claim a nearby gas well has contaminated the water wells they rely on for drinking, bathing, cooking and washing. The lawsuit names Southwest Energy Production Company, a Houston, Texas-based gas drilling firm as well as its parent, Southwestern Energy Company.[24] The lawsuit alleges that the families

have been, and continue to be, exposed to hazardous chemicals, including barium, manganese and strontium. One individual is alleged to have become physically ill, and exhibits neurological symptoms consistent with toxic exposure to heavy metals. The other families live in constant fear of future physical illness, particularly with respect to the health of their minor children and grandchildren. There is currently one other fracturing case pending in Pennsylvania.

Southwest Energy began hydraulic fracturing operations near where the plaintiffs live in 2008. The complaint charges that the defendant was negligent in the drilling, construction and operation of the well which allowed pollutants, including fracking fluid, to be discharged into the ground or into the waters near plaintiffs' homes and water wells.[25] According to the plaintiffs' attorneys, for the past two years, gas drillers have been descending upon Pennsylvania, anxious to tap the vast natural gas resources in the state's Marcellus Shale. Since 2008, the Pennsylvania Department of Environmental Protection has issued 3,800 Marcellus Shale well permits. In the same time period, drillers have been cited for over 1,400 violations. Of those, 952 were identified as having or likely to have an impact on the environment, including violations of the state Clean Stream Law, improper construction of waste water impoundments, poor erosion and sedimentation plans and the discharging of industrial waste.[26] This is not likely to be the last case filed relating to hydraulic fracturing.

B. Climate Change

Most scientists agree that the climate is changing, with potential risk to the global economy, ecology and human health and well being. How much of this is due to natural phenomena as opposed to the effects of human activity on this planet is a matter of ongoing debate. Even with all of the visible signs of global warming, weakened political support for curbing the emissions that drive it means that the United States is unlikely to impose national

limits on greenhouse gases before 2013, at the earliest. Several leading GOP candidates are questioning whether these emissions even cause warming, while some key senate Democratic candidates are now disavowing the cap-and-trade bill that passed the House in 2009.[27] Senate Natural Resources Committee Chairman Jeff Bingaman (D-NM) told a Washington policymakers' conference recently that he did not see a comprehensive bill going anywhere in the next two years.[28]

Although the Obama administration asserts that it continues to back a federal cap on greenhouse gas emissions, the federal limits on carbon emissions could be curtailed if Republicans re-take the House in mid-term elections.

There have also been some interesting developments in the climate related cases pending in the federal courts. In Connecticut v. American Electric Power Company, a panel of two Justices from the Second U.S. Circuit Court of Appeals sided with a coalition of states, environmental groups and New York City, by permitting a public nuisance suit to go forward in September 2009, determining that states and municipalities could sue the nation's utilities for their contribution to global warming. The Second Circuit ruled that the trial court was wrong to have dismissed the case just because it raised international political issues. The Justices found that in pursuing their claims the plaintiffs were not asking the court to fashion a comprehensive solution to global climate change. In August 2010, the defendants, American Electric Power Co. Inc., Duke Energy Corp., Southern Co. and Xcel Energy, filed a petition for review to the Supreme Court, asking the Court to reject the argument that greenhouse gas emissions can be addressed through "public nuisance" lawsuits. [29]

In a brief filed in August 2010 on behalf of the Tennessee Valley Authority, acting U.S. Solicitor General, Neal Katyl, agreed with the defendants and argued that U.S. EPA's newly

finalized regulations on greenhouse gases have displaced common-law nuisance claims. Katyl therefore urged the Court to vacate the Court of Appeals decision and remand the case back to the Second Circuit. There has been no ruling to date.

In Comer v. Murphy Oil, the Fifth U.S. Circuit Court of Appeals reversed a district court's dismissal of a complaint and ruled that homeowners could maintain an action against oil and coal companies for property damage resulting from Hurricane Katrina. The plaintiffs claim that greenhouse gas emissions contributed to global warming, which in turn caused the storm surge that increased Hurricane Katrina's destructiveness.

In February 2010, the Fifth U.S. Circuit Court of Appeals granted defendant's petition for rehearing *en banc* and ruled that all nine Justices could review the case. However, in May 2010, the Fifth Circuit announced that it could not entertain the original case on appeal and dismissed the case because too many Justices had recused themselves due to their investments in energy companies, leaving it without a quorum. Therefore, the district court's opinion, dismissing the plaintiffs' lawsuit on the basis that it presented a non-justiciable "political question", remains good law. The Comer plaintiffs could petition for review before the Supreme Court.

The Comer dismissal of the plaintiffs' complaint against the oil and coal companies could strengthen industry's appeal of the adverse Second Circuit decision in Connecticut v. American Electric Power Company which held that states and municipalities could sue the nation's utilities for their contribution to global warming.

In November 2009, a judge in the U.S. District Court for the Northern District of California dismissed a public nuisance lawsuit brought by the Ninupiat Eskimo community of Kivalina, Native Village of Kivalina v. Exxon Mobil Corp.[30] The plaintiffs alleged that greenhouse gas emissions from energy-related companies are leading to rising sea temperatures

and, as a result, the Arctic sea ice that surrounds the town is melting, exposing it to winter storms and possible destruction. The Judge said that the public nuisance claim required the court to make a policy decision about who should pay for global warming when, as the plaintiffs acknowledged, almost everyone is responsible to some degree. Plaintiff village's appeal is currently pending before the Ninth Circuit.

On 5 February 2010, the Circuit Court of Arlington County, Virginia, provided insurers with a victory in the inaugural coverage litigation arising out of the Kivalina underlying climate change lawsuit. In Steadfast Ins. Co. v. The AES Corporation, the court ruled that Steadfast Insurance Company has no duty to defend The AES Corporation in connection with the Kivalina action because no "occurrence" took place. The insurer's denial of coverage was based on a three pronged reasoning: (1) that the damages allegedly caused by global warming were not caused by an "occurrence" as described in the policy since the decision to burn fossil fuels and discharge carbon dioxide into the atmosphere was an intentional act and the company knew or should have known the damage the emissions would cause; (2) the "loss in progress" endorsement excluded coverage for events that began before the insurance policy was issued; and (3) coverage is excluded under the policies' pollution exclusion. The court found no duty to defend based on the policies' insuring agreements, i.e., the absence of an "occurrence," and did not address the policies' "loss in progress" exclusion or whether carbon dioxide and other greenhouse gas emissions resulting from the operation of fossil-fuel-fired electricity generating plants fall within the ambit of the policies' pollution exclusions. AES filed an appeal with the Virginia Supreme Court.

Overall, climate change may produce an increase in property losses, catastrophic losses (those claims that are expected to reach a certain dollar threshold, currently set at $25 million)

and liability losses including those claimed against directors and officers that they failed to properly manage the company's global warming liability exposures. Professionals who design the products or projects carried out by a company may be sued for the harm these projects cause. Lawsuits may be filed by shareholders or consumers against a business for actions or inactions that could harm the environment. In addition, shareholder lawsuits may target a company for failure to disclose important information that could materially affect its financial health and thus influence shareholder investment decisions.

C. Bisphenol: A Potential Threat

Bisphenol A ("BPA") is a chemical used to make thousands of polycarbonate plastic products such as eyeglass lenses, computers, CDs, medical devices and most notably, baby bottles and food and drink containers. It has been used since the 1950s with no reports of injuries.[31] From the 1960s until early this year, the U.S. Food and Drug Administration considered it safe. However, low levels of BPA enter the body through sipping from plastic containers made with BPA.[32] In January 2010, the FDA took a new stance saying it has "some concern" about how current levels of BPA affect the brain, behavior and prostate gland of fetuses, infants and children.[33] The FDA calls for studying the situation further and has appropriated $30 million to do so over the next 18 to 20 months. The EPA has acted similarly.[34] Canada banned the importation of polycarbonate baby bottles in 2009 with no determination of the safety of the chemical. However, as alternatives to bottles containing BPA were available, it eliminated any risk.[35] Denmark banned some BPA products and France is considering whether to do so.[36]

In late 2009, a putative class action lawsuit was filed asserting that the manufacturer of stainless steel water bottles defrauded plaintiffs because it represented that its bottles were BPA-

free, when in fact it knew they were not. The complaint asserts that the manufacturer knew BPA was dangerous yet continued to sell bottles containing the chemical.[37] More than 25 lawsuits, which seek class action status, were consolidated last year in a multidistrict litigation in U.S. District Court in Kansas City, Missouri. The lawsuits accuse manufacturers of knowing that BPA is harmful, particularly to infants and children, and failing to warn consumers. The suits seek economic damages—return of their purchase price for millions of baby bottles and other food containers—as well as punitive damages. In August 2009, a federal judge in Chicago ruled that certain insurers had no duty to defend or indemnify their insureds against the BPA class actions because the lawsuits do not allege bodily injury.[38] The uncertainty of the effects of BPA all but assures additional legal challenges which insurers will likely need to address.

IV. LITIGATION TRENDS

A. Introduction

According to NERA's 2010 Trends Mid-Year Study, the pace of federal securities class action filings slowed in the first half of 2010, with filings on track to decline for a second consecutive year.[39]

According to NERA, one key factor in the decline of securities class action filings is a decline in cases relating to the global credit crisis. The decline in credit crisis related filings was partially offset by an increase in the frequency of other types of filings of class actions such as those alleging breaches of fiduciary duty in connection with mergers and acquisitions and cases filed against companies in the life sciences and technology sectors. Moreover, certain recent events, such as the Gulf of Mexico oil spill and motor vehicle recalls such as the Toyota acceleration problem, have given rise to new filings. The past year has also seen a large number

of non-class action complaints filed related to the Gulf of Mexico oil spill, product recall and Chinese drywall litigation as well as other Chinese imported products.

B. Securities Class Action Filings

1. Financial Companies

Lawsuits against financial companies have continued to predominate among all securities class action filings, and directors and officers are usually named defendants. Although there has been a decrease in subprime/credit crisis-related filings, there has been an increase in filings of cases alleging breach of fiduciary duty. Out of thirty such cases filed in the first half of 2010, more than half involved a defendant in the financial industry. Almost half of all breach of fiduciary duty cases filed in 2010 related to pricing in a merger or an acquisition. Moreover, cases alleging failure to represent investor interests have grown as a percentage of all cases in the breach of fiduciary duty category.

2. Gulf Oil Spill Related Filings

- *British Petroleum Company, PLC*

According to the putative class action complaint filed on 21 May 2010,[40] the massive explosion in the Gulf of Mexico on a mobile offshore drilling unit operated by British Petroleum Company, PLC ("BP"), known as The Deep Water Horizon, was caused by inadequate safety protocols. Plaintiffs allege that BP convinced investors that BP would be able to generate tremendous growth with minimal risks. It is now alleged that BP misled the investing public, when the truth was that BP was cutting corners and reducing its spending on safety measures in an effort to maximize profits in the Gulf of Mexico. It was not until after the explosion on 20 April 2010, that material information began to emerge about BP's safety measures. Had the plaintiff and other members of the class known the truth concerning BP's operations, which were

not disclosed by defendants, plaintiffs would not have purchased or otherwise acquired their shares or, if they had acquired such shares or other interests during the class period, they would not have done so at the distorted prices which they paid. The complaint alleges that BP and its officers violated Section 10(b) of the Securities and Exchange Act and Rule 10b-5 promulgated thereunder. The complaint further alleges that by virtue of the individual defendants' position as controlling persons, each is liable pursuant to Section 20(a) of the Exchange Act.

- *Transocean Ltd.*

A putative class action was also filed against Transocean[41] in relation to the Gulf of Mexico oil spill. Transocean is an owner of the drilling rig Deep Water Horizon. The complaint asserts that Transocean and its Chief Executive Officer violated the Securities and Exchange Act in connection with the dissemination of false and misleading statements about the company's efficient safety protocols with regard to blow out preventer ("BOP") problems, and its operating safety record. Plaintiffs allege that despite the warnings and defendant's knowledge that a BOP failure would likely result in fatalities and oil releases, Transocean continued to conceal its knowledge while making false and misleading statements to the investing public throughout 2009 and 2010. Plaintiffs allege as a result of the explosion on the Deep Water Horizon and ensuing events, stock shares fell in price.

- *Anadarko Petroleum Corporation*

Another putative securities class action suit, alleging violations of Section 10(b) of the Exchange Act and Rule 10b-5, as well as Section 20(a) of the Exchange Act, was filed against Anadarko Petroleum Corporation ("Anadarko"),[42] a 25% owner of the Deep Water Horizon well. The complaint alleges that Anadarko published a series of materially false and misleading statements because it failed to disclose, among other things, that there was no effective

Exploration and Oil Spill Response Plan for Deepwater Horizon; that drilling procedures were implemented solely to cut costs at the expense of safety; and that Anadarko lacked adequate systems of internal, operational or financial controls to maintain adequate insurance reserves or to meet the known or foreseeable risks associated with its deepwater drilling liabilities. Plaintiffs allege that once the public began to learn the truth about Anadarko's business operations in June 2010, its stock plummeted.

3. Toyota Motor Corporation

A securities class action complaint was filed in the United States District Court for the Central District of California in February 2010[43], alleging that Toyota Motor Corporation ("Toyota") issued materially false and misleading statements regarding the company's operations and its business and financial results and outlooks. Plaintiffs allege that defendants mislead investors by failing to disclose that there was a major design defect in Toyota's acceleration system, which could cause unintended acceleration. It is alleged that as a result of the defendants' false statements, Toyota's securities traded at artificially inflated prices. When Toyota then announced it would be recalling over 8 million Toyota brand vehicles because of the accelerator problem, stocks plummeted. Violations of Section 10(b) of the Exchange Act and Rule 10b-5, as well as Section 20(a) are alleged.

4. Massey Energy Company

Massey Energy Company produces, processes and sells bituminous coal extracted from 56 mines in West Virginia, Kentucky and Virginia and claims to be the largest coal company in Central Appalachia. A class action securities complaint was filed against Massey Energy in the United States District Court for the Southern District of West Virginia in April 2010.[44] The complaint alleges that Massey claimed to be one of the safest mine operators in the industry

when in fact, safety at Massey's mines was repeatedly sacrificed so that aggressive production goals could be met, and further alleges that Massey had received numerous, undisclosed citations.

On 5 April 2010, an explosion at the Upper Big Branch Mine in West Virginia resulted in the loss of 29 miners' lives and revealed the alleged falsity of Massey's repeated representations concerning safety. The price of Massey's common stock plunged following the explosion and subsequent revelations regarding Massey's safety record. The complaint against Massey and its officers and directors alleges that the defendants violated Section 10(b) of the Exchange Act and Rule 10b-5 in that they employed devices to defraud; made misleading statements and engaged in acts, practices and a course of business that operated as a fraud on plaintiff and others similarly situated in connection with their purchase of Massey securities during the class period.

5. Life Science Companies

There were seventeen class action securities' lawsuits filed against life science companies in the first half of 2010.[45] A putative class action was filed on 21 September 2010 against pharmaceutical giant, Johnson & Johnson, stemming from the largest recall of over-the-counter medications for children and infants in history. Two other noteworthy filings involve pharmaceutical company, Pfizer, Inc. and vitamin company, NBTY, Inc.

- *Monk v. Johnson & Johnson*[46]

A Johnson & Johnson investor filed a putative class action complaint against Johnson & Johnson, its subsidiary, McNeil Consumer Healthcare, and its Chief Financial Officer and President. The complaint asserts that the defendants secretly retained contractors to perform a quiet store-by-store buyback of Motrin products in which defects had been discovered, rather than contact the Food and Drug Administration. The complaint further alleged that due to the

blatant, systematic and repeated failure of defendants to maintain proper manufacturing practices at their facilities, defendants have been forced to issue over eight separate recalls including dozens of products and hundreds of millions of individual packages, which caused stock prices to decline significantly. The Johnson & Johnson complaint alleges that the defendants violated Section 10(b) of the Exchange Act and Rule 10b-5 in that they employed devices to defraud, made misleading statements, and engaged in acts, practices and a course of business that operated as a fraud on plaintiffs and others similarly situated in connection with their purchase of Johnson & Johnson securities during the class period. The complaint further alleges that by virtue of the individual defendants' position as controlling persons, each is liable pursuant to Section 20(a) of the Exchange Act.

- *Mary K. Jones, et al. v. Pfizer, Inc*.[47]

On 14 May 2010, an amended class action complaint was filed in the United States District Court for the Southern District of New York on behalf of purchasers of shares of Pfizer. Pfizer is a pharmaceutical company engaged in the discovery, development, manufacture, and marketing of prescription medicines for humans and animals worldwide. The amended complaint alleges that Pfizer misled investors by failing to disclose that it was engaged in an ongoing course of conduct designed to illegally promote the sale of certain Pfizer drugs, including Bextra, Geodon, Zyvox and Lyrica. Plaintiffs allege that Pfizer's practices caused hundreds of millions of dollars in false or fraudulent claims to be submitted to several federal healthcare programs, thus exposing Pfizer to untold legal liability.

On 26 January 2009, Pfizer announced that it was paying $2.3 billion to resolve several ongoing investigations including investigations into the improper promotion of and kickbacks involving Bextra, Geodon, Zyvox and Lyrica. After the cost of resolving these investigations

became public, the price of Pfizer common stock declined from $17.45 at the close of the previous trading day, to $15.65 on 26 January 2009. The complaint against Pfizer and its officers and executives alleges that the defendants violated Section 10(b) of the Exchange Act and Rule 10b-5 in that they employed devices to defraud, made misleading statements and engaged in acts, practices and a course of business that operated as a fraud on plaintiffs and others similarly situated in connection with their purchase of Pfizer securities during the class period.

- *John F. Hutchins, et al. v. NBTY, Inc.*[48]

On 11 May 2010 a class action was commenced in the United States District Court for the Eastern District of New York on behalf of purchasers of the common stock of NBTY. NBTY manufactures, markets, and sells nutritional supplements in the United States and worldwide. The complaint alleges that, throughout the class period, defendants failed to disclose material adverse facts about NBTY's true financial condition and business prospects. Specifically, the complaint alleges that NBTY failed to disclose: (i) that the company was experiencing a significant disruption in its private label business and a related decrease in demand for its private label products; (ii) that the company's advertising costs were escalating far in excess of the company's internal forecasts; and (iii) as a result of the foregoing, defendants lacked a reasonable basis for their positive statements about the company and its prospects. In response to the unexpected rise in advertising costs and a slowdown of sales in its private label business, shares of NBTY's stock fell 21%.

Similar to the Pfizer complaint, the complaint against NBTY and its officers and executives alleges that the defendants violated Section 10(b) of the Exchange Act and Rule 10b-5 in that they employed devices to defraud, made misleading statements, and engaged in acts,

practices and a course of business that operated as a fraud on plaintiffs and others similarly situated in connection with their purchase of NBTY securities during the class period.

C. Product/Operation Defect Litigation

1. BP Oil Spill

The 20 April 2010 explosion aboard the Deep Water Horizon resulted in the largest oil spill in American history and is also likely to spawn the largest and most diverse litigation in American history.

In the months following the spill, BP established a $20 billion Deep Water Horizon Fund ("Fund") to provide emergency, interim payments to claimants. Ken Feinberg, best known for his work with the Victims Compensation Fund created in the wake of the terrorist attacks of 9/11 and for his work relating to setting Wall Street compensation, has been appointed to define the parameters and processes under the Fund. The Fund provides an expedited process for initial payments for workers who are not getting a pay check because of the oil spill.

Although the Fund provides some immediate relief to those affected by the spill, the civil justice system will likely provide a resolution for the majority of the more complex claims. Claims may fall into a number of different categories. Government entities will likely bring natural resource damage claims under the 1990 Oil Pollution Act ("OPA"), enacted by Congress in the wake of the Exxon Valdez Oil Spill, to provide fisherman and others harmed by spills a more expeditious avenue for settling claims. The OPA requires a responsible party to pay up to $1 billion for cleanup and up to $75 million in economic damages for lost income.[49]

It is anticipated that there will be response and removal cost claims brought by the government as well as by private individuals and businesses that employed others to prevent contamination to their property, i.e. an individual's portion of the coast. A claimant need only

establish proximate cause under OPA. Under that low threshold, a hotel or even private landowner, trying to protect its property on the Gulf Coast, may be able to recover under OPA.

In addition to claims under OPA, traditional property damage lawsuits have been filed by individual landowners. Louisiana law provides that a plaintiff may receive restoration value for his damaged property which may be higher than market value. Further, people who have property near an oil spill may have "stigma" damage claims. More than just physical damage, social stigma -- defined as the belief that an area has been negatively affected because of its proximity to the Gulf -- is having a dramatic impact on housing markets.[50] It has been reported that Gulf of Mexico coastal homes may lose as much as $56,000 each in value as buyers shun areas marred by the worst oil spill in U.S. history.[51]

Claims are likely to be made for loss of profits and earning capacity. Studies indicate that the BP oil spill may cost the Gulf Coast region up to $22.7 billion in lost tourism spending alone.[52] The loss in tourism has been felt as far away as Alabama and Florida.

Lost earnings will likely be claimed by people who were laid off by the slow down in economic activity, including fisherman who are likely the most well known class of claimants. Although BP is making interim monthly payments to fishermen for lost profits and earning capacity under the Deep Water Horizon Fund, the question becomes how far removed from the spill can the lost earnings claims be made. For example, if a business in another state specializes in importing Louisiana seafood and selling it to area restaurants, that business probably suffered an economic loss. However, if another restaurant merely calls itself "Cajun" and goes out of business because of its tenuous association with the Gulf Coast, does that restaurant have a claim? Proximate causation will be an issue.

The types of claims associated with the Gulf Spill are as limitless as the imagination. Some plaintiffs will have simple subsistence claims alleging that they were unable to fish for their own personal consumption. Claims may be filed under the Occupational Safety and Health Act ("OSHA") on behalf of workers asserting unsafe workplace conditions. Negligence actions against manufacturers that provided products and contractors that participated in the alleged remediation processes are also likely. Defendants may include BP, Transocean, Halliburton, and other contractors involved in the initial explosion, oil spill and cleanup effort.

The more uncertain issue raised by the Gulf Oil Spill is damages. This was not a typical spill situation in which the release of oil occurred and was stopped shortly thereafter. In this incident, oil was released into the Gulf of Mexico over a three month period leaving large plumes possibly still moving throughout the Gulf. In fact, there are large amounts of oil that are, to date, unaccounted for. This raises the possibility that the oil will cause an enduring problem complicating any settlements in light of the possibility of future damages.

In August 2010, the Judicial Panel on Multi-State Litigation (JPML) entered an Order consolidating and transferring 154 oil-spill related cases to the United States District Court for the Eastern District of Louisiana. Although defendants and plaintiffs had moved to consolidate in other jurisdictions, the JPML found that the Eastern District of Louisiana was the geographic and psychological center of gravity of the oil spill claims.

A class action lawsuit filed on 20 August 2010, in the U.S. District Court in New Orleans by a group of fishermen, property owners, business owners and wage earners, appears to be the first to address the issue of punitive damages in connection with the BP oil spill. This case will test the 2008 opinion of the U.S. Supreme Court limiting punitive damages. The Corliss Gallo et al v. BP[53] complaint alleges that the "outrageous conduct" by BP, Transocean, Cameron

International and Halliburton represents a "common thread of gross negligence and willful, wanton and reckless indifference for the rights of other."[54]

In its 2008 opinion in Exxon v. Baker, the United States Supreme Court limited punitive damages related to the Exxon Valdez oil spill to a one-to-one ratio of punitive to compensatory damages, characterizing the ratio as a "fair upper limit" in maritime cases. The court's decision reduced punitive damages awarded in that case from $5 billion to $507.5 million. However, the Supreme Court left open the possibility that punitive damages could be as much as three times actual damages in cases of reckless profiteering. The Supreme Court stated that the three to one punitive damages ratio might be warranted in a wide variety of cases involving egregious conduct, including malicious behavior and dangerous activity carried out for the purpose of increasing a defendant's financial gain. The plaintiffs in the Gallo case believe that the BP oil spill qualifies as an exception to the Exxon v. Baker rule. In support of their position, plaintiffs rely on a U.S. Coast Guard investigation and congressional hearings that allegedly establish that the defendants knowingly took risks and failed to properly maintain their equipment because of their over-riding desire to maximize profits.

a. Liability Insurance Implications

Bodily injury and property damage claims against business owners are likely to implicate commercial general liability coverage. One can predict coastal property owners' claims for property damage from oil-contaminated beaches against the target defendants such as the well operators, the manufacturer of the malfunctioning blow-out preventer, and those contractors who installed the pipeline and worked on the rig. Or on a smaller scale, one can readily predict claims against restaurant owners by patrons who claim to have been sickened by oil-contaminated food.

In addition to claims implicating occurrence-based general liability coverage, oil spill claims will also undoubtedly implicate claims-made coverages and the notice and reporting requirements, such as directors and officers' liability coverage with respect to securities litigation, and errors and omissions coverage if claims are made against engineers, surveyors or architects for professional negligence, or professional malpractice claims made against the various environmental contractors involved with the cleanup.

Policyholders with operations likely to draw pollution-related claims may have environmental impairment liability ("EIL") coverage which is also typically written on a claims-made basis. Given the wide array of coverages potentially implicated by the Gulf Oil Spill, and the possible availability of claims-made coverage for several types of spill-related claims, timeliness of notice, tenders, and reporting to insurers and co-insurers will be vitally important.

Coverage issues from the spill will likely implicate a host of policy exclusions, such as the absolute pollution exclusion, contractual liability exclusions and intentional act exclusions. Along those same lines, the CGL policy excludes damages expected or intended by the insured. CGL policies further typically exclude coverage for hazards, conditions, risks or losses known to the insured before the effective dates of the policies. Other potentially applicable exclusions may include the "owned property" exclusion excluding any loss resulting from damage to property owned or occupied or rented to the insured. Policy limits and aggregate limits may also pose limitations on the extent of insurance coverage for the multitude of expected claims.

b. Liability Coverage Litigation

Certain Underwriters at Lloyd's of London and other excess insurers ("Excess Insurers"), filed a declaratory judgment action on 21 May 2010 in Texas federal court seeking a declaration that no additional insured coverage is owed to BP, and others, under policies issued to

Transocean with respect to pollution claims arising out of the blowout and fire on the Deepwater Horizon oil well.[55] Specifically, the Excess Insurers allege that no coverage is owed for BP's current and future pollution liabilities related to oil emanating from the Deepwater Horizon because the policies provide coverage to BP only for surface pollution from substances in Transocean's possession, and liabilities that originate above land and water. The complaint further alleges that BP's liabilities fall outside the scope of the additional insured protection, because liabilities BP faces for pollution emanating from BP's well are from below the surface and, therefore, there is no coverage under the policies for current or future pollution.

2. Product Recall

Product recalls occur nearly on a daily basis in the U.S. market. The most prevalent recalls concern food products, motor vehicles, medical devices and drugs. Motor vehicle recalls have been significant in the last year. Although there have been a number of recalls in the past six months, including sudden power steering loss in certain Mazda sedans, General Motors seat belts, Kawasaki off-road motorcycle ignition switches, Ford ignition locks, Nissan Cube fuel leaks, and Jeep Sport and Dodge and Chrysler minivan accelerator pedal problems, the largest recall in recent memory, and one inciting government investigations and even possible criminal charges, is the Toyota sudden acceleration lawsuits.

Toyota, the world's largest automaker, faces more than 300 federal and state lawsuits, including a proposed class action, claiming economic losses, personal injuries or deaths relating to allegations that vehicles suddenly accelerated and could not be stopped. Toyota has recalled more than 8 million vehicles worldwide in the past year for defects including pedals that stuck or snagged on floor mats. Consumers claim that Toyota knew of problems related to sudden acceleration as early as 2003.

On or about 18 September 2010, Toyota quietly settled a high profile lawsuit over a fatal crash near San Diego last year that drew national attention to the recall issue and an unprecedented apology from its president. The settlement concerned an accident that occurred in August 2009, in which California Highway Patrol Officer Mark Saylor was driving a Lexus ES when the vehicle sped out of control and crashed over an embankment. Saylor was killed along with his wife, young daughter and brother-in-law. The case received national attention because of a two minute emergency response recording narrating the events prior to the accident in chilling detail. This incident set off a chain of events leading to Congressional Hearings, multiple federal investigations and record fines against Toyota.

In June 2010, the majority of the Toyota acceleration cases filed in state court were consolidated in Los Angeles County State Court. Currently, there are close to 50 federal lawsuits now consolidated in the United States District Court for the Central District of California. On 14 September 2010, Toyota filed a motion seeking dismissal of those federal complaints based on the plaintiffs' failure to identify a single electronic defect that could cause sudden acceleration. A motion to dismiss on the same grounds was filed on 30 September 2010 with regard to a Virginia State Court lawsuit.

3. Chinese Drywall

Although the use of Chinese Drywall may have ceased, the liability and coverage disputes stemming from Chinese Drywall claims have only begun. Because of the enormous costs associated with these claims, and the unsettled law in this area, we anticipate that liability suits will continue to be filed and insurers and contractors will vigorously assert their respective positions on coverage for the claims.

Chinese Drywall was installed during the U.S. building boom of the mid to late 2000s, prompted by a shortage of domestic supplies. It is estimated that over 500 million pounds of Chinese Drywall were imported into the United States between 2004 and 2008. As of 20 August 2010, the U.S. Consumer Product Safety Commission ("CPSC") had received 3,526 incident reports related to drywall from 38 states, the District of Columbia, Puerto Rico, and American Samoa. More than 90% of reports are from five states – Florida (58%), Louisiana (19%), Mississippi (6%), Alabama (6%), and Virginia (4%).[56]

In the summer of 2008, Florida homeowners began experiencing a variety of problems including a sulphuric odor and corrosion of HVAC coils, copper plumbing, wiring, refrigerators and metallic fixtures. Affected homeowners also reported unexplained physical ailments such as headaches, nosebleeds and respiratory problems.[57] The CPSC continues to investigate the corrosive effects of the Chinese Drywall which resulted in the largest compliance investigation in CPSC history. To date, CPSC has spent over $5 million investigating the chemicals and the chain of commerce of problem drywall and issuing remediation guidance to assist impacted homeowners.[58] Most drywall came from subsidiaries of two non-U.S. companies, Knauf Tianjin and Taifhan Gypsum Company, Ltd., and it has proven difficult to successfully sue foreign manufacturers.[59]

Defective Chinese Drywall results in are two types of claims: [60]

1. Property Damage

   Some homeowners contend their residences are worthless and may have moved out awaiting repairs. Remediation efforts may include removing the suspect drywall and repairing or replacing damaged appliances and electronics. A rule of thumb estimates the claim size to be one-third the value of the home, up to $100,000. Towers Perrin estimates losses could be $8 billion to $10 billion. The cost could climb dramatically if the metal frames critical to a modern home begin to corrode and require the house to be raised and rebuilt.

2. Bodily Injury

> The number and size of health related claims are difficult to estimate. Researchers have found no scientific link between the symptoms reported and the emission levels of the chemicals found. However, some news reports are highlighting the perceived health risk even while reporting that no link has been found.[61]

The first Chinese Drywall liability cases concluded in April 2010. In one case a Virginia Court awarded $2.6 million to seven homeowners for damage to all copper pipes, HVAC units, carpet, vinyl flooring, insulation and much more.[62] In another case, a Louisiana federal court has gone much further than the remediation recommendation of the CPSC of selective removal of problem drywall[63] and found that all drywall had to be replaced.[64] In that case, the Louisiana homeowner received $164,000 plus attorneys' fees.[65]

In May 2010, Manufacturer Knauf Tianjin negotiated a settlement with home builders, the terms of which remain confidential.[66] Although liability is developing with regard to property damage claims, the science with regard to bodily injury claims seems to have stalled.

With regard to potential coverage for Chinese Drywall claims, the applicability of policy exclusions is developing on a state by state basis. The typical homeowner's policy excludes losses from defective construction materials. In June 2010, a U.S. District Court Judge in Norfolk, Virginia found that a homeowners' policy specifically excluded damage from Chinese Drywall which it deemed a latent defect, as well as faulty materials, corrosion and pollution.[67] Therefore, the court determined there was no coverage for removing or replacing drywall under the policy.

It is anticipated that claims for coverage for third party claims will be made under standard CGL policies which provide an insured coverage for property damage or bodily injury

arising from an "occurrence." It is anticipated that the most significant issues that will be litigated will be whether there is an occurrence as defined by the policy, the number of occurrences, trigger of coverage, and the applicability of the pollution exclusion. A significant coverage issue is whether the absolute pollution exclusion will apply to preclude coverage. Insurers are closely watching for rulings in states such as New York, New Jersey, Illinois, Florida and California that have not applied the pollution exclusion to non-traditional, indoor claims for environmental contamination. In March 2010, a Louisiana State Court held that the Pollution or Contamination exclusion in a homeowner's policy was not intended to exclude the residential homeowner's claims for damages caused by substandard building materials.[68]

Liability insurance agreements also contain certain "business risk" exclusions which may preclude or otherwise limit coverage for Chinese Drywall claims, such as the "Your Product" exclusion, the "Your Work" exclusion, the "Impaired Property" exclusion and the "Sistership" exclusion.

4. Chinese Product Recall Claims

Chinese Drywall is only one of the many products arriving from emerging markets that pose a new sort of liability risk to insurers. Chinese imports have more than quadrupled since 1999, to $337.8 billion in 2008, before falling to $296.4 billion in 2009 in the wake of the recession.[69] Moreover, the number of defective products from China has mushroomed.

In 1997, 21% of all recalled imports were from either Hong Kong or China. By 2007, China alone accounted for 67% of recalled imports, including 98% of toys.[70] High profile Chinese product recalls include poisoned pet food, drug-laced fish and lead paint in children's trains. Insurers face two problems in these types of cases. The first is indemnifying U.S. insureds for liability imposed on them in connection with defective Chinese products as most

product liability litigation involving Asian products targets U.S. distributors and retailers. Suing the actual Chinese manufacturer is expensive and time consuming. Further, if Chinese products prove unreliable or even suffer under the perception of being unreliable, juries may "punish" the U.S. companies and the distributors by awarding large verdicts.

The second challenge to insurers involves the cost of adjusting the claim. Seeking contribution or indemnification from a foreign manufacturer in a country like China can be expensive and complex. Adding a manufacturer to a lawsuit involves compliance with The Hague Convention, can take many months and be costly.

V. CONCLUSION

It has been an interesting year in the world of claims. Claims continue to emerge and develop as is indicated by the overall increase in litigation and jury verdicts, as well as the litigation trends observed. Changes in the composition of the U.S. courts and U.S. economic conditions contribute to the uncertainties in today's litigation climate and the manner in which the U.S. tort landscape will develop in the foreseeable future. We will continue to monitor these trends as they continue to evolve.

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