Summer 2012

# Perspectives
## on Insurance Recovery

*Welcome to our latest Insurance Recovery newsletter. We start with a closer look at cyber insurance—policies that cover cyber-related incidents such as data security breaches. The cyber insurance market is truly in flux, with insurers competing for market share by writing increasing numbers of policies, despite consistently poor underwriting, highly negotiable coverage terms and a rapidly evolving set of exposures. This provides either great opportunity or quicksand for risk managers and proves the importance of consulting with skilled counsel. This issue includes our top 10 list of tips for buying cyber insurance. We will also look at SEC's cyber exposure disclosure guidance and how it impacts cyber insurance.*

*We also take a look at other issues Pillsbury's insurance attorneys have worked on and matters of the moment, including insurance issues related to asbestos, construction and other topics.*

—**Peter Gillon**, Insurance Recovery & Advisory

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# Cyber Insurance—Mitigating Loss from Cyber Attacks

*by Rene Siemens and David Beck*

The market is rapidly growing for insurance that is specifically meant to cover losses arising out of cyber attacks and other privacy and data security breaches. These insurance policies are marketed under names like "cyber-liability insurance," "privacy breach insurance" and "network security insurance." Many companies and other institutions that handle legally protected information now view this kind of insurance as an essential part of their coverage programs.

There is no standardization of cyber insurance policies. The terms and exclusions can vary dramatically from one insurer to the next. Broadly speaking, however, cyber insurance policies can provide coverage for third-party liability, first-party losses or both. A policy typically includes some or all of the following types of coverage.

For third-party liabilities, a cyber insurance policy may cover costs of mitigating the insured's potential liability from an actual or suspected data security or privacy breach, including:

**Crisis Management Expenses**

- Costs of notifying affected parties
- Costs of providing credit monitoring to affected parties
- Costs of public relations consultants
- Forensic investigation costs incurred to determine the existence or cause of a breach
- Regulatory compliance costs
- Costs to pursue indemnity rights
- Costs to analyze the insured's legal response obligations

**Claim Expenses**

- Costs of defending lawsuits
- Judgments and settlements
- Regulatory response costs
- Costs of responding to regulatory investigations
- Costs of settling regulatory claims

Many policies also provide coverage for a variety of torts, including libel, invasion of privacy or copyright infringement.

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## Cyber Insurance—Mitigating Loss from Cyber Attacks

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First-party coverages may include lost revenue due to interruption of data systems resulting from a cyber or denial of service attack and other costs associated with the loss of data collected by the insured, such as:

**Revenue lost due to interruption of your operations due to, e.g.,**

- Hacking
- Virus transmission
- Other security failures

**Costs of restoring, recreating or recollecting:**

- Lost data
- Stolen data
- Damaged data

Some policy forms even include coverage for costs of responding to demands for "ransom" or "E-extortion" threats to prevent a threatened cyber attack.

### Market Conditions

The market for cyber insurance in the U.S. grew from less than $100 million in premiums underwritten during 2002 to approximately $800 million in annual premiums by 2011. Many insurers have recently jumped into this market and are competing to establish market-share. As a result, the cyber insurance market is "soft": The coverage has actually become less expensive as insurers compete for business. This decrease in price contrasts with the ever-increasing risk for significant cyber-liability exposures. The cyber insurance market may not remain soft for long, but in the meantime policyholders may benefit from a competitive market.

The cost of cyber insurance will vary depending on a variety of factors, including the size and risk factors of the insured organization, the amount and kinds of coverages purchased, and the size of the retentions or deductibles. Average premiums for primary coverage may range from $15,000 to $35,000 per $1 million of limits.

Given the lack of standardization and competitive market, the terms of cyber insurance coverage tend to be highly negotiable. Terms that are initially offered in the form of an apparently "off the shelf" policy by an insurer may often be customized, through negotiation, in order to respond to a prospective policyholder's unique circumstances. A prospective policyholder may also negotiate changes to policy language that ultimately yield an insurance policy with broader grants of coverage, and narrower (or at least clearer) exclusions and limitations, than those initially offered by an insurer, with no additional premium charge. The result is better coverage, usually for no increased cost.

Insureds that are considering cyber coverage, or are approaching renewal time, should therefore have an experienced insurance coverage attorney review the terms of the policy forms they are being offered, with a view to recommending enhancements that should be requested from the insurer. In short, companies should approach the purchase of a cyber insurance policy the same way they approach the negotiation of any other substantial business contract: They should review the proposed contract carefully and negotiate better terms where possible. Soliciting competitive bids from several insurers may increase one's negotiating power.

### Common Coverage Provisions

Cyber insurance policies, like other kinds of insurance policies, usually contain several insuring clauses that cover different types of loss within a single policy.

For third-party liability, most cyber insurance forms apply to claims that are brought against the insured by those whose private data has been breached. Costs that are payable typically include the amount of any settlement or judgment, as well as the insured's defense costs. Other covered costs may include expenses incurred

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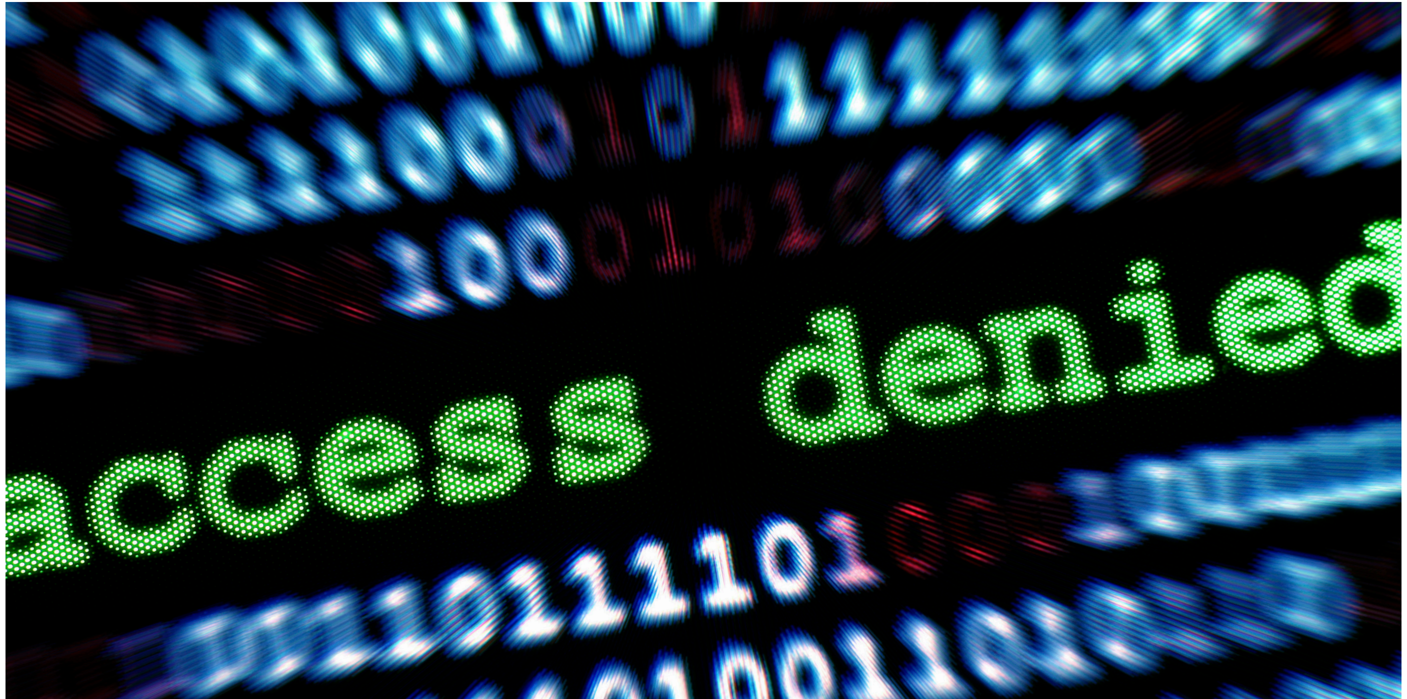
## 10 Tips

### FOR BUYING CYBER INSURANCE

1. Make sure your policy limits and sublimits are adequate
2. Request "retroactive" coverage for prior, unknown breaches
3. Watch out for "panel" and "prior consent" provisions that purport to tie your hands in responding to a breach
4. Get coverage for claims resulting from your data vendors' errors and omissions, not just your own
5. If you handle data for others, make sure your liability to them is covered too
6. Seek coverage for "loss" of data, not just data theft
7. Dovetail your cyber insurance with data vendor indemnities to maximize both
8. Harmonize cyber coverage with your other insurance
9. Get a subrogation waiver from your cyber insurer
10. Negotiate favorable defense provisions




# Public Companies Must Disclose Cyber-Liability Risks

*by Rene Siemens and David Beck*

If you thought you did not need cyber insurance before, Uncle Sam may cause you to think otherwise. On October 13, 2011, the Securities and Exchange Commission (SEC) Division of Corporation Finance issued guidance on disclosure obligations relating to cyber security risks and incidents. The guidance, which is based on existing disclosure requirements and is effective immediately, emphasizes the need for SEC registrants to provide "timely, comprehensive, and accurate information about [cyber] risks and events that a reasonable investor would consider important to an investment decision."

The required disclosures highlighted by the SEC include:

1. Risk factors relating to a potential cyber incident, including known or threatened attacks
2. Costs or other consequences associated with known cyber incidents or the risk of potential incidents, where such costs represent a material event, through disclosure in the Management Discussion and Analysis section of the registrant's annual report
3. Cyber incidents that materially affect a registrant's products, services, or relationships with customers and suppliers
4. Material legal proceedings involving cyber incidents
5. Any material impact of cyber security, both pre- and post-incident, on the registrant's financial statements

Failure to make the above disclosures could subject registrants to various consequences, including SEC enforcement actions or lawsuits brought by shareholders.

The new SEC guidance provides yet another reason for companies that handle sensitive information to insure themselves against data security and privacy claims. Indeed, the SEC expressly notes insurance coverage as one of the relevant factors to be considered in assessing a company's potential cyber-liability risk. In recent years, a large market has evolved for insurance that is specifically designed to cover these risks—marketed under names like "privacy breach insurance," "network security insurance" and "cyber-liability insurance." This insurance provides both first- and third-party coverage for loss associated with a cyber security incident and includes coverage for costs such as restoring damaged data, responding to regulatory investigations, defense and indemnification against lawsuits arising out of cyber incidents, and loss of revenue for business interruption caused by a data security breach. While traditional insurance may cover some of these risks too, this new coverage should be seriously considered by any company—whether a registrant with the SEC or not—handling sensitive information.

In procuring cyber insurance, it is important to note that one size does not fit all. Every insurance company has its own unique policy forms, terms and exclusions. Therefore, it is important to consult with an attorney or other professional familiar with the coverages available and the needs of your business so as to ensure that you do not purchase coverages that you do not need or are inadequate.

# California Appellate Court Upholds Trial Court's Dismissal of a Coverage Claim for an Alleged Advertising Injury

*A recent decision in California put a crimp in a rock star impersonator's effort to seek coverage for his liability to the rock star for "trading on his celebrity"*

*by Kimberly Buffington*

In *Oglio Entertainment Group, Inc. v. Hartford Casualty Insurance Company*, 200 Cal. App. 4th 573 (2011), the California Court of Appeal concluded that an entertainment company's insurance policy covering "personal and advertising injuries" did not cover a claim for trading on the celebrity and goodwill associated with a musician's name or using the musician's name as the domain name for a Web site selling similar music.

In *Oglio*, the coverage clause at issue provided that the carrier would indemnify the insured for any damages incurred by the insured "because of … 'personal and advertising injury' to which the insurance applies." The policy's coverage provisions required the carrier to defend the insured in actions seeking such damages.

The policy defined an "advertising injury" as an injury stemming from "[c]opying, in your 'advertisement,' a person's or organization's 'advertising idea' or style of 'advertisement.'" The policy defined "advertisement" as "the widespread public dissemination of information or images that has the purpose of inducing the sale of goods, products or services through" radio, television, billboard, magazine or newspaper, as well as "[t]he Internet, but only that part of a Web site that is about goods, products or services for the purpose of inducing the sale of goods, products or services," and "[a]ny other publication that is given widespread public distribution." The policy further provided that "'advertisement' did not include the design, printed material, or any images or information contained in or on the packaging or labeling of any goods or products, or an interactive conversation through a computer network." In addition, the policy defined the term "advertising idea." Under the policy, an "advertising idea" constituted "any idea for an 'advertisement.'"

The Court of Appeal concluded that the underlying claim did not fall within the policy's definition of an "advertising injury." Specifically, the court reasoned that the underlying claim did not allege that the insured used an advertisement that copied an advertisement or that the insured copied an idea or style of advertisement in an advertisement. Further, because the court concluded that the underlying claim was not covered by the policy language, the Court of Appeal declined to address whether exclusions in the policy were applicable. Thus, the court never reached the issue of whether the exclusions for advertising injuries arising out of violations of intellectual property rights or out of "the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers" precluded coverage.

Although the court ultimately concluded that the *Oglio* policy did not provide for this particular claim, the court recognized that other policies would provide coverage, including an earlier version of the policy at issue. The *Oglio* decision highlights the importance of performing a careful comparison of available policies when purchasing insurance. Further, to avoid risking a loss of coverage, businesses should always promptly notify their insurance carriers of an advertising injury claim. Businesses should not be deterred by an initial coverage denial. In our experience, although insurance carriers frequently initially deny coverage, insurance coverage may still be available.

# UK Supreme Court Pulls Trigger on Asbestos Liability Insurance

*by Raymond L. Sweigart*

The UK's highest court has issued its decision in the *Employers' Liability Insurance "Trigger" Litigation: BAI (Run Off) Ltd v Durham & Ors,* [2012] UKSC 14 (28 March 2012), and finally resolved a long-pending dispute over insurance claims by the relatives of workers who died after being exposed to asbestos. The Supreme Court has ruled, without reference or comparison to the earlier resolution of similar issues in the United States, that insurance liability in the UK is triggered when an employee is exposed to asbestos, not when mesothelioma later manifests itself.

As we discussed in our prior article, the legal battle over employers' liability insurance coverage for mesothelioma arising from workplace exposure has been ongoing in the UK since at least 2006 and has delayed the resolution of thousands of injury and death claims. The legal dispute centered on which insurance companies providing employers' liability insurance cover were legally obligated to indemnify employers against claims from workers who became ill, often many years after their employment had ended, and whether the insurer on coverage when the claimant was exposed to asbestos should pay the claim or the insurer on coverage when the mesothelioma developed. The Court of Appeal had decided that it really depended upon the wording of the policies in question.

The UK Supreme Court has now determined after hearing extensive argument that the wording of the particular policies does not really make a difference after all; and all such policies, regardless of their wording, that were in effect when exposure occurred must respond to the claims.

As those in the United States familiar with the battles over insurance coverage for asbestos damages will recognize, "trigger" is a term of art often used in discussion of insurance coverage for the event that activates coverage under a particular insurance policy. The U.S. courts have looked to various trigger theories in cases, such as those involving asbestos injury or damage, where the difficulty in determining when the underlying injury or damage actually happened raises questions as to which among multiple policies might apply.

While the courts in England were considering between exposure and manifestation triggers under various policy language, the U.S. courts had wrestled more broadly with three generally accepted trigger of coverage theories and one subset.

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## UK Supreme Court Pulls Trigger on Asbestos Liability Insurance

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### Exposure Trigger

The exposure theory is perhaps best explained in *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc*., 633 F.2d 1212 (6th Cir. 1980). The Forty-Eight Insulations court concluded, similar to the UK Supreme Court, that coverage is triggered under the exposure theory when the first injury-causing conditions occur or upon the first inhalation of asbestos fibers.

*The fact-finder can determine that injury occurred at any number of points, from initial exposure through manifestation.*

### Manifestation Trigger

The manifestation, or discovery, trigger activates coverage under the policy in place when the personal injury or property damage becomes known, or is discovered by, the property owner or victim. However, even when U.S. courts say they have applied the manifestation theory, they have not always been consistent in doing so. Some courts find the policy is triggered when the damage is actually discovered while others trigger the policy in place when the damage could or should have been discovered.

### Continuous, Multiple or Triple Trigger

The continuous trigger has also been referred to as the multiple trigger or triple trigger. This trigger originated in asbestosis cases where bodily injury progresses and becomes more serious over time. The court in *Keene Corp. v. Insurance Co. of N. Am*., 667 F.2d 1034 (D.C. Cir. 1981), contains a discussion of the origin and application of the multiple trigger theory:

> [T]he allocation of rights and obligations established by the insurance policies would be undermined if either the exposure to asbestos or the manifestation of asbestos-related disease were the sole trigger of coverage. We conclude, therefore, that inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies. We interpret "bodily injury" to mean any part of the single injurious process that asbestos-related diseases entail.

### Injury-in-fact Trigger

The injury-in-fact, or actual injury, coverage trigger under a general liability policy has been found when the personal injury or property damage underlying the claim actually occurs. *GenCorp., Inc. v. AIU Ins. Co.*, 104 F.Supp.2d 740 (N.D. Ohio, 2000), for example, held that the appropriate trigger for claims arising out of the disposal of hazardous waste was: "a continuous trigger employing injury-in-fact as the initial triggering event ... if GenCorp can substantiate its claim that the injuries ... were continuing in nature ... coverage will be triggered for the periods between the first point of injury-in-fact and manifestation."

The injury-in-fact approach, on consideration, may really be identical to the continuous or triple-trigger theory. In *Wolverine World Wide, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 705981 (Mich. App. 2007), the court explained:

> [t]his is likely because the concept of "injury in fact" is flexible. The fact-finder can determine that injury occurred at any number of points, from initial exposure through manifestation. Further, in continuous damages cases, injury may occur repeatedly through numerous consecutive policy periods.

There seem to be as many triggers as there are U.S. courts that have considered these issues. For now, however, in England and at least in employer liability coverage cases, the UK Supreme Court has come down on exposure to asbestos as the trigger for insurance coverage.

## Cyber Insurance—Mitigating Loss from Cyber Attacks

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to comply with consumer notification provisions contained in privacy laws and regulations, or to provide credit monitoring services for those parties whose information has been compromised, investigatory expenses incurred to determine the cause and scope of the data breach, and the cost of retaining a public relations firm to handle the public disclosure of the breach.

For first-party losses, coverage may include lost revenues and continuing operating expenses incurred due to a denial of service or other impairment resulting from a cyber attack. Some policies also provide coverage for the cost of restoring or re-creating lost or stolen data.

As with any insurance, these coverages are subject to a number of limitations and exclusions that must be reviewed carefully —and renegotiated where appropriate—in order to ensure that important coverages are not omitted and the insured's intent in purchasing the coverage is not obscured or frustrated. Clients frequently ask us to review cyber insurance policies before the underwriting process and advise them on terms, conditions and exclusions that should be renegotiated.

*Cyber insurance can be a valuable tool for mitigating losses from data security breaches.*

### Conclusion

Cyber insurance can be a valuable tool for mitigating losses from data security breaches. However, as with any insurance policy, cyber insurance policies contain many limitations and exclusions. It is important that these exclusions be read carefully during the initial underwriting process, as many of the limitations of this kind of insurance can be overcome through negotiation before the policy is bound.

# Preparing Your Business for the 2012 Atlantic Hurricane Season

*by Vince Morgan*

*The Atlantic Hurricane Season officially runs from June 1 to November 30, though peak activity usually occurs in August and September.*

With the beginning of tropical storm activity just around the corner, now is the time to prepare your company and review your insurance coverage for what may lie ahead in the coming months.

## Consensus Predictions for 2012

While estimates from various forecasters differ, the consensus predictions at this time expect a relatively average hurricane season this year with about 12 to 14 named storms, roughly six or seven of which may become hurricanes, with perhaps two to four developing into intense hurricanes. Even one storm, however, may be enough to cause massive losses.

## Steps to Prepare Your Company

Though it is impossible to predict precisely if, and where, this year's storms may make landfall, it is prudent for companies with significant exposure to the Eastern and Gulf coast regions to prepare as if a storm is headed their way. With that approach in mind, here are some steps that can be taken now to prepare ahead of time, which should be part of the company's disaster and business continuity plan.

## Review Your Policies, and Adjust Them if Necessary

The time to review your company's policies is now, not after a storm has passed. Scenario planning is an excellent way to identify potential gaps in coverage as well as challenges the company might face in the aftermath of a storm. For example, preparing a hypothetical claim for a Category 3 storm at a key facility should present a fairly realistic picture of potential losses and how the policies will likely respond. To the extent that this process identifies any deficiencies in coverage, or perhaps asset schedules and related policy information that needs to be updated, now is the time to take care of these details to avoid disputes in the future.

## Understand Key Coverages

### Protecting the Company's Property

A company's commercial property policy is usually the starting point for protecting its tangible property. Ensuring that the policy carries adequate limits, based on a current fixed-asset verification, is critically important. Additionally, the policy should be carefully examined for exclusions,

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# What if Your Insurer Goes Bankrupt and No One Tells You?

*by Laura P. Bourgeois*

"Does an insurance broker, after procuring an insurance policy for a developer on a construction project, owe a duty to apprise a subcontractor that was later added as an insured under that policy of the insurance company's subsequent insolvency?"

In this issue of first impression in California, the Fourth District Court of Appeals said "no." *Pacific Rim Mechanical Contractors, Inc. v. Aon Risk Insurance Services West, Inc.* --- *Cal.Rptr.3d* ----, 2012 WL 621346 (Cal.App.4 Dist.).

A quick background: Developer (Bosa) engaged insurance broker (Aon) to obtain insurance for a project in downtown San Diego. Through Aon, Bosa created an OCIP from Legion. Under the OCIP, Legion provided liability insurance to every contractor and subcontractor on the project. Bosa later subcontracted with Pacific Rim (PacRim), which became an enrolled party on the OCIP. After the project was complete, Legion became insolvent. And apparently subcontractor PacRim was the last to find out.

Six years after the project was completed, when the homeowners association filed a lawsuit for construction defects, a series of cross- and counterclaims followed. At issue in this appeal were PacRim's claims against Aon and Bosa begging the question: Who should have notified PacRim that the OCIP insurer became insolvent?

## Insurance Broker's Duty?

Turning first to the insurance broker, the court held that Aon had no duty to inform PacRim of Legion's insolvency. Under well-settled California law, insurance brokers owe a limited duty "to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured." The court declined to create and impose on the insurance broker a new legal duty of notification after the policy is procured. According to the court, PacRim's claims against Aon failed as a matter of law because "PacRim's claims are based entirely on the allegation that Aon failed to satisfy a duty that California law does not recognize."

The court rejected PacRim's argument that public policy considerations warranted imposing such a duty on Aon. Noting that other states have enacted statutes imposing such a duty on brokers—and California has not—the court agreed with Aon that it should remain the province of the Legislature.

The court further observed that PacRim was not merely seeking to impose a "narrow duty" on insurance brokers to notify insureds when the broker has actual knowledge of an insurer's insolvency. Instead, PacRim asked the brokers to notify an insured of "any adverse changes in its financial condition." This would necessarily include a duty of monitoring insurers and would present uncertainty as to when the broker's duty arises. This would fundamentally change the relationship between brokers and their insureds—a step the court refused to take.

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# Given Recent Ruling, Will Negligence Claims Be Covered Under CGL Policies in Virginia?

*by James Bobotek and Peter Gillon*

The Virginia Supreme Court recently issued a very troubling opinion for Virginia-based policyholders. In *AES Corp. v. Steadfast Insurance Co.*, the court held that when a lawsuit alleges that a company engaged in an intentional or volitional act where (i) it subjectively intended or anticipated the result, or (ii) the result was a natural or probable consequence of the intentional act, that company is not entitled to a defense or indemnity under its commercial general liability insurance coverage because a covered "occurrence" has not been alleged.

The *AES* decision arises from litigation since dismissed by the U.S. District Court for the Northern District of California—developed and funded by a group of high-profile plaintiffs' lawyers to establish a cause of action for property damage caused by climate change. In *Native Vill. of Kivalina v. ExxonMobil Corp.*, the plaintiffs, a group of Inupiat Eskimos who were forced to abandon their seaside village north of the Arctic Circle due to excessive erosion allegedly caused by sea level rise due to global warming, brought suit against AES and other power companies alleged to be the largest carbon dioxide emitters. AES tendered the suit to Steadfast, which accepted the defense subject to a reservation of rights and then filed a declaratory judgment action against AES in the Circuit Court for Arlington, Virginia. After both sides moved for summary judgment, the trial court ruled that Steadfast had no duty to defend AES because the Kivalina plaintiffs' complaint did not include allegations falling within the applicable CGL policies' definition of "occurrence." AES petitioned for, and was granted, an appeal to the Virginia Supreme Court.

Notwithstanding the underlying complaint's specific allegations of negligence by AES, the Supreme Court concluded that "[e]ven if AES were negligent and did not intend to cause the damage that occurred, the gravamen of Kivalina's nuisance claim is that the damages it sustained were the natural and probable consequences of AES's intentional emissions." The court concluded that "[i]f an insured knew or should have known that certain results would follow from his acts or omissions, there is no 'occurrence' within the meaning of a comprehensive general liability policy." Thus, the trial court's ruling was affirmed.

AES then petitioned for rehearing, arguing that each of the authorities on which the Supreme Court relied stated that no occurrence would exist only where it was alleged that the insured knew to a "substantial certainty" or "substantial probability" that injury would occur. AES asserted that the standard actually applied by the Supreme Court was very different from the standard applied by the cited authorities, which required knowledge of the resulting harm "to a substantial certainty." As the Kivalina plaintiffs made no such "substantial certainty" allegation, AES argued that the court's holding was in error. The Supreme

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## Preparing Your Business for the 2012 Atlantic Hurricane Season

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deductibles and internal sublimits that may reduce available proceeds. Further, some policies also place conditions on where insured property can be located to be covered, such as within a certain distance from a covered location.

### Protecting the Company's Income

Covering tangible property itself is usually not enough to make most businesses whole in the aftermath of a natural disaster. It may take weeks or months—even years—to fully restore the company's revenue produced by these assets. Thus, there are a number of "time element" coverages that serve to protect against such losses. These include:

#### Business Interruption Coverage

Business interruption coverage protects a company against the revenue lost as a result of covered damage to the company's own property. For example, if a hurricane causes damage to a company's facility, which then results in downtime while the property is being repaired or rebuilt, business interruption coverage provides protection against this lost revenue.

#### Contingent Business Interruption Coverage

Hurricanes typically cause widespread damage to affected areas. As a result, a company's key suppliers or customers might also suffer outages that affect the company's ability to conduct its normal business operations. Contingent business interruption coverage protects against losses due to these disruptions.

#### Civil and Military Authority Coverage

In the aftermath of a disaster, and occasionally beforehand with approaching storms, government authorities may issue evacuation orders and other constraints on access to certain areas. After the September 11 terrorist attacks, parts of Manhattan were off limits for several days. Likewise with Hurricanes Katrina and Rita. Most commercial property policies provide coverage for losses arising out of prohibitions against access due to orders from a civil or military authority.

#### Service Interruption Coverage

Service interruption coverage is designed to protect against losses that result from the interruption of utilities such as water, power, communications or similar services.

### Prepare for Initial Post-Storm Activities

Steps taken in the immediate aftermath of a storm are critical to preserving and maximizing a company's insurance recovery, as well as ensuring that the company's business levels return to normal as quickly as possible. From the standpoint of insurance, these steps include: (i) notifying all carriers in accordance with the policies; (ii) forming a claims team, utilizing both internal personnel from the risk management, operations, legal and accounting functions as well as external claim consultants and coverage counsel; (iii) setting up separate accounts to track post-claim losses and expenses incurred in the recovery efforts; and (iv) establishing and observing effective claim management procedures to avoid disputes and streamline the process, such as preservation of the carrier's salvage rights, protecting covered property against further loss and seeking advances against the ultimate loss payment.

*Hurricanes can wreak havoc on your business, but the insurance process doesn't have to be stormy.*

Hurricanes that make landfall often cause enormous damage. Having a properly managed insurance recovery process, however, can mitigate a storm's impact on your business.

## What if Your Insurer Goes Bankrupt and No One Tells You?

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The court cited to a California insurance statute and noted that "if anyone had a duty to inform PacRim of Legion's insolvency, it was Legion." For obvious reasons, pursuing Legion for violating this statute would have likely been a dead end for PacRim. In a brief two paragraphs, the court agreed with the lower court that Bosa breached its contractual duty to inform PacRim of Legion's insolvency.

### California Stands Its Ground

In a lengthier portion of the opinion, the court rebuffed PacRim's assertion that the court should "join with every other state to consider the issue by recognizing an insurance broker's duty to share its actual knowledge of the insurer's insolvency with the insured." First, the court cited examples of other states that have refused to impose such a duty on a broker after it procured the insurance policy. Further, the court distinguished the cases that PacRim cited, because in almost all of those cases the plaintiff insured was the broker's client. Here, Bosa was Aon's client—PacRim was not. Accordingly, the court declined to follow the out-of-state authority.

### Why Is This Important to You?

Back to our original question: Where does that leave you if you find yourself in a position of needing to rely on your insurer, only to find out your insurer is insolvent? At the risk of stating the obvious, you will be in the best position if you have advance notice of your insurer's pending insolvency. That way, you can do like PacRim alleged it would have done—procure alternate insurance. But since you may not always (or ever) have such advance notice, you need to find another way to protect yourself. Because—at least in California—you cannot rely on your insurance broker to notify you of adverse changes in your insurer's financial condition.

## Given Recent Ruling, Will Negligence Claims Be Covered Under CGL Policies in Virginia?

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Court granted AES' petition for rehearing, entertained oral argument and then issued its April 20 decision.

The April 20 decision, however, was almost a verbatim replication of the court's earlier decision. There is no discussion of "substantial certainty" or "substantial probability," although the court once again relied on the same authorities. Virginia law, according to the court, is as follows:

> For coverage to be precluded under a CGL policy because there was no occurrence, it must be alleged that the result of an insured's intentional act was more than a possibility; it must be alleged that the insured subjectively intended or anticipated the result of its intentional act or that objectively, the result was a natural or probable consequence of the intentional act.

The Kivalina plaintiffs did not allege that AES intended the erosion of the spit, so the underlying complaint must have been read by the Supreme Court as alleging that the erosion in Alaska was a natural or probable consequence of the emissions of carbon dioxide from AES' plants located somewhere other than Alaska. This interpretation is most troubling, as there were no allegations in the underlying complaint that the alleged damage in Alaska was a "substantial certainty" or a "natural or probable consequence." Moreover, the Supreme Court ignored the wide body of Virginia case law stating that an insurer must defend its insured unless there is no possibility of coverage. The Supreme Court stood that jurisprudence on its head, ignoring the Kivalina plaintiffs' allegations that, if proved, would have obligated Steadfast to indemnify AES. Most courts agree that under the standard "occurrence" definition, an unnatural or improbable consequence of an intentional act can be "accidental." *See, e.g., State Farm Fire & Cas. Co. v. Superior Court*, 164 Cal. App. 4th 317 (Cal. Ct. App. 2008) (insured intended to throw claimant into swimming pool, but was unaware of a step, and thus injury from landing on step was accidental and thus an "occurrence.").

This decision will have major implications on Virginia policyholders, at least until it is clarified through subsequent decisions. We anticipate insurers raising the lack of an "occurrence" as a basis to deny a wide range of claims, including product defect and product liability claims based on allegations that a claimant's damages were a "natural or probable consequence" even if the defendant did not know of the inherent harm when it sold its product. This could create a gap in policyholders' commercial general liability and other such third-party coverages, at least until this issue is clarified through subsequent decisions or legislative action. Until then, we recommend that policyholders undertake one or more of the following options:

- Endorse CGL policies to ensure that they are governed by another state's law
- Endorse CGL policies to provide a definition of "occurrence" that is in line with the vast majority of courts' interpretation and application of that term. We suggest the following definition:

  Occurrence means (i) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; or (ii) an intentional act from which "bodily injury" or "property damage" arises, unless the insured subjectively intended the resulting "bodily injury" or "property damage."

- Approach members of the Virginia General Assembly to request a legislative correction to the Supreme Court's very troubling ruling.

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