TORT TRIAL & INSURANCE PRACTICE

Committee News

Defending Liberty
Pursuing Justice

Fall 2010

Property Insurance Law Committee

First-Party Insurance and Bankruptcy

By: Susan N. K. Gummow, Esq*

I. INTRODUCTION.

The Bankruptcy Code often collides with insurance for a simple reason: virtually all businesses carry insurance of some kind and these policies can be considered a source of funds to a company that files bankruptcy. Several issues arise when the holder of a first-party insurance policy files for bankruptcy ("debtor-insured").

A. FIRST-PARTY INSURANCE: WHAT IS IT?

Insurance policies are classified by the interest they protect. If the insurer has a duty to indemnify the debtor-insured for the loss directly, it is a first-party insurance policy.[1] A first-party insurance policy provides coverage for the insured's personal and real property or for the insured's own person. In contrast, a third-party policy is liability insurance that the insured (the first party) buys from an insurer (the second party) for protection against possible suits brought by another party (third party).[2]

B. BANKRUPTCY BASICS AND INSURANCE.

The Bankruptcy Code ("the Code") governs how persons and companies go out of business or recover from debt. The Code is designed to give the honest, but unfortunate debtor a "financial fresh start." It accomplishes this goal through the bankruptcy discharge, which releases debtors from personal liability from

Continued on page 10

*Susan N.K. Gummow is a partner in the Chicago Office of Butler Pappas Weihmuller Katz Craig LLP, where she handles business-related matters, including bankruptcy, business litigation, and insurance law. She is the author of the Bankruptcy and Insurance Law Manual, currently in its third edition.

1 DICTIONARY OF INSURANCE TERMS 189 (4th ed. 2000). The insured makes a claim with its insurer and payment is made directly to the insured; if the insurer doesn't pay, the insured can sue the insurer. Susan N.K. Gummow, BANKRUPTCY AND INSURANCE MANUAL, 78 (3d ed. 2009). In re: Doug Baity Trucking, Inc., No. 04-13537, 2005 WL 1288018 (Bankr. M.D.N.C. Apr. 21, 2005).

2 DICTIONARY OF INSURANCE TERMS 520 (4th ed. 2000). The Bankruptcy Court for the Middle District of North Carolina best describes third party insurance as follows: Liability insurance is customarily described and classified as third-party insurance because the liability insurer's duty to pay runs not directly to the insured, but directly (on the insured's behalf) to a third-party claimant who is injured by the insured's conduct. The insured is only a conduit for transferring the insurance proceeds from the liability insurer to the third party. In re: Doug Baity Trucking, Inc., No. 04-13537, 2005 WL 1288018, at *3 (Bankr. M.D.N.C. Apr. 21, 2005).

In This Issue:

Uniting Plaintiff, Defense, Insurance, and Corporate Counsel to Advance the Civil Justice System

MESSAGE FROM THE CHAIR

Dear Committee Members:

I have been fortunate enough to be selected to chair this Committee for the upcoming year and I am looking forward to another outstanding year for the Committee.

Before discussing the activities we are involved in, I want to thank our outgoing chair, Bill Lewis, for all of his hard work and leadership during the past year. Bill's efforts culminated in the Committee receiving an Exceptional Achievement Award from TIPS during the ABA's Annual Meeting. Hopefully, I can continue to meet the high standards Bill and others have set.

Renee Callantine is the chair-elect this year. Please feel free to contact Renee at rcallantine@chapop.com or me if you would like to become more involved in the Committee, or have any questions or suggestions.

We are in the final planning stages for our spring meeting scheduled for April 28-30, 2011, at the Ritz Carlton Grande Lakes Resort in Orlando, Florida. The program will address coverage issues that arise during the litigation of property insurance claims for catastrophic losses. An experienced faculty will share some of the lessons learned during the property insurance claims that followed catastrophic events such as the attack on 9/11 and Hurricane Katrina, and give us advice to better prepare us for handling those claims that arise out of the next catastrophic loss. Please do not miss it.

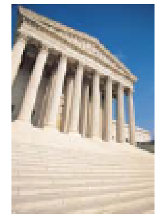
We are also excited about our updated website. Our website vice-chair, Doug Widin, has great plans to keep the site relevant for our daily practice. Among other things, we hope to have new property insurance decisions posted to the site in a timely manner. Please reach out to Doug directly at dwidin@reedsmith.com if you have content you believe suitable for posting.

We will also have several publications coming out this year. John Garaffa is always looking for new content for the Committee newsletter. Bill Schreiner is our publications vice-chair and is working on our submission to the TIPS Annual Survey along with an update to our Bad Faith Annotations. Finally, the Committee expects to put out a revised edition of its *Property Insurance Litigator's Handbook*. Obviously, there are plenty of great opportunities to publish written material through the Committee. If you would like to participate in any of these projects, please let me know.

I am truly excited about our activities for the upcoming year. I hope you will take the time to get involved with these efforts.

Richard D. Gable, Jr.
Gibbons P.C.
Philadelphia, PA



2011 TIPS/ABOTA National Trial Academy
April 9-13, 2011
National Judicial College
Reno, NV

- Named the Country's top "Boot Camp for Lawyers" in the *ABA Journal*.
- Offers a unique, interactive, diverse program combining today's latest technology with the Country's top trial attorneys as personal mentors.
- Consists of a faculty of seasoned experts including defense and plaintiff lawyers, district judges, Supreme Court justices, jury consultants, professors and technical engineers.
- Uses a variety of individualized teaching methods and unique approaches.
- Involves a core case study and provides students with constructive feedback including videotape reviews of their courtroom performance.
- Includes individual courtroom presentations, lectures and demonstrations on a variety of trial skills including direct and cross examination of medical and scientific witnesses, opening statements, closing arguments and jury selection.

Please watch for more information to be posted at www.abanet.org/tips

Defending Liberty
Pursuing Justice

Sponsored by the ABA Tort Trial & Insurance Practice Section and the American Board of Trial Advocates (ABOTA)

TORT TRIAL INSURANCE

An Increase in a Manufacturing Insured's Per-Unit Allocation of Fixed Costs Does Not Constitute a Covered Extra Expense

By: Thomas B. Caswell, Zelle, Hofmann, Voelbel & Mason LLP[1]

The Extra Expense provisions of many first-party property insurance policies provide coverage for expenses reasonably and necessarily incurred by an insured to reduce a loss payable under the policy's time element (business interruption) coverage. However, only reasonable and necessary temporary extra expenses incurred in order to continue operations after a covered loss are compensable under such provisions.

TRADITIONAL EXTRA EXPENSE PROVISION

First-party property insurance policies often include an Extra Expense provision similar to the following:

EXTRA EXPENSE:

1. Measurement of Loss:

The Recoverable EXTRA EXPENSE loss will be the reasonable and necessary extra costs incurred by the Insured of the following during the PERIOD OF LIABILITY:

a. Extra Expenses to temporarily continue as nearly normal as practicable the conduct of the Insured's business; and

b. Extra Costs of temporarily using property or facilities of the insured or others.

Excluded from coverage under such traditional Extra Expense provisions are any costs that would normally have been incurred in the event no physical loss or damage had occurred:

EXTRA EXPENSE Exclusions: As respects EXTRA EXPENSE, the following are also excluded:

* * *

c. Costs that normally would have been incurred in conducting the business during the same period had no direct physical loss or damage occurred.

While the foregoing language is from an Allianz Global Risks US Insurance Company form, the standard ISO Extra Expense form is consistent on this issue:

[Insurer] will pay necessary Extra Expense you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to property at the described premises ... caused by or resulting from a Covered Cause of Loss.

Extra Expense means expense incurred:

(1) To avoid or minimize the suspension of business and to continue 'operations':

(a) At the described premises ...

(2) To minimize the suspension of business if you cannot continue 'operations.'

(3) (a) To repair or replace any property ...

to the extent it reduces the amount of loss that otherwise would have been payable under this Additional Coverage or Additional Coverage f., Business Income.

LOSS SCENARIO

A manufacturing insured has a production slow down due to property damage caused by a covered peril. Instead of manufacturing its usual 200,000 widgets for a particular month, only 90,000 widgets are manufactured. In putting together its insurance claim, the insured calculates not only its property damage and time element (business interruption) losses, but also calculates its claim for extra expense incurred in achieving even the reduced manufacturing output it was able to accomplish during the Period of Liability (i.e., the loss period).

On occasion, an insured will calculate its extra expense to not only include its actual extra expenses (e.g. extra over-time labor, additional shipping costs to sister plants to help remediate the lost production, etc.), but to also include a portion of the costs normally incurred in the manufacture of the widgets. On such occasions, the insured pro-rates these normally occurring fixed costs over the lessened production volume that resulted from the covered peril. By allocating these normally occurring fixed costs to the lower production numbers from the loss period, the per-unit cost of the goods manufactured during the loss period increases.

[1] Thomas B. Caswell, whose practice includes significant insurance coverage litigation, is a partner with Zelle Hofmann in its Minneapolis office.

To illustrate this allocation methodology using the loss scenario set forth above, assume the insured's monthly fixed costs total $8,000. Also assume in May, a normal production month, the insured manufactured 200,000 widgets, while in the month of June widget production was only 90,000 units due to property damage caused by the covered peril. Although the $8,000 in normally occurring fixed costs remains the same in both May and June, the result of allocating these fixed costs over the decreased June production volume is to show a per-unit increase in cost during the June loss period.

Month	Fixed Costs	Widgets Manufactured	Fixed Cost/Widget
May	$8,000	200,000	4 cents/ widget
June	$8,000	90,000	8.8 cents/ widget

Relying upon this calculation, the insured contends it has experienced an "increase" in its expenses of 4.8 cents per widget to keep its plant in operation during the loss period. Therefore, the insured claims it is entitled to that "extra" 4.8 cents it necessarily incurred for each of the 90,000 widgets it was able to manufacture during the loss period, giving rise to an extra expense claim of $4,320.

RECENT TREATMENT OF NORMALLY OCCURRING FIXED COSTS UNDER A TRADITIONAL EXTRA EXPENSE PROVISION

While the foregoing claim scenario is not uncommon, cases addressing the coverage aspects of such a claim are few. Into that sparse area of law came one decision from the United States District Court for the Western District of Arkansas, where the court held that such pro-rated increases in the allocation of normal operating costs would be compensable as extra expense. Order at p. 9, *George's Inc. v. Allianz Global Risks U.S. Insurance Company*, Civil No. 08-5026 (W.D. Ark. Dec. 9, 2008). The District Court based its ruling on the fact that the term "costs" was not defined in the policy, and that the insurer was aware from its underwriting that the insured allocated its costs on a per pound basis. Therefore, the court held that an increase in the allocation of normally occurring costs (the 4.8 cent per widget increase from our above example) was an extra expense the insured necessarily incurred to continue its production following a covered peril, and constituted an extra expense compensable under the policy.

In reversing that district court ruling earlier this year, the Court of Appeals for the Eighth Circuit ruled that the "increase" derived from allocating normally occurring fixed costs to a lessened production volume does not constitute a compensable extra expense. *George's Inc. v. Allianz Global Risks U.S. Insurance Co.*, 596 F.3d 989 (8th Cir. 2010). The court founded its determination on two separate bases. The first basis for reversal focused on the need for an actual increase in the insured's outlay of money in order for a compensable extra expense claim to exist, while the second basis looked to the insured's impermissible blurring of the distinction between sums recoverable as extra expense and those recoverable under business interruption coverage.

When discussing the requirement that an insured's costs must have increased, the Eighth Circuit found that "[a] straightforward reading of the policy language makes it clear that the extra expense provision was intended to cover unanticipated outlays related to a business disruption." *Id.* at 993. Moreover, the court quickly dismissed the insured's contention that the lack of a definition for "costs" meant that an increase in the allocation of a cost (rather than an increase in the cost itself) could give rise to a compensable extra expense: "A term in an insurance policy is not ambiguous simply because it is undefined. . . . Looking only at the words themselves, the ordinary meaning of 'costs' is distinct from the concept of 'cost-per-pound,' which as its wording suggests, is an equation representing the relationship between cost and total production." *Id.*

In summarizing its finding as to costs, the court reiterated the very fact shown in the above widget example. "A company's overall expenditures do not necessarily increase simply because it experiences an increase in the per-unit cost of its product." *Id.* at 993. The insured must actually have *spent* more money than it normally spent in order for Extra Expense coverage to potentially apply. An increase in the per-unit *allocation* of otherwise normally occurring costs does not constitute a covered Extra Expense.

The second basis for reversal was the court's finding that the insured's claim was actually one for lost production and not increased expenses. In so finding, it highlighted the overlap in the claim for fixed expenses under an extra expense provision when a business interruption claim has also been made. As the Eighth Circuit stated:

> Conceptually, there are two components to such indemnification: [P]ayment for losses in gross earnings and compensation for unanticipated expenses. The present policy contains separate, mutually exclusive provisions addressing both categories of liability. The formula for indemnifying losses in gross earnings – which is not at issue here – does not include additional, unforeseen expenses caused by an insured event; and conversely, the provision covering extra expenses explicitly excludes "[a]ny loss of income." By reading the extra expense provision to cover what is actually a claim for lost production, however, George's interpretation eliminates the distinction between the two provisions, suggesting that one is superfluous. We think the various provisions of the policy are best harmonized by *reading the extra expense provision to exclude coverage for a decrease in production relative to fixed costs*.
>
> *Id*. at 993-94 (emphasis added).

Put another way, the insured's business interruption coverage is the coverage by which it is to be compensated for any losses based on decreased production. The increase in an allocated cost is a production-based "loss" since the increase does not exist absent the production loss. Whatever covered loss that may result from a loss of production is properly indemnified under the business interruption coverage grant, and not as Extra Expense. The Extra Expense provision is to be read separately from the business interruption provisions. Therefore, the Extra Expense covered under traditional property forms is the extra expense that is represented by an actual increase in the cash outlay for an expense, and not merely an increase in the allocation of normal costs which results mathematically from an allocation to decreased production.

Subrogation Dilemmas Under a Standard Mortgage Clause

By: Todd C. Harshman[1]

The increased complexity of modern mortgage clauses can contain hidden perils to the unwary insurer, sometimes having a profound effect on the possibility of recovery in subrogation. The Associated Press recently reported that foreclosures in the United States rose dramatically from last year, and it is more important than ever that insurers and their counsel be aware of the issues that can arise when subrogation involves a mortgage clause.

DEVELOPMENT OF THE STANDARD MORTGAGE CLAUSE

A mortgage clause is a provision in an insurance policy that protects the rights of the mortgage holder by allocating insurance proceeds between the insured and the mortgagee. Historically, such clauses were simple, providing that "loss, if any, is payable to a mortgagee as its interests shall appear," which typically referred to the amount of debt owed on the mortgage.[2] This type of clause quickly became problematic for mortgagees. Since there is no separate contractual duty to the lender, it became a mere appointee of any insurance proceeds.[3] Thus, if an insured's claim was denied for any reason, the mortgagee would be barred from recovery, too.[4]

In 1943, this problem was rectified by the creation of what is now known as the Standard Mortgage Clause, named after the New York Standard Fire Policy in which it first appeared. This clause provides that a mortgagee will be paid regardless of an insured's right to recovery, and is now incorporated into nearly every homeowner's insurance policy. Specifically, the Standard Mortgage Clause "protects the mortgagee's interest even if the insured does something to invalidate the policy. In effect, this clause creates a separate contract between the insurer and the mortgagee."[5] Of course, revision of the mortgage clause necessitated a corresponding modification of the policy's subrogation clause, which now contains provisions granting an insurer the right to subrogate payments made to a lender whether or not the insured is covered.

REQUIREMENTS FOR SUBROGATION IMPOSED BY A STANDARD MORTGAGE CLAUSE

The Standard Mortgage Clause imposes two substantive requirements on an insurer in order to recover payments made to a lender: (1) denial of payment to the insured and (2) payment to the mortgagee for any amount of the loss. The first condition – often stated as an insurer's non-liability to its insured – can occur because of any number of acts by the insured that constitute policy violations or breaches. These acts can be intentional, like arson, or merely a failure to comply with policy requirements, such as failure or refusal to appear for deposition, failure to produce documents, or even procuring other insurance, if that is a policy violation.[6]

What is the burden of proof on an insurer to show that payment was rightfully denied to its insured? While courts agree that more than a "naked claim" of non-liability is required, they differ on whether a separate action should be brought to establish non-liability or whether a trial court can determine same in a subrogation action.[7] Perhaps the best statement of an insurer's burden is that a determination must be made "in good faith, and be based upon a state of facts which, under the contract of insurance, would entitle them to exemption from liability."[8]

There are two fact patterns that can complicate a showing of non-liability. First, when the insured's misconduct occurs *after* payment to the lender, payment may be seen as merely extinguishing the mortgage debt. Thus, the lender would have no cause of action that the insurer could subrogate because the mortgage is not in default. Even if an insurer claims non-liability

Continued on page 14

[1] Todd Harshman practices primarily insurance subrogation as a partner of Grotefeld, Hoffmann, Schleiter, Gordon & Ochoa LLP's San Francisco office. He may be contacted by email at tharshman@ghlaw-llp.com. This article is based on a presentation by Todd Harshman and Ann Johnston, principal of Berger Kahn's Northern California office, at the ABA TIPS's Property Insurance Law Committee 2010 Annual Spring CLE Meeting.

[2] See, Cozen, Stephen A., *Insuring Real Property* ("Cozen") § 52.01 (2007).

[3] *Rushing v. Dairyland Ins. Co.*, 456 So.2d 599 (La. 1984).

[4] *Pearson Mfg. v. Pittsburgh Steamboat Co.*, 163 A. 680 (Pa. 1932).

[5] Black's Law Dictionary 1104 (9th ed. 2009).

[6] *See*, Cozen § 52.02 for a full discussion.

[7] See, e.g., *Frontier Mortgage Corp. v. Heft*, 125 A. 772, 778 (Md.App. 1924).

[8] *Traders Ins. Co. v. Race*, 31 N.E. 392 (Ill. 1892).

Insurers and Regional Cap-and-Trade Programs: Regional Greenhouse Gas Initiative

By: Thomas H. Cook, Jr., Jason Reeves, and Kim Gonzalez, Zelle Hofmann Voelbel & Mason LLP*

This is the first in a series of articles that addresses the impact of mandatory, regional cap-and-trade programs on first and third-party insurers in the U.S. This article reviews the Regional Greenhouse Gas Initiative ("RGGI") and considers underwriting and claims issues. Future articles will address a number of related issues including the Western Climate Initiative, the Midwestern Greenhouse Gas Accord, Assembly Bill 32 in California, and the future of cap-and-trade in the U.S.

By 2012, mandatory, regional cap-and-trade systems may regulate the carbon dioxide (carbon) emitting industry in more than half of all U.S. states.[1] September 2010 was the second anniversary of the first attempt to regulate carbon emissions in North America.[2] RGGI is a mandatory, regional cap-and-trade program for electric utilities in ten northeastern and Mid-Atlantic states.[3] It limits carbon emissions at 210 fossil fuel fired power plants (facilities).[4] Insurers providing coverage to these facilities need to include RGGI in their underwriting process and claims handling.

Cap-and-trade presents unique issues for insurers. How should surplus emission allowances be treated following a facility's insured loss, particularly where there may be a claim for business interruption? What new risks may be posed by the use of green technology at facilities operating under a cap-and-trade system? Are first-party policies for facilities operating under a cap-and-trade system sufficiently rated? Does cap-and-trade pose any unique risks for third-party insurers? How will modified policy wordings or new insurance products contemplate cap-and-trade issues?

A general understanding of RGGI is helpful before analyzing these issues. Cap-and-trade loss scenarios are set out at the end of the article.

WHAT IS CAP-AND-TRADE?

Cap-and-trade is a market-based policy tool which controls large amounts of (greenhouse gas) emissions from a group of specific industrial locations ("facilities").[5] Cap-and-trade programs set a maximum limit, or cap, on emissions.[6] Facilities covered by the program then receive authorizations to emit in the form of emissions allowances, or permits, with the total amount of permits limited by the cap.[7] Permits are effectively a license to pollute within the cap.[8] Each facility can design its own compliance strategy to meet the overall reduction requirement, including the sale or purchase of allowances, installation of pollution controls, and/or the implementation of efficiency measures.[9] Each facility must surrender permits equal to its actual emissions to comply.[10] Facilities must accurately measure and report all emissions to guarantee that the overall cap is achieved.[11] The scarcity of permits, or supply and demand economics, determines the price of permits.[12] The financial consequence of buying and selling surplus permits creates a market-based incentive to reduce emissions.[13] Through supply and demand economics, cap-and-trade gives emissions a price tag and makes climate change a board level financial concern.

Continued on page 16

*Thomas H. Cook, Jr., is a partner in the Dallas office of Zelle Hoffman Voelbel & Mason LLP. Jason Reeves and Kim Gonzalez are associates in that office. Mr. Cook, Mr. Reeves and Ms. Gonzalez devote their practice to complex insurance coverage, liability, defense and subrogation.

1 *See* Pew Center, *Regional Initiatives*, PewClimate.org (Oct. 15 2010 5:59 PM), http://www.pewclimate.org/what_s_being_done/in_the_states/regional_initiatives.cfm.

2 *See* Amy Boyd, *RGGI Auction #9: The Floor Price is Right*, LawandEnvironment.com (Oct. 15, 2010, 2:57 PM), http://www.lawandenvironment.com/2010/09/articles/climate-change/rggi-auction-9-the-floor-price-is-right.

3 Jeffrey B. Margulies & William L. Troutman, *Regional GHG Regulation – Full of Hot Air?*, Law360 (Oct. 15, 2010 6:07 PM), http://www.law360.com/print_article/148169.

4 RGGI, Inc., RGGI CO2 Allowance Tracking System, RGGI.Org (Oct. 15, 2010 5:32 PM), https://rggi-coats.org/eats/rggi/index.cfm?fuseaction=reportsV2.sources_rpt&clearfuseattribs=true.

5 Michael Polentz, *Ensuring Carbon Offsets Do Their Job*, Law360 (Oct. 15, 2010 6:13 PM), http://www.law360.com/print_article/116375); RGGI, Inc., *Overview of RGGI CO_2 Budget Training Program*, RGGI.org (Oct. 15, 2010, 2:04 PM), http://www.rggi.org/docs/program_summary_10_07.pdf.

6 Margulies & William L. Troutman, *supra* note 3.

7 *Id*.

8 *See Id*.

9 *See Id*.

10 *See Id*.

11 Lisa S. Barnes, *States Leading on Greenhouse Gas Emissions Reporting Regulation*, EHS Today (May 1, 2009 12:00 PM), http://ehstoday.com/environment/news/states_leading_greenhouse.

12 Sean Pool, *The Proof is in the Pudding: Regional Greenhouse Gas Initiative Shows Pollution Pricing Works*, Center for American Progress (March 22, 2010 2:15 PM), http://www.americanprogress.org/issues/2010/03/rggi_roadmap.html.

13 Pool, *supra* note 12.

First-Party Insurance…

Continued from page 1

specific debts, and prohibits creditors from taking action against the debtor to collect those debts.[3]

Upon discharge, the debtor is no longer liable for any debt incurred before the bankruptcy petition (pre-petition debt), unless the debt cannot be discharged (and must be repaid) under Section 523 of the Bankruptcy Code. The nature of a debtor's discharge depends on the chapter of the Bankruptcy Code under which the debtor files. In general, there are two types of relief under the Bankruptcy Code: liquidation under Chapter 7 and reorganization under either Chapter 11 or 13.

II. BANKRUPTCY'S EFFECT ON POLICY PROVISIONS THAT MAY PRECLUDE COVERAGE.

Before a claimant is entitled to any insurance proceeds, the insurer must be required to pay. Insurance policies—contracts between the insured and the insurer—contain several provisions that may preclude the insurer's duty to indemnify the debtor-insured, including a "replacement cost" provision, and an exclusion for intentional destruction of covered property. Yet, when the debtor-insured files for bankruptcy, some courts relax these preconditions to recovery considerably.

A. REPLACEMENT COST PROVISIONS IN POLICIES.

First-party policies will usually indemnify the debtor-insured for the loss—meaning the insurer will pay the debtor-insured the actual cash value for the loss of the insured property. But first-party policies may contain a replacement cost provision. Under this provision, the debtor-insured is required to first replace the destroyed property before payment of replacement costs.[4] The purpose of this policy provision is to avoid valuation issues and fraud.

But funding a replacement purchase for a debtor-insured in bankruptcy proves difficult for obvious reasons. There is a split of authority whether the debtor-insured is entitled to insurance proceeds in the presence of a replacement cost provision where the debtor-insured has not actually replaced the property. The insurer will take the position that the filing of bankruptcy does not alter the obligations of the debtor-insured under the policy. Some courts enforce these clauses to the letter, making no exception for bankruptcy.[5]

Other courts extend replacement coverage to the debtor-insured under equitable principles.[6] Courts that disregard the replacement condition reason that requiring the debtor-insured to actually repair or replace the property would render coverage illusory.[7] These courts consider replacement cost coverage as a type of windfall insurance: it reimburses the insured for the full cost of repairs if the insured repairs or rebuilds the building even if it results in putting the insured in a better position than before the loss.[8] But this explains why strict compliance (why the property must be actually repaired or replaced) is necessary. The insurer provides this coverage under specific terms; requiring the insurer to give replacement costs without first replacing or repairing the property alters the risk the insurer agreed to cover.

B. EXCLUSIONS FOR INTENTIONAL DESTRUCTION.

Under most insurance policies, if the debtor-insured engages in fraudulent conduct which causes the loss, or submits fraudulent proofs of a loss after the loss has occurred, this is a complete bar to recovery.[9] This exception is particularly important in bankruptcy. In the absence of this exception, a debtor in dire financial straits need only set fire to a business, file for bankruptcy, and wait for the creditors to collect from the insurer. The absence of this exception would encourage a debtor, seeking to provide additional moneys to the estate's creditors, to commit arson and fraud. It

---

3 "A discharge is release from a legal duty to pay a debt." Elaine Moorer, *The Case for Allowing Post-Discharge Actions Against Debtors*, 81 Ill. B.J. 468 (Sept. 1993).

4 *See* Sun Ins. Co. of N.Y. v. Consolidated Co. (In re Consolidated Co.), 185 B.R. 223, 224 (E.E. La. 1995).

5 *See* O-SO v. Home Ins. Co., 973 F.2d 498 (6th Cir. 1992); In re Dickler, 957 F.2d 1088 (3d Cir. 1992); Lerer v. MFB Mut. Ins. Co., 474 F.2d 410 (5th Cir. 1973). (The property must be actually repaired or replaced to trigger the insurer's duty of indemnification.)

6 12 Lee R. Russ & Thomas F. Segalla, COUCH ON INS. § 176:59 (3d ed. 2009); *see also*, Rockford Mut. Ins. Co. v. Pirtle, 911 N.E.2d 60, 64-65 (Ind. Ct. App. 2009); Zaitchick v. Am. Motorists Ins. Col., 554 F. Supp. 209, 217 (S.D.N.Y. 1982) (concluding an award of replacement costs was required by equity because, although insured had not repaired or replaced the property, the insured had no money with which to begin rebuilding); McCahill v. Commercial Union Ins. Co., 446 N.W.2d 579 (Mich. Ct. App. 1989) (when fire insurer failed to advance necessary funds to rebuild home destroyed by fire, insured was excused from having to rebuild and was entitled to recover replacement costs without actually replacing property).

7 Rockford Mut. Ins. Co. v. Pirtle, 911 N.E.2d 60, 65-66 (Ind. Ct. App. 2009).

8 *E.g.*, Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 352 (Ind. 1982); Nahmias Realty Inc. v. Cohen, 484 N.E.2d 617, 622 (Ind. Ct. App. 1985).

9 *E.g.*, J.C. Wyckoff & Assoc. v. Standard Fire Ins. Co., 936 F.2d 1474, 1491 (6th Cir. 1991) (applying Michigan law); "This is known as the 'barn burning' defense, so named because one who intentionally burns his own barn is not entitled to collect the insurance on it." Keith Witten, '*Barn Burning' and what Can be Done to Prevent It*, 22 TORT & INS. L.J. 511 (1987).

would provide a windfall to the creditors and allow the debtor-insured to profit from his wrongdoing.[10]

But whether this policy exclusion prohibits recovery by the debtor-insured depends on the timing of the loss. If the debtor-insured intentionally causes the loss before the bankruptcy petition is filed, the debtor-insured cannot recover under the policy—the term applies. The estate cannot recover because the trustee of the debtor-insured's estate steps into the shoes of the debtor-insured and has no greater rights than those held by the debtor-insured at the time of filing.[11] Thus, the exclusion would apply to the Trustee.

If the debtor-insured damages the property after the bankruptcy petition is filed though, courts have held the estate is not barred from recovering insurance proceeds.[12] The estate is allowed to recover in this instance because at the time of the petition, there is no claim yet for the loss and a debtor or trustee no longer acts to further its own interests, but rather the interests of the creditors.[13]

III. WHO IS ENTITLED TO THE PROCEEDS OF A FIRST-PARTY POLICY WHEN THE INSURED IS IN BANKRUPTCY?

Assuming an insurer is required to pay on the policy, the next inquiry is whether the creditor, the debtor-insured, or the bankruptcy estate is entitled to the proceeds. The main point of contention here is whether the proceeds belong to the debtor-insured's bankruptcy estate or solely to a creditor.

A. POLICY PROVISIONS THAT ALTER ENTITLEMENT TO PROCEEDS.

The creditor of the debtor-insured has no right to insurance procured by the debtor-insured merely because the creditor happens to be a mortgagee. Rather, to have an interest in the proceeds, the creditor must be a named payee in the policy, obtain as assignment, or have some common law entitlement to the proceeds. The creditor's interest can be altered by certain policy provisions, including a loss payable clause and anti-assignment clause.

1. Loss Payable Clauses.

A loss payable clause may preclude insurance proceeds from ever becoming property of the debtor-insured's estate. A "loss payable" clause provides coverage for a lender where real or personal property, used as security for a loan, is damaged or destroyed.

Most often, the debtor-insured names the lender-creditor as the sole loss payee. This ensures that the lender-creditor is able to collect the full amount of its debt if something happens to the property. But the enforceability of a "loss payable" clause depends on the timing of the loss; it depends on when the property was transformed from property to insurance proceeds. Courts distinguish between pre-petition and post-petition loss.

Some courts hold that if the loss occurs pre-petition, the creditor is the *owner* of the proceeds. If the loss occurs pre-petition, the loss payable clause negates any interest the debtor-insured might have over the proceeds, so the proceeds never become property of the bankruptcy estate.

If the loss occurs post-petition, the effect of a "loss payable" clause is even more unclear. A survey of case law has revealed three approaches that the courts take: (1) the creditor is entitled to the proceeds and these proceeds never become property of the estate; (2) the proceeds are property of the estate, but the creditor is entitled to the collect the proceeds up to the amount of its secured debt; and (3) the proceeds are property of the estate and the automatic stay prevents enforcement of the "loss payable" clause.

Under the first approach—the ownership approach—the creditor named as the loss payee is entitled to the proceeds; the proceeds never become property of the estate. Also, if the creditor is entitled to the proceeds, the debtor-insured will be prohibited from using the proceeds to replace the property, such as buying a replacement car or home.

Under the second approach, insurance proceeds of a first-party policy are property of the estate, but the loss payable clause means that the creditor is entitled to the

10 Dery v. Citizens Ins. Co. of Am. (In re Light), 23 B.R. 482, 484 (Bankr. E.D. Mich. 1982).

11 Dery v. Citizens Ins. Co. of Am. (In re Light), 23 B.R. 482, 484 (Bankr. E.D. Mich. 1982).

12 *See, e.g.*, Kremen v. Harford Mut. Ins. Co. (In re J.T.R Corp.), 958 F.2d 602, 604-05 (4th Cir. 1992); Unigard Mut. Ins. Co. v O'Dwyer (In re Feiereisen), 56 B.R. 167, 169-70 (Bankr. D. Ore. 1985); *see also* Am. States Ins. Co. v. Symes of Silverdale, Inc., 78 P.3d 1266, 1269 (Wash. 2003) (en banc); Schwab v. Reamstown Mut. Ins. Co., No. 3:06-CV-0489, 2006 WL 3325645, at *2 (M.D. Pa. Nov. 14, 2006).

13 Kremen v. Harford Mut. Ins. Co. (In re J.T.R. Corp.), 958 F.2d 602, 605 (4th Cir. 1992); *see also* Unigard Mut. Ins. Co. v. O'Dwyer (In re Feiereisen), 56 B.R. 167, 169-70 (Bankr. D. Ore. 1985).

proceeds to the extent of its secured claim; the debtor-insured's estate is entitled to the excess.[14]

The third approach is similar to the second because it too recognizes that the proceeds are property of the estate and that the creditor maintains a security interest. But it goes further and holds that the protection afforded the debtor-insured by the automatic stay negates the effect of a loss payable clause. If the loss occurs post-petition, even in the face of a loss payable clause designating the lender-creditor as the loss payee, the insurance proceeds become property of the estate because the automatic stay prevents the lender-creditor from enforcing its interest.[15]

If the creditor is not a named payee under the policy, the proceeds are property of the estate.[16] Where the debtor-insured is the sole loss payee, the lender-creditor's interest is negated.[17] The insurance proceeds become property of the debtor-insured's bankruptcy estate.

If the creditor and the debtor-insured are both named as co-payees under the policy, the proceeds are estate property and the creditor has a security interest. But, as Professor Henderson observes, how courts reach this conclusion differs: some courts conclude that the creditor has a security interest under state law; other courts conclude that the creditor has a security interest in the proceeds because the proceeds are a substitute for the security interest in the collateral.[18]

The mere existence of a lender relationship does not entitle the lender to all or any part of insurance proceeds. But the creditor can still have a security interest under an equitable lien theory, an unjust enrichment theory, and under Article 9 of the Uniform Commercial Code.

2. Anti-Assignment Clauses.

Another way in which a creditor can obtain insurance proceeds is if the debtor-insured assigns a claim under the policy to the creditor. But insurance policies often contain anti-assignment clauses that state the policy cannot be assigned absent the insurer's consent. The effect of the anti-assignment clause is dependent on state law.

The majority of states permit the assignment of an insurance claim as long as that assignment occurs post-loss.[19] Permitting post-loss assignments of insurance policies is allowed because pre-loss assignments modify the risk the insurer agreed to cover, and legitimately an insurance company would want to restrict the holder of the policy to the party with whom the company has negotiated. But after the loss has occurred, courts reason, the assignment of the claim does not modify the risk; therefore, courts allow the assignment of a claim regardless of the anti-assignment clause.

IV. CONCLUSION.

The filing of bankruptcy by an insured can impact an insurer in a variety of ways. An insurer must evaluate the actions taken by the debtor-insured in the bankruptcy proceeding and consider the impact on its rights and obligations under the policy. An insurer must also consider the various entities which may assert a right to the policy proceeds, and assure that payment is made to the proper entity.

[14] *E.g.*, Ford Motor Credit Co. v. Stevens, 130 F.3d 1027, 1029 (11th Cir. 1997); In re Huff, 332 B.R. 661, (Bankr. M.D. Ga. 2005); In re Suter, 181 B.R. 116, 119 (Bankr. N.D. Ala. 1994); In re Arkell, 165 B.R. 432, 436 (Bankr. M.D. Tenn. 1994).

[15] In re Asay, 184 B.R. 265 (Bankr. N.D. Tex. 1995).

[16] *E.g.*, Miller v. Norwest Bank Minn., N.A. (In re Inv. & Tax Servs., Inc.), 148 B.R. 571, 573 (Bankr. D. Minn. 1992).

[17] In re Coker, 216 B.R. 843 (Bankr. N.D. Ala. 1997).

[18] Joann Henderson, Bankruptcy Disaster Relief: A Chapter 13 Debtor's Right to Use Insurance Proceeds to Repair or Replace Collateral, 35 GONZ. L. REV. 21, 43-47 (2000).

[19] *E.g.*, Globecon Group, LLC v. Hartford Fire Ins. Co., 434 F.3d 165, 170-71 (2d Cir. 2006) (applying New York law); N. Ins. Co. of N.Y. v. Allied Mut. Ins. Co., 955 F.2d 1353, 1358 (9th Cir. 1992) (applying Washington law); In re Katrina Canal Breaches Consol. Litig., 601 F. Supp. 2d 809, 818 (E.D. La. 2009) (applying Louisiana law and collecting cases); LeMoyne's Rest., Inc. v. Axis Surplus Lines Inc. Co., Civ. A. No. 07-8445, 2008 WL 1988798, at *2 (E.D. La. May 2, 2008); R.L. Vallee v. Am. Int'l. Specialty Lines Ins. Co., 431 F. Supp. 2d 428, 435 (D. Vt. 2006); Century Indem. Co. v. Aero-Motive Co., No. 1:02-CV-108, 2004 WL 5642427, at *4 (W.D. Mich. 2004); Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co., 861 N.E.2d 121, 128 (Ohio 2006); Egger v. Gulf Ins. Co., 903 A.2d 1219, 1229 (Pa. 2006); Conrad Bros. v. John Deere Ins. Co., 640 N.W.2d 231, 236-37 (Iowa 2001); Lexington Ins. Co. v. Simkins Indus., Inc., 704 So.2d 1384, 1386 n. 3 (Fla. 1998); Antal's Rest., Inc. v. Lumbermen's Mut. Cas. Co., 680 A.2d 1386, 1389 (D.C. 1996). Prof'lConsulting Servs. Inc. v. Hartford Life & Acc Ins. Co., 849 So.2d 446, 447 (Fla. Dist. Ct. App. 2003); Better Constr. Inc. v. Nat'l Union Fire Ins. Co., 651 So.2d 141, 142 (Fla. Dist. Ct. App. 1995).

Subrogation Dilemmas...

Continued from page 8

prior to payment, if liability does in fact exist *at the time of payment*, recovery may be denied.[9]

The second problem involves an innocent coinsured. Historically, there was a split of authority as to whether an insured has a right to policy proceeds notwithstanding the acts of their coinsured, and the split reflected differing opinions on whether the obligations under the policy are joint or several.[10] In most jurisdictions, the rule was that an innocent coinsured was not precluded from recovery because the insureds' obligations were deemed several.[11] Jurisdictions following the minority rule tended to rely on the status of the insureds as spouses, joint tenants, etc. to show that their obligations were joint. The modern approach, however, is to focus on the policy language itself. For example, California courts require a clear expression in the policy manifesting the intent to exclude coverage for an insured based on the willful acts of another insured.[12] Without such language, a court will probably fall back on construing ambiguities against the insurer and exceptions and exclusions liberally in the insured's favor.

Once non-liability to the insured has been established, the insurer generally must make payment to the lender before advancing its subrogation claim, as in conventional subrogation. Under the standard subrogation clause, this payment can take two forms: (1) paying the loss amount or (2) paying the balance of the mortgage. There are a couple of issues to keep in mind for each of these options. First, it is important that the insurer's right to recovery is subordinate to the lender's, who has the right and ability to settle fully any claim. Fortunately, the lender must protect the insurer's pro tanto interest or face liability for misappropriation of trust assets.[13]

Second, there is a split of authority on whether a partial payment to a lender – one that does not totally extinguish the mortgage – gives an insurer a right to proceed in subrogation. As noted above, some courts take the position that as long as the mortgage is not in default and an insurer is subrogated only to the lender's rights, there can be no recovery.[14] The better line of cases recognizes that payment under a policy to a lender is not the same as a mortgage payment, and subrogation is proper.[15] If the insurer pays the full amount of the mortgage, the mortgage clause clearly contemplates an assignment of that mortgage, and case law suggests this happens by operation of law.[16] However, in order to further the insurer's argument that payment does not extinguish the mortgage, an insurer and its counsel should make sure that the note and mortgage are *not* marked paid and satisfied when the assignment is obtained.

Third, complications can arise when foreclosure enters the picture. If the loss occurs after foreclosure, generally the lender is considered the owner of the property. If the lender is named in the policy, the claim (and the resulting subrogation action) would proceed as normal. However, some case law suggests that the lender is entitled to outstanding debt only (and not the full value of the claim),[17] or that foreclosure impairs the insurer's subrogation rights and thus operates as a waiver of the mortgagee's right to recovery under the policy.[18] If your jurisdiction departs from the general rule, these arguments should be made on the insurer's behalf.

If the loss occurs prior to foreclosure, the rule is that the lender's rights are fixed at the time of the loss. Therefore, the mortgagee extinguishes its interest in any policy proceeds to the extent that the mortgage is satisfied by the proceeds of the foreclosure sale.[19] If that sale fails to cover the outstanding mortgage, the insurer will still be liable for the balance under the standard mortgage clause, and will be able to subrogate that amount.[20]

---

9 *Pike v. American Alliance Co*., 124 S.E. 161 (Ga. 1924).

10 See, 10 Couch on Insurance 3d §§ 149:48-50 for a comprehensive discussion of this issue.

11 See, e.g., *Lovell v. Rowan Mut. Fire Ins. Co*., 274 S.E.2d 170 (N.C. 1981).

12 *See, e.g., Arenson v. National Auto. & Cas. Ins. Co*., 286 P.2d 816 (Cal. 1955).

13 *American Eagle Fire Ins. Co. v. Grant Building & Loan Ass'n*, 154 A. 112 (N.J. Ch. 1931).

14 *Mutual Ins. Co. v. Huddleston*, 459 S.W.2d 104 (Mo.App. 1970).

15 *Badger v. Platts*, 44 A. 296 (N.H. 1895); *Barile v. Wright*, 175 N.E. 351 (N.Y. 1931).

16 See, e.g., *Great Am. Ins. Co. v. Smith*, 172 So.2d 558 (Miss. 1965).

17 *Federal Nat'l Mortgage Ass'n v. Great Am. Ins. Co.,* 300 N.E.2d 117 (Ind.App. 1973).

18 *Mann v. Glens Falls Ins. Co*., 541 F.2d 819 (9th Cir. 1976).

19 *See, e.g., Whitestone Sav. & Loan Ass'n v. Allstate Ins. Co*., 28 N.Y.2d 332, 321 N.Y.S.2d 862 (1971).

20 *Track Mortg. Group, Inc. v. Crusader Ins. Co*., 98 Cal.App.4th 857 (2002).

ELECTION OF REMEDIES UNDER THE STANDARD MORTGAGE CLAUSE

After a determination of non-liability to the insured and payment to the lender, an insurer has three options in pursuit of recovery: (1) a civil subrogation action, (2) a foreclosure action, or (3) a declaratory judgment action. In contrast to traditional subrogation, because there is no liability to the insured, most subrogation claims under a Standard Mortgage Clause actually involve a claim or counterclaim by an insurer against its own insured.[21] Thus, the issue that most frequently arises is whether an insurer is required to bring a counterclaim if its insured files suit seeking payment under the policy. Although this question has not been directly addressed by courts, a counterclaim is likely to be permitted given the liberal joinder rules of most jurisdictions, even if payment has not yet been made, as long as the obligation to pay is clear.[22]

However, an insurer may not want to bring a counterclaim at that time, because there is a risk that a court will determine that the insurer has elected its remedy. Some courts have held that an insurer can either subrogate or foreclose on the property, but not both.[23] If the insurer is still investigating the loss, and if payment has not yet been made to the lender, an insurer may wish to take advantage of an exception to the compulsory counterclaim rule that excuses a party from asserting a claim which, at the time of serving its pleading, has not yet matured.[24]

The decision to foreclose on the property is something that depends upon the circumstances of the loss, the amount of the outstanding mortgage and other debt, whether mortgage payments are current, the value of the property, the costs associated with foreclosure as compared to a lawsuit against the insured, and the insurer's resources.

As an alternative to subrogation or foreclosure, an insurer can often seek a declaratory judgment in which the coverage and subrogation issues can be resolved. Declaratory actions are probably the best way to go in cases involving multiple coverages or multiple claimants to the policy proceeds.[25] Declaratory relief may be most appropriate where there are multiple mortgages involved in the loss, foreclosures on one or more mortgages, or complex relationships between the various mortgages, because issues such as priority of coverage and recovery can become very complicated very quickly.

If only because of the necessity to establish nonliability to its insured and the potential of a bad faith claim, subrogation under a Standard Mortgage Clause is rarely a simple matter. Notwithstanding the complexities of relationships between involved parties and their interests in the property, this article will give subrogation professionals a place to start when tackling subrogation under mortgage clauses.

21 Cozen, § 52.04[3]; *Krupp v. Aetna Life & Cas. Co.*, 150 A.D.2d 345 (N.Y. Sup. Ct. 1989).
22 *Smith v. Ins. Co. of North America*, 30 F.R.D. 540 (M.D.Tenn. 1962); *Cerullo v. Aetna Cas. & Surety Co.*, 41 A.D.2d 1 (N.Y. Sup. Ct. 1973).
23 See, e.g., *Payne v. Buffalo Reins. Co.*, 317 S.E.2d 408 (N.C.App. 1984).
24 6 Wright & Miller, *Federal Practice and Procedure* § 1410.
25 See, *State Farm Fire & Cas. Co. v. Brethren Mut. Ins. Co.*, 386 A.2d 1249 (Md.App. 1978).

Insurers and Regional…

Continued from page 9

RGGI JURISDICTIONS

RGGI's current members include Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont.[14] These ten states represent about 20% of the U.S. economy and 14% of total U.S. greenhouse gas emissions.[15] The 210 participating facilities all produce electricity.[16]

BIRTH OF RGGI

Participating states formed a working group in 2003.[17] The working group used the EPA's cap-and-trade system for NO_X and SO_2 as a template for the program.[18] The states ultimately created a Model Rule, a set of proposed regulations that form the basis for each state's program.[19] Each state's program works off of its own statutory and/or regulatory authority.[20] In other words, RGGI varies among the participating states.

RGGI MODEL RULE

The Model Rule established a phased approach to reducing emissions.[21] The initial goal for emissions reduction is modest.[22] The total amount of pollution allowances gradually decreases under the plan.[23] RGGI compels a 10% reduction of 2009 emissions by 2018.[24]

Caps are linked to the total emissions for all RGGI facilities in the participating states. Caps are passed on to facilities by each individual state.[25] States assess compliance for each facility based on its historical emissions less the amount of the facility's eligible biomass combustion, which subject to program rules, includes the burning of renewable materials such as wood and crops.[26] RGGI has a series of three-year compliance periods.[27] A facility may purchase extra allowances or offsets to account for its burn.[28] Offsets are projects that participate in activities that lower greenhouse gas emissions.[29] A facility may only purchase 3.3% of its allowances from RGGI approved offsets.[30] This offset cap applies in all states for all compliance periods save for periods of extreme market volatility.[31]

RGGI imposes penalties on facilities that emit without purchasing enough allowance permits to compensate.[32] The allowance penalty is three times the amount the facility exceeds its emissions allowance.[33] Additional state penalties may apply as well.[34]

WHO DOES RGGI REGULATE?

RGGI only regulates utilities and, for now, there is no official plan to extend regulation to other industries.[35] RGGI applies to 210 specific facilities that started operating before January 1, 2005, that use fossil fuel for more than 50% of their total annual input, and to utilities that started operating after January 1, 2005, that use fossil fuel for more than 5% of their total annual heat input.[36] In practice, this means that, in RGGI states, all coal, natural gas and diesel-fired electricity

14 *Id*.

15 *Id*.; Div.of Air & Waste Mgmt., *CO_2 and Delaware Power Plants*, Delaware.gov (Oct. 15, 2010 4:45 PM), http://www.awm.delaware.gov/Info/Regs/Documents/609e89c067ff4815bc00d6d718334052RGGIbasics.pdf.

16 Margulies & William L. Troutman, *supra* note 3; RGGI, Inc., *supra* note 4.

17 Div.of Air & Waste Mgmt., *supra* note 15.

18 RGGI, Inc., *supra* note 5.

19 RGGI, Inc., *Model Rule*, RGGI.org (Oct. 15, 2010, 5:08 AM), http://www.rggi.org/design/history/model_rule.

20 *See* RGGI, Inc., supra note 19.

21 RGGI, Inc., *supra* note 5.

22 *Id*.

23 Pool, *supra* note 12.

24 Margulies & William L. Troutman; Pool, *supra* note 12.

25 *Id*.

26 RGGI, Inc., *supra* note 5.

27 Pool, *supra* note 12.

28 William M. Bumpers, *Sustaining Renewable Energy and Carbon Markets*, Law360 (Sept. 13, 2010, 2:11 PM), http://www.law360.com/print_article/191605.

29 *See* RGGI, Inc., *supra* note 5.

30 RGGI, Inc., *Fact Sheet: RGGI Offsets,* RGGI.org (Oct. 15 2:16 PM), http://www.rggi.org/docs/RGGI_Offsets_in_Brief.pdf.

31 *See* RGGI, Inc., *supra* note 30.

32 RGGI, Inc., *Compliance*, RGGI.org (Oct. 15, 2010 4:39 PM), http://www.rggi.org/market/tracking/data/compliance.

33 *Id*.

34 *Id*.

35 Jeffrey B. Margulies & William L. Troutman, *Regional GHG Regulation – Full of Hot Air*, Law360 (October 15, 2010 2:25 PM), http//www.law360.com/articles/148169.

36 RGGI, Inc., *supra* note 4; RGGI, Inc., *supra* note 5.

generating facilities operate under RGGI.[37] It also means that almost any new power station will operate under RGGI. Once a state determines that a facility falls within these criteria, RGGI will always regulate the program even if it later falls under the regulatory threshold amount.[38]

HOW DOES RGGI WORK?

RGGI works by distributing "allowances" first to the states, based on adjusted emissions from facilities, and then to private purchasers through quarterly auctions.[39] One allowance is the equivalent of one ton of carbon.[40] Annual state caps range from a high of over 64 million tons for New York to a low of approximately 1.2 million tons for Vermont.[41] There are no caps for the individual 210 RGGI facilities. The RGGI cap is linked to the number of available allowances.

RGGI is flexible and permits allowance banking.[42] Facilities may also sell surplus allowances to other facilities.[43] There is also an extended three-year compliance program and early reduction allowances.[44] Early reduction allowances permit utilities that start reduction prior to the compliance program to receive additional allowances that can be sold or applied toward their compliance obligation.[45] Unlike other programs, however, borrowing allowances is not permitted.[46]

OFFSETS

Facilities may also purchase offsets which are the equivalent of permit allowances.[47] For example, a company may capture and dispose of the methane gas that escapes from landfills.[48] To the extent that these projects create additional emission savings outside of RGGI, a facility may purchase an offset to help meet its compliance obligation.[49] RGGI pre-approved five different offset projects.[50]

The five eligible RGGI offset project categories can: (1) capture or destroy methane from landfills; (2) reduce emissions of sulfur hexafluoride from electricity transmission and distribution equipment; (3) sequester carbon dioxide through the planting of seeds or trees; (4) reduce emissions of carbon dioxide through non-electric end-use energy efficiency in buildings; (5) or avoid methane emissions through agricultural manure management operations.[51] However, to date, facilities have primarily chosen to buy auction allowances rather than offsets.[52]

This area should be reviewed by insurers if facilities begin relying on, or investing in, offsets for RGGI compliance. There are some unique offset loss scenarios that resemble loss scenarios for the Kyoto Protocol's Clean Development Mechanism.

FINANCIAL TREATMENT OF ALLOWANCES

At the quarterly auctions, electric generators and related entities purchase most of the auction allowances.[53] RGGI operates on a facility-by-facility basis.[54] But RGGI compliance operates at a corporate level.[55] Allowances are typically treated as a corporate asset rather than the asset of a facility.[56]

---

37 *See* Margulies & Troutman, *supra* note 3.

38 *See* RGGI, Inc., *supra* note 5.

39 *See* Pew Center, *Q&A: Regional Greenhouse Gas Initiative*, PewClimate.org (Oct. 16 2010 4:50 PM), http://www.pewclimate.org/what_s_being_done/in_the_states/regional_initiatives.cfm.

40 RGGI, Inc., *supra* note 30.

41 RGGI, Inc., *Regulated Sources*, RGGI.Org (Oct. 15, 2010 6:59 PM), http://www.rggi.org/design/overview/regulated_sources.

42 *Id*.

43 Pool, *supra* note 12.

44 Pool, *supra* note 12; RGGI, Inc., *supra* note 5.

45 RGGI, Inc., *supra* note 5.

46 Pool, *supra* note 12.

47 *See Id*.

48 *Id*.

49 *Id*.

50 *Id*.

51 *Id*.

52 Point Carbon, *Carbon Market Analyst North America: U.S. Offset Markets in 2010: The Road Not Yet Taken*, Thomson Reuters (Mar. 1, 2010), http://www.scribd.com/doc/28021833/US-Offset-Markets-in-2010-The-Road-Not-Yet-Taken.

53 Sustainable Business.com News, *RGGI Marks Two Years of CO2 Allowance Auctions*, SustainableBusiness.com (Oct. 15, 2010, 2:50 PM), http://www.sustainablebusiness.com/index.cfm/go/news.display/id/21028.

54 Margulies & William L. Troutman, *supra* note 3.

55 *See, e.g.*, RGGI, Inc., *CO2 Allowance Auctions; Frequently Asked Questions*, RGGI.org (Oct. 15, 2010 5:28 PM), http://www.rggi.org/docs/RGGI_%20CO2_%20Allowance_%20Auction_%20FAQs_Oct_5_2010.ppd; TransCanada, *Management's Discussion and Analysis*, Edgar-online.com (Oct. 15, 2010 5:40 PM), http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=7077659-652213-656894&SessionID=qZe2HSCK0t9qrl7.

56 *See* TransCanada, *supra* note 55.

Each state sells allowances for the current and future regulatory periods.[57] Bidding for the emissions allowances starts at a mandatory floor price of $1.86.[58] The auction takes place in a single round with a sealed bid, and purchasers can buy current or future allowances.[59] Currently, anyone may purchase an allowance, including corporations, individuals, non-profit corporations, environmental organizations, brokers and other interested parties.[60] Any party that would like to speed the objectives of RGGI could, with sufficient funding, purchase and retire large numbers of allowances.[61] Allowance prices would spike and emission reduction would become a pressing financial concern for facility owners and their customers.[62]

Proceeds from RGGI auctions are invested by each state in the development of a range of green technology projects.[63] But some states have recently raided their RGGI auction proceeds to plug holes in state budgets.[64]

SAFETY VALVES AND ALLOWANCE PRICES

The current oversupply of RGGI allowances ensures, for now, that allowance prices remain low.[65] However, should the prices rise dramatically, RGGI has "safety valves" built into the system.[66] When allowances reach the price of $7.00, a facility may purchase more of its allowances from offsets, up to 5%, and up to 10% if the price rises above $10.[67] Additionally, when prices rise above $10, the compliance period may be extended from three to four years.[68] However, these "safety valves" have not been utilized.[69] Auction prices have remained low.[70] For example, at the inaugural auction in September 2008, 12.5 million allowances sold for $3.07 each.[71]

In September 2010, RGGI had its ninth auction.[72] For the first time, the states were not able to sell all of the allowances they offered for the current and future regulatory periods.[73] The auctions closed at the floor price of $1.86.[74] The states may sell these leftover allowances in the future or may retire them.[75] Many analysts believe that the leftover allowances and the low auction prices resulted from a lower demand for electricity caused by the recession and by lower emissions from utility companies driven by their increased use of cheap natural gas, a cleaner burning fuel.[76] Others believe that the emissions goals set by RGGI are too low to drive utilities to change their behavior or that RGGI regulators supplied too many permits because of their inexperience in allocating allowances.[77]

If carbon allowance prices are set high enough, utilities will find it more profitable to switch to cleaner energy.[78] Analysts have speculated that the states strategically set prices too low and will raise the prices by lowering emission level caps in the future or by retiring allowances.[79] RGGI was the first program of its kind in the United States.[80] To ensure the program's success by

57 Boyd, *supra* note 2.
58 *Id*.
59 *See* TransCanada, supra note 55.
60 *See* RGGI, Inc., *supra* note 55.
61 *See, e.g*., David Brooks, *First RGGI Auction Sets Carbon Price at $3.07*, New Hampshire Business Review (Oct. 15, 2010 5:11 PM), http://findarticles.com/p/articles/mi_qa5283/is_20081010/ai_n30966692/?tag=content;col1.
62 *See Id*.
63 *See* Sustainable Business.com News, *supra* note 53.
64 Pool, *supra* note 12.
65 *Id*.
66 RGGI, Inc., *supra* note 5.
67 *Id*.
68 *Id*.
69 *See, Pool*, supra note 15; RGGI, Inc., *Overview of RGGI CO_2 Budget Training Program*, RGGI.org (Oct. 15, 2010, 2:04 PM), http://www.rggi.org/docs/program_summary_10_07.pdf.
70 Bumpers, *supra* note 28.
71 Mass. Dep't. of Envtl. Prot., *First-in-Nation RGGI Auction Brings $13.3 Million to Commonwealth for Use in Energy Efficiency Programs*, Winter Energy Costs, Mass.Gov. (Oct. 15 3:20 PM), http://www.mass.gov/dep/public/publications/1108rggi.htm.
72 Boyd, *supra* note 2.
73 Boyd, *supra* note 2.
74 Boyd, *supra* note 2.
75 Boyd, *supra* note 2.
76 *See* Pool, *supra* note 12; Sustainable Business.com News, *supra* note 53.
77 *See* Tiffany Clements, *What Can We Learn from RGGI Auction Prices?*, Weathervane (Oct. 15, 2010 4:57 PM), http://www.org/wv/archive/tags/RGGI/default.aspx; Pool, *supra* note 12.
78 *See* Pool, *supra* note 12.
79 *Id*.; Boyd, *supra* note 2.
80 Mass. Dep't. of Envtl. Prot., *supra* note 71.

gaining support from voters and industry, goals and prices were kept low in the hopes that after the program gained acceptance, RGGI could implement changes to more aggressively reduce emissions.[81]

THE FUTURE PRICE OF RGGI ALLOWANCES

Economists have concluded that the behavior of capped facilities changes in cap-and-trade programs when the allowance price exceeds approximately $50 per allowance.[82] Analysts predict that it will take at least six years from the start of the program for the market to mature and prices to rise.[83] They are, however, not expected to reach the $50 allowance price.[84] The program is set for a comprehensive review by the states in 2012.[85] The first three years are therefore, essentially, an elaborate trial run.

RGGI REPORT CARD

Based on the current low carbon price and other factors, analysts have given RGGI's performance a mixed report.[86] Since the first auction in September of 2008, RGGI has achieved ground breaking results as the first market-based carbon cap-and-trade program in the United States.[87] The quarterly auctions have generated proceeds of over $729 million to date.[88] Additionally, the program avoided some of the problems with the European Union's Emission Trading Scheme, which saw market volatility, windfall profits for regulated installations, and increased utility prices for consumers.[89]

RGGI avoided these problems by selling its allowances rather than allocating allowances at no cost.[90] Allowance prices were also managed. Auction protocol also prohibits any one bidder from purchasing more than 25% of the allowances.[91] Administrative costs of the program are low at 5% of emission allowance revenues.[92] Critics argue the program regulates a limited segment of industry, and low allowance prices have not driven utilities to burn clean energy or to invest in green technology.[93] Some critics are concerned that states have used revenues from the program to fund state budget shortfalls.[94]

THE FUTURE OF RGGI

There is little short-term prospect of federal cap-and-trade legislation. EPA regulation through cap-and-trade is, however, a more realistic possibility. The future of RGGI depends on the terms of any federal cap-and-trade program and the pricing of allowances.[95] Regional cap-and-trade programs may or may not be compatible with any federal program.[96]

Without a federal cap-and-trade program, RGGI states face several decisions.[97] RGGI may retire allowances or lower the cap on emissions.[98] The net effect would be to lower the amount each facility can emit.[99] In a supply and demand market, fewer allowances mean each allowance has more value.[100] And lower caps mean more allowances are required for compliance.[101] Increased allowance costs will more rapidly promote the goals of RGGI: decreased carbon emissions.[102]

81 *See* Pool, *supra* note 12.

82 *See* Craig Rubens, *Traders Start Snapping Up U.S. Carbon Futures on the Cheap*, Gigaom.com (Oct. 15 5:05 PM), http://gigaom.com/cleantech/us-cap-and-trade-launch-high-lights-hurdles.

83 *Id*.

84 *See* Nathaniel Gronewold, *RGGI Allowance Prices Continue Slide in Sixth Auction*, NY Times.com (December 4, 2009), http://www.nytimes.com/gwire/2009/12/04/04greenwire-rggi-allowance-prices-continue-slide-in-sixth-48850.html.

85 Conservation Law Foundation, Comments of Conservation Law Foundation on Development of RGGI Reference Case for Analysis of Electricity and CO2 Allowance Markets, RGGI.org (Sept. 2010), http://www.rggi.org/docs/Conservation_Law_Foundation.pdf.

86 *See* Eric de Place, *Grading RGGI's First Year*, Grist (Oct. 15 3:42 PM), http://www.grist.org/article/grading-rggis-first-year; Pool, *supra* note 12; Sustainable Business.com News, *supra* note 53.

87 *See* Mass. Dep't. of Envtl. Prot., supra note 71.

88 Sustainable Business.com News, *supra* note 53.

89 Pool, *supra* note 12.

90 *See Id*.; Polentz, *supra* note 5.

91 *Id*.

92 *Id*.

93 *See, e.g.*, *Id*.

94 *Id*.

95 *See* Bumpers, *supra* note 28; Pool, *supra* note 12.

96 Jesse Greenspan, *The Do's and Don'ts of Carbon Trading*, Law360 (Oct. 15, 2010 4:35 PM), http://www.law360.com/print_article/132234.

97 *See* Boyd, *supra* note 2.

98 *Id*.

99 *Id*.

100 *Id*.

101 *Id*.

102 *Id*.

But there are practical problems with retiring allowances and lowering caps.[103] Each state may not currently have the authority to retire allowances.[104] Those that do have the requisite statutory authority may not want to retire allowances.[105] Retiring allowances would reduce the amount of revenue generated for the state in auctions.[106] While it is possible to lower the carbon cap, there is no established process to easily do so.[107] Analysts expect the price of RGGI allowances to rise dramatically in the future, regardless of the way the program evolves.[108] No consensus has developed about future prices, but analysts forecast future allowance permit prices will increase dramatically in the next twenty years.[109]

EXPANDING RGGI?

Aside from increasing prices of allowances to drive conservation, environmentalists have proposed other changes to RGGI.[110] In light of Congressional failure to enact a climate change bill, some environmentalists have switched their strategy to a regional focus.[111] For example, Clean Energy Works, a group claiming 12 million members, will lobby for additional states to adopt RGGI.[112] Pennsylvania, which already officially observes the program,[113] may join next. Other analysts envision a larger program combining RGGI with the Western Climate Initiative, which consists of six western states and several Canadian provinces.[114]

There is little prospect of meaningful federal cap-and-trade *legislation* in the short term. But cap-and-trade through EPA *regulation* is a realistic possibility.[115] In that scenario, RGGI may run alongside a federal program.[116] State attorneys general from seven of the RGGI member states sent a letter to Senators Kerry, Graham, and Lieberman urging them not to completely preempt state regulation of greenhouse gases in federal legislation.[117] The attorneys general also asked the senators to draft a bill that allows states to adopt more aggressive regulations than the federal standards.[118] Most existing federal environmental statutes permit state programs to run in conjunction with the federal program, raising the possibility that regulated entities may be faced with regulation from multiple state or regional programs as well as federal regulation.[119] Economists argue, however, that regional cap-and-trade programs, whether stricter or not, will lose economic relevance upon the implementation of a meaningful federal cap-and-trade program.

Even if Congress were to completely preempt state regulation, the national program would likely be influenced by RGGI.[120] At a minimum, analysts expect RGGI to be folded into federal legislation.[121] The climate change bill recently proposed by Senator Kerry would have permitted holders of RGGI allowances to convert them to the federal program.[122] However, analysts believe that the conversion would have been at a discount.[123] The oversupply and underpricing of allowance permits in the system would have generated a lower conversion price than that of Climate Action Reserve, which works alongside the California Climate

103 *See* de Place, *supra* note 86.
104 *Id*.
105 *Id*.
106 *Id*.
107 *Id*.
108 *See* Point Carbon, *Carbon 2010 – Return of the Sovereign*, Thomson Reuters (Oct. 15, 2010 6:00 PM), http://www.pointcarbon.com/polopoly_fs/1.1420234!Carbon%202010.pdf.
109 *See Id*.
110 *See, e.g*., Anne C. Mulkern, *Coalition Plans Campaign to Protect EPA Climate Action, Mulls Future Direction*, New York Times (Oct. 15, 2010 4:06 PM), http://www.nytimes.com/gwire/2010/09/13/13greenwire-coalition-plans-campaign-to-protect-epa-climate-4260.html.
111 *See, e.g*., *id*.
112 Clean Energy Works (Oct. 15, 2010), http://www.cleanenergyworks.us/who-we-are.html.
113 Pew Center, *supra* note 1.
114 Eric de Place, *The Way Forward After the Senate's Climate Failure*, Grist (Jul. 23, 2010 2:04 PM), http://www.grist.org/article/the-way-forward-after-the-senates-climate-failure.
115 *See* Sarah Fitts, *What to Know in the Absence of a Climate Change Law*, Law 360 (Oct. 15, 2010 4:16 PM), http://www.law360/print_article.186490.
116 *See Id*.
117 Christopher Norton, *State AGs to Sens.: Don't Trample Our Climate Work*, Law 360 (Oct. 15, 2010 4:19 PM), http://www.law360.com/print_article/160563.
118 *Id*.
119 *Id*.
120 *See*, Greenspan, *supra* note 96.
121 *See Id*.
122 Mulkern, *supra* note 110.
123 *Id*.

Action Registry.[124] Others predict that RGGI will be a model for the national program.[125] The auction process under the Waxman-Markey bill, which was passed in the House but not the Senate, included many of the features of the RGGI auction process.[126]

CASE STUDIES

The following examples will help detail the unique cap-and-trade issues set out in the opening section.

LOSS SCENARIO 1
ALLOWANCE TREATMENT IN A COVERED LOSS

There is a 2480MW generating facility in New York.[127] In 2009, it reported annual carbon emissions of approximately 1.87M tons, or 5,123 tons per day.[128] It will account for three years of emissions at the end of the first RGGI compliance period in 2011.[129] It suffers an insured loss and has a 180-day outage. It submits a claim for business interruption. Due to the 180-day outage caused by the insured event, it does not burn 922,140 tons of carbon. What should happen to allowances not used due to an insured event?

During the outage period the value of allowances fluctuates from $3-$25 per allowance. Should allowances be treated like any other saved expense? Does a volatile allowance market change this? Does this loss scenario change the facility's insurance requirements? Should wording be amended to address this loss scenario?

EUROPEAN LOSS EXPERIENCE

The treatment of carbon credits (EUAs) in a similar loss scenario under the European Union's Emission Trading Scheme (ETS) is unclear. Most of the EUAs, during Phase 1 (2005-2007) and Phase 2 (2008-2012), are allocated at no cost to carbon emitting installations.[130] The allocation of EUAs provides ETS installations a fungible financial asset with no clear accounting treatment.[131] It can be argued that, just like a fleet of trucks or machinery, insurers cannot compel mitigation of losses by selling EUAs. Emitters have treated EUAs as a generation "cost" and passed this "cost" on to consumers.[132]

In the context of the world's largest cap-and-trade program, and in light of the considerable media attention, it is hard to believe this has been permitted to occur. Enriching emitters at the cost of consumers and the environment appears to be at odds with the purpose of the EU's attempt to comply with its Kyoto Protocol obligations. In the context of business interruption insurance, there is little transparency in loss scenarios. With no compulsory accounting treatment and no redress for windfall profits, EUAs may appear as any number of items, or not at all, on a profit and loss sheet. And, while perhaps unpalatable, EUA windfall profits have no direct bearing on adjusting business interruption losses. It is fundamentally an EU consumer issue.

This is evidenced in the European utility insurance sector where, in most loss scenarios, it is not normally an issue. EU utility insurers generally insure profit based on formulas which, rightly or wrongly, include an EUA generation "cost." But the EUA question remains unresolved for risks outside the power industry. Windfall profits, low EUA prices, a lack of corporate transparency, and an absence of cap-and-trade savoir faire by insurers have all contributed to the issue not being addressed in the context of first-party insurance in the EU.

RGGI LOSS

The treatment of allowances in a business interruption loss under RGGI, however, should be clear. Allowances are purchased.[133] There is no windfall profit under RGGI.[134] Auction proceeds are ring-

---

124 Greenspan, *supra* note 96.

125 Boyd, *supra* note 2.

126 Tiffany Clements, *Waxman-Markey Auction Plan Draws Heavily from RGGI*, WEATHERVANE (Oct. 15, 2010 4:59 PM), http://www.rff.org/wv/archieve/tags/RGGI/default.aspx.

127 Nationalgrid, *Sale of Ravenswood Generating Station for $2.9 Billion*, NATIONALGRID.COM (Mar. 31, 2008), http://www.nationalgrid.com/corporate/Media+Centre/Press+Releases/Global+Press+Releases/310308.htm.

128 RGGI, Inc., *RGGI CO2 Allowance Tracking System: Report: Annual Emissions*, RGGI.Org (Oct. 15, 2010 7:26 PM), https://rggi-coats.org/eats/rggi/index.cfm?fuseaction=reportsV2.sources_rpt&clearfuseattribs=true (enter Ravenswood in the Source Name field and 2009 in the beginning and ending year).

129 *See* RGGI, Inc., *supra* note 30.

130 EUR. PARL. DOC. (2003/87/EC).

131 Ernst & Young, *Carbon Market Readiness*, ERNST & YOUNG.COM (Oct. 18, 2010), http://www.ey.com/Publication/vwLUAssets/Carbon-market-readiness-Is-your-company-prepared/$File/Carbon_market_readiness.pdf.

132 Point Carbon, EU ETS PHASE II – THE POTENTIAL AND SCALE OF WINDFALL PROFITS IN THE POWER SECTOR, Thomson Reuters, THOMSON REUTERS (OCT. 18, 2010), http://assets.panda.org/downloads/point_carbon_wwf_windfall_profits_mar08_final_report.pdf.

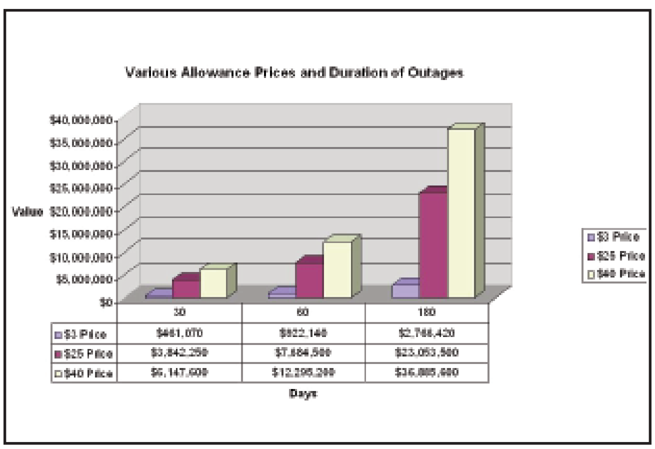
133 Sustainable Business.com News, *supra* note 53.

134 Barry G. Rabe, *The Complexities of Carbon Cap-and-Trade Policies: Early Lessons from the States*, GOVERNANCE STUDIES AT BROOKINGS (Oct. 2008), http://www.brookings.edu/~/media/Files/rc/papers/2008/1009_captrade_rabe/1009_captrade_rabe.pdf.

fenced for investment in green technology and, more recently, to plug state budget deficits.[135] Emitters are not profiting from RGGI and, unlike EU emitters, have no motive to obfuscate their financial treatment of allowances.

RGGI allowances have a lot in common with EUAs. Allowances can best be thought of as the equivalent to a barrel of oil. They are a new synthetic commodity with no clear accounting treatment.[136] Due to the limited compliance period, allowances are uniquely wasting assets. Depending on the value of the allowances, a significant quantum of business interruption losses could be wiped out. Policyholders may use allowances as an additional layer of self-insurance. Allowances may change the need for business interruption insurance and even for the rating of first-party policies. Policyholders treat allowances as transferable corporate assets despite the link to specific installations.[137] Certainly, allowances add another layer of complexity to first-party loss scenarios.

But allowances, unlike EUAs, are purchased at auction. They should, therefore, be treated like any other commodity used in production. And, just as with any other saved expense, insurers should, arguably, be able to compel policyholders to sell their allowances to mitigate covered losses. In the loss scenario set out above, depending on whether it is a $3 or $25 allowance price, this is a $2.7M - $23M question. The key issue is transparency: Do insurers and their service providers know to compel mitigation at RGGI facilities?



LOSS SCENARIO 2 GREEN TECHNOLOGY

A facility installs green technology to reduce its emissions. The green technology has an outage which is an insured event. A claim for property damage to the green technology is submitted. The facility also submits a claim for the purchase of additional allowances when it relies on its backup coal-fired plant. Was the policy rated for this loss scenario? Does the wording protect insurers or the insured from a volatile commodity market? Alternatively, the facility submits a claim for the cost of purchasing electricity from a competitor which includes the cost of allowances purchased at auction. Should the facility be required to sell its saved allowances when it purchases replacement product from an alternative supplier?

EUROPEAN EXPERIENCE = RGGI

The treatment of EUAs by policyholders in the EU is far more transparent in this loss scenario. The treatment would be similar to a RGGI loss. Here, policyholders may have an extra expense due to an insured event and submit a claim for the cost of purchasing additional EUAs/allowances. Insurers may or may not have contemplated this loss scenario when the policy was rated. Insurers must, generally, indemnify the policyholder for this extra cost. Without cap-and-trade wording and suitable rating, insurers can be exposed to the perils of a young and volatile supply and demand market. Insurers can manage this potential risk through wording, rating and sub-limiting their exposures.

Therefore, the anticipated response to this type of loss under RGGI is as follows: Insurers must pay for covered property damage and covered business interruption losses. Business interruption losses may include the cost of purchasing power from an alternative source. If the backup generation source relied on is a less efficient system, the additional cost could, necessarily, include the cost of additional allowances. In a supply and demand marketplace, the sudden and unexpected demand for a large number of allowances may result in a price spike. With no suitable wording, rating or sub-limits, allowances may pose a significant new exposure for insurers.

135 Sustainable Business.com News, *supra* note 53; Pool, *supra* note 12.
136 Ernst & Young, *supra* note 131.
137 *See* Transcanada, *supra* note 55.

CONCLUSION

Realistically, RGGI is not a game changer until the value of allowances increases. But insurers of U.S. risks can learn from the European experience. Cap-and-trade issues can be managed through awareness, transparency, suitable policy wordings, and sub-limits. RGGI, in the context of insurance, should, for all parties, be an opportunity to effectively manage a unique new risk.

Thomas H. Cook, Jr. is a partner with Zelle Hofmann in its Dallas Office. Jason Reeves is an associate with Zelle Hofmann in its Dallas office. He is a Solicitor of the Supreme Court of England & Wales and a US attorney. Jason has worked on cap and trade claims issues in the first-party context since 2005. Kim Gonzalez is an associate with Zelle Hofmann in its Dallas office awaiting July of 2010 Texas bar results. Prior to law school, Kim worked in the insurance industry for over twelve years.

The views and opinions expressed herein are solely those of the authors and do not reflect the views or opinions of Zelle Hofmann Voelbel & Mason LLP or any of its clients.

2011 TIPS CALENDAR

January

13-16 TIPS Midwinter Symposium — **Eden Roc, Miami, FL**
Contact: Ninah Moore 312/988-5498

18-21 Fidelity & Surety Midwinter Meeting — **Waldorf~Astoria Hotel, New York, NY**
Contact: Felisha A. Stewart – 312/988-5672

February

9-15 ABA Midyear Meeting — **Hyatt Regency, Atlanta, GA**
Contact: Felisha A. Stewart – 312/988-5672

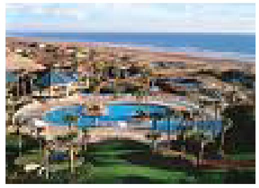
24-26 Insurance Coverage Midwinter Meeting — **Arizona Biltmore, Phoenix, AZ**
Contact: Ninah Moore 312/988-5498

March

3-4 Security International — **Israel Bar Association**
Contact: Donald Quarles - 312/988-5708

August

5-10 ABA Annual Meeting — **TBD, Toronto, Canada**
Contact: Felisha A. Stewart – 312/988-5672
Speaker Contact: Donald Quarles - 312/988-5708

2011 TIPS Spring Leadership Meeting

May 18-22, 2011
Ritz-Carlton Hotel
Amelia Island, FL

Don’t Miss Our Impressive Lineup of Quality CLE Programs

Technology Program

The Deepwater Horizon Disaster: Liability, Coverage, Claims, and Environmental Damages for an Oil Spill – One Year Later

Ethical Challenges in Cyberspace

Winning Strategies for Jury Instructions: From Beginning to End

Unpacking Chinese Drywall: The Science, The Litigation, and The Insurance Coverage Issues

A Title Insurance Law CLE Mini-Series

Legal Ethics Through an Animal’s Eye

TORT TRIAL INSURANCE

For more information, visit the TIPS website at:
www.abanet.org/tips

ABA
Defending Liberty
Pursuing Justice