

## Conning the IADC Newsletters

**International Association of Defense Counsel Committee members prepare newsletters on a monthly basis that contain a wide range of practical and helpful material. This section of the *Defense Counsel Journal* is dedicated to highlighting interesting topics covered in recent newsletters so that other readers can benefit from committee specific articles.**

### Crumb Rubber Turf Wars: The Synthetic Turf Fields Investigation

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**A**LL those beautiful artificial turf fields popping up everywhere these days have transformed the

sports and playground surface industry – the artificial fields stay green all year round, work well in any kind of weather, never turn to mud or dust, and require no herbicides or fertilizers to maintain. No wonder these fields now cover the football stadium surfaces of many college and pro

teams, as well as thousands of local community soccer fields and playgrounds.

But the promise and advantages these fields bring to sports is being threatened by currently unsupported allegations of a darker side of the turf field lurking beneath the surface – or more accurately, *in* the surface of these fields. The fields use a material called *crumb rubber*, made from tiny bits of ground up tires, to provide the “infill” necessary to support the grass blades and to cushion impacts. In part led by a monograph published in 2007 by the EHHI, a group of advocates has mounted an increasingly aggressive attack on crumb rubber. Those advocates claim that crumb rubber contains carcinogens and either could or actually is causing cancers and other health problems for players and children who use these fields. Many of the news stories cite to a group of over 150 soccer players identified with cancer, and many of them goalies, who understandably spend more time on the turf surface.

The crumb rubber material consists of chopped or ground up tire bits, so the material itself is likely no more dangerous than a tire itself. But in the ground up form, crumb rubber lays loose on these fields, sprays up when balls strike it, and routinely clings to the shoes, clothing, and skin of players. Many soccer moms and dads have no doubt cleaned it off their own children’s clothing at home. And thus crumb rubber presents an attractive target for adverse health claims – a strange material (what are these small black pellets?), known to contain certain carcinogens, used on fields where children play, and which attach to skin and clothing or could presumably be ingested.

For some years the challenge to crumb rubber had little traction. But NBC news picked the story up in October 2014 and again a year later in a series of specials. That and other media helped generate Congressional attention. After requests from certain members of Congress, three federal agencies – the CPSC, EPA, and the CDC – recently announced a joint health investigation. California’s OEHHA has also announced a three-year investigation, in which EPA will assist. The studies will examine the way in which the fields are used, likely sources of exposure, and the contents of crumb rubber, and may also include a component focused on monitoring actual releases. The CPSC has advised Congress that crumb rubber is one of its two top priorities for 2016-2017, so the agency investigation is not an inconsequential effort.<sup>1</sup> No litigation has yet ensued over these health claims, other than a short burst of activity some years ago focused on lead in the grass itself. But some plaintiff firms are trolling, and the investigations could prompt medical monitoring or other litigation.

This article provides background on the health issues and studies to date, why the existing studies do not support the claims, and where the investigations are likely headed. We include a section on the regulatory status and another on litigation, if it occurs. In the world of emerging torts, crumb rubber has moved into the top

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<sup>1</sup> Oversight of the Consumer Product Safety Commission, Subcommittee on Commerce, Manufacturing, and Trade (May 19, 2015), available at <https://energycommerce.house.gov/hearings-and-votes/hearings/oversight-consumer-product-safety-commission-0>.

echelon of potential new sources of claims.<sup>2</sup>

## I. Crumb Rubber – What Is It and Where Is It Used?

Crumb rubber is made of the car and truck tires that formerly filled the nation's landfills, or even worse piled up on roadsides and empty lots. Today, used tires are ground up and recycled to create, among other things, the infill for synthetic turf. Tires are reduced down to tiny, granular rubber pieces, with 99 percent or more of the steel and fabric removed from them. In artificial turf, the recycled crumb rubber acts as a sort of synthetic dirt that fills the space between and supports plastic blades of grass. The use of crumb rubber is not limited to synthetic sports fields – it has covered playgrounds and running tracks for well over a decade.

Because of its advantages over natural or other synthetic turf, as well as its success as a means to recycle scrap tires (between 20,000 and 40,000 tires are ground up per football field<sup>3</sup>), the use of crumb rubber has become widespread. Many local playing fields have it in place today, and a large number of universities and professional sports leagues have

installed crumb rubber football, soccer, baseball, field hockey, and other fields. The industry group Synthetic Turf Council reports that there are over 12,000 synthetic fields installed in parks, schools, and sports facilities across the United States,<sup>4</sup> with many more being installed every year.

## II. The Spread of the Attack on Crumb Rubber

The criticisms of crumb rubber have existed for a number of years but began to coalesce after the EHHI's extensive review and critique in 2007.<sup>5</sup> The EHHI review identified some of the substances in crumb rubber as known or potential carcinogens. In 2015 EHHI commissioned a laboratory study by the Yale School of Forestry and Environmental Studies that confirmed the presence of a group of known or suspected carcinogenic chemicals in several samples of crumb rubber.<sup>6</sup> The Yale study did not, however, address the concentrations available or whether actual field conditions would produce hazardous levels of these materials. The Mount Sinai Children's Environmental Health Center similarly published a report in 2009 stating

<sup>4</sup> Terrie Ward, *STC Position on Crumb Rubber Infill Safety and Calls for Additional Federal Guidance*, Synthetic Turf Council (2015).

<sup>5</sup> David Brown, *Artificial Turf: Exposures to Ground Up Rubber Tires – Athletic Fields, Playgrounds, Garden Mulch*, Environment and Human Health, Inc. (2007).

<sup>6</sup> One portion of the Yale study superheated crumb rubber (300° C) to obtain identifiable levels of these carcinogens. <https://environment.yale.edu/benoit-lab/research/other/>; [http://www.ehhi.org/turf/new\\_study\\_jun2015.shtml](http://www.ehhi.org/turf/new_study_jun2015.shtml).

<sup>2</sup> For a review of the current science and litigation issues in further detail, see the recent Law360 article on crumb rubber by one of the authors (William Anderson and Emma Burton, *Turf Wars: The Attack on Crumb Rubber Synthetic Turf*, Law360 Dec. 14, 2015, available at <https://www.crowell.com/files/20151214-Turf-Wars-The-Attack-On-Crumb-Rubber-Synthetic-Turf-Anderson-Burton.pdf>).

<sup>3</sup> Rachel Simon, *Review of the Impacts of Crumb Rubber in Artificial Turf Applications*, University of California (2010).

that substances in crumb rubber “are known to cause birth defects . . . and even cancer” at high levels, and recommended that alternatives be used. That publication recommended that crumb rubber fields contain warnings not to use turf on hot days or for “passive recreation” (lying down) and to monitor young children for ingestion. Similar publications typically name some of the rubber constituents, couple that with the rubber pellet contact that occurs on playing fields, and argue for use of alternatives to “avoid the risk.”

The product likely does contain a number of materials known or suspected as carcinogens, but it seems unlikely that those carcinogens would pose a risk to field users. Tires contain a number of chemical ingredients at issue, including carbon black (30%), lead, zinc and other heavy metals, and oils with PAHs and VOCs, some of which are known or suspected carcinogens. Butadiene and styrene are apparently key components. These materials are bound up in the rubber matrix. The risk of release of these materials is very low, consistent with background exposures to similar substances.

That is the conclusion, at least, of many national and state health agency reviews to date. In contrast to the EHHI and Mt. Sinai publications, these reviews have consistently concluded that there is no cause for concern. They include investigations by the California Office of Environmental Health Hazard Assessment,<sup>7</sup> the State Department of Health

of New York,<sup>8</sup> the Consumer Product Safety Commission (“CPSC”),<sup>9</sup> the New York State Department of Environmental Conservation,<sup>10</sup> the New York City Department of Health and Mental Hygiene,<sup>11</sup> the United States Environmental Protection Agency (“EPA”),<sup>12</sup> the Connecticut Department of Public Health,<sup>13</sup> the California Office of Environmental Health Hazard Assessment (“OEHHA”),<sup>14</sup> the Robert Wood Johnson

<sup>8</sup> “A Review of the Potential Health and Safety Risks from Synthetic Turf Fields Containing Crumb Rubber Infill,” N.Y. City Dept. of Health & Mental Hygiene (May 2008).

<sup>9</sup> “CPSC Staff Finds Synthetic Fields OK to Install, OK to Play On,” CPSC (July 30, 2008), available at <http://www.cpsc.gov/en/Newsroom/News-Releases/2008/CPSC-Staff-Finds-Synthetic-Turf-Fields-OK-to-Install-OK-to-Play-On/>.

<sup>10</sup> “An Assessment of Chemical Leaching, Releases to Air and Temperature at Crumb Rubber Infilled Synthetic Turf Fields,” N.Y. State Dept. of Envir. Conservation (May 2009).

<sup>11</sup> “Air Quality Survey of Synthetic Turf Fields Containing Crumb Rubber Infill,” N.Y. City Dept. of Health & Mental Hygiene (May 2009).

<sup>12</sup> “A Scoping-Level Field Monitoring Study of Synthetic Turf Fields and Playgrounds,” National Exposure Research Laboratory, U.S. EPA (Nov. 2009).

<sup>13</sup> Simcox, Nancy et al., *Artificial Turf Field Investigation in Connecticut Final Report*, University of Connecticut (July 27, 2010).

<sup>14</sup> “Safety Study of Artificial Turf Containing Crumb Rubber Infill Made From Recycled Tires: Measurements of Chemicals and Particulates in the Air, Bacteria in the Turf, and Skin Abrasions Caused by Contact with the Surface,” California Department of Resources Recycling and Recovery (Oct. 2010).

<sup>7</sup> “Evaluation of Health Effects of Recycled Waste Tires in Playground and Track Products,” California Office of Environmental Health Hazard Assessment (Jan. 2007).

Medical School;<sup>15</sup> and the Norwegian Institute of Public Health.<sup>16</sup> The Synthetic Turf Council has compiled more than fifty relevant studies on its website.<sup>17</sup> One typical conclusion is that of the City of Toronto:

Available evidence does not indicate that playing on third generation artificial turf will result in exposure to contaminants at levels that pose a significant risk to human health provided it is properly installed and maintained and users follow simple hygienic practices. . . . While there are still some uncertainties regarding impacts from exposure to some substances found in artificial turf (carbon nanotubes, lead and other metals, latex, some metals, and polyaromatic hydrocarbons, for example), standard hygienic measures will minimize any of these risks. Under such conditions, and in the cases where use of natural turf is not possible or practical, the benefits from increased physical activity on fields are expected to outweigh the risks from exposure to toxic substances.

And even where chemicals are released from crumb rubber, the New York City Department of Health and Mental Hy-

giene concluded that “ingestion, dermal or inhalation exposures to chemicals in or released from crumb rubber do not pose a significant public health concern.”<sup>18</sup>

The Toronto report is one of several recent reports associating carbon nanotubes (CNTs) with crumb rubber. But to date the authors have not located any evidence that either tires or crumb rubber are made with CNTs. These reports may have confused CNTs with tire constituent carbon black, a totally different material. If CNTs become part of the allegations, crumb rubber may take on some aspects of asbestos litigation, because a series of articles have claimed that certain kinds of CNTs would act like asbestos in the human body.<sup>19</sup>

The studies and health department conclusions have not stopped the mounting criticism. In the last few years, allegations of a “cluster” of soccer players with cancer have appeared, and the numbers have grown to about 150 today as more such case reports are identified. While there is no evidence that these cancers are arising from contact with crumb rubber, that figure is frightening to a lay person and has helped generate the current interest. The father of one such soccer/football player, for example – a former National Health Service chief executive – is claiming in the UK media

<sup>15</sup> B. Pavilonis, et al., *Bio-accessibility and Risk of Exposure to Metals and SVOCs in Artificial Turf Field Fill Materials and Fibers*, Risk and Analysis (June 2013).

<sup>16</sup> “Artificial Turf Pitches — an Assessment of the Health Risks for Football Players,” Norwegian Institute of Public Health and Radium Hospital (Oslo, Jan. 2006).

<sup>17</sup> <https://syntheticturfCouncil.site-ym.com/news/news.asp?id=221847>.

<sup>18</sup> “A Review of the Potential Health and Safety Risks from Synthetic Turf Fields Containing Crumb Rubber Infill,” N.Y. City Dept. of Health & Mental Hygiene (May 2008).

<sup>19</sup> See, e.g., M. Jacobs, M. Ellenbecker, et al., *Precarious Promise: A Case Study of Engineered Carbon Nanotubes*, Lowell Center for Sustainable Production, University of Mass. (Mar. 2014).

that his son's cancer was caused by crumb rubber.<sup>20</sup>

The media stories on NBC and other networks, followed by a Julie Foudy special on ESPN,<sup>21</sup> got nationwide attention. Two Congressman – Senators Blumenthal and Nelson – demanded that the CPSC and EPA take action, and later wrote the White House to enlist its oversight. The resulting investigations are discussed below under the regulatory initiatives section. The first report likely to come out is a “status report” from the ATSDR/CDC at the end of this year.

What impact is all of this having? Many cities and communities around the country are increasingly faced with angry parent groups and others demanding alternative forms of infill or asking that warning signs be posted on synthetic turf fields. At least one such community did in fact put warning signs up.<sup>22</sup> Many other schools and communities are looking to replace grass fields and are faced with the complicated science and health claims as their boards and councils decide what to do. The pressure on this product and its users is going to increase exponentially in coming months as news trickles out from

<sup>20</sup> See <http://www.dailymail.co.uk/news/article-3447336/My-teenage-son-s-cancer-caused-artificial-football-pitches-says-former-NHS-boss-launches-campaign-halt-turf-s-use-fears-contain-dangerous-chemicals.html>.

<sup>21</sup> Julie Foudy, “Turf Wars: How Safe Are The Fields Where We Play?” (Nov. 24, 2015), available at <http://espn.go.com/espnw/news-commentary/article/14206717/how-safe-fields-where-play>.

<sup>22</sup> Robert Miller, “Health Advisory Posted at Ridgefield Artificial Turf Fields; Other Towns Differ in Approach,” *Newstimes.com*, June 8, 2009, available at <http://www.newstimes.com/news/article/Health-advisory-posted-at-Ridgefield-artificial-221850.php>.

the various investigations and the media and Members of Congress keep up the drumbeat.

#### IV. The Regulatory Initiatives and Likely Course

Despite the studies above, several government agencies have been under pressure to take a closer look. The key concern is that the existing studies may not be sufficient to rule out possible harm, and many people, understandably, want agency declarations that crumb rubber is “safe” for their children to play on. California’s OEHHA was the first to commit to a thorough investigation in mid-2015, with a focus on actual field sampling and preparation of a protocol for biomonitoring (but stopping short of actual biomeasurements).<sup>23</sup> EPA is assisting OEHHA. OEHHA expects to complete the study in July 2018.

The CPSC responded to Congressional requests by joining in a coordinated effort with EPA and the CDC. Jointly the agencies have announced a federal investigative plan that is focused on identifying the gaps in scientific information, in part because “the existing studies do not comprehensively evaluate the concerns about health risks from exposure to tire crumb.”<sup>24</sup> The plan keys in on classifying the chemical compounds, potential emissions and their toxicity as well as identifying the likely pathways of expo-

<sup>23</sup> <http://oehha.ca.gov/risk/SyntheticTurfStudies.html>.

<sup>24</sup> “Federal Research Action Plan on Recycled Tire Crumb Used on Playing Fields” (last updated Feb. 18, 2016), available at <https://www.epa.gov/chemical-research/federal-research-action-plan-recycled-tire-crumb-used-playing-fields>.

sure. The ATSDR – an arm of the CDC – has issued a public notice that in conjunction with EPA it has begun the process of conducting two studies on crumb rubber, one to characterize field use of crumb rubber and testing of material, and the second to explore possible exposure routes.<sup>25</sup>

The CPSC prides itself on being a science and data driven agency. There is no mention of any potential rulemaking in the current action plan, presumably because the scientific results will necessarily drive any decision with regard to agency action. The plan for scientific action acknowledges further work that may be necessary before moving forward to regulate, including identifying potential biomarkers of exposure, collecting preliminary biomonitoring data, analyzing samples of recycled tire crumb used on playground surfaces, and evaluating the feasibility of conducting an epidemiologic study. In its February 2016 budget request, CPSC has asked for an additional \$3 million earmarked for healthy children and the study of both nanotechnology in consumer products and crumb rubber in artificial turf fields and playgrounds.

Should the CPSC eventually determine that it should move forward with rulemaking to address a potential cancer risk from crumb rubber exposures, it would have to follow a specific statutory process and appoint a Chronic Hazard Advisory Panel (CHAP) to study the issue and make recommendations.<sup>26</sup> The CHAP panel would have to review the scientific data on toxicity and exposure to determine the

carcinogenic risk and report its determination to the CPSC. Any regulatory action would occur by rulemaking after receipt of the CHAP report and peer review of the science behind any regulatory determination.

For these reasons regulatory action at the federal level will not happen anytime soon. Years of scientific research and participatory process will inform any decision to move forward with rulemaking. California, an important bellwether state on chemical exposure issues, could get out ahead of the federal government in taking action because they are not constrained to follow the disciplined CHAP process and scientific peer review required at the federal level. In the interim, though, public statements of concern by agency heads and Members of Congress, even if based on partial or flimsy science, could raise the risks of litigation and cause even more difficulties for schools and communities considering the use of crumb rubber fields.

The questions regarding crumb rubber have spread to Europe, with a series of recent articles in the UK and a recent call for investigation from the European Commission.<sup>27</sup>

## V. Litigation Realities and Defenses

To date, the only litigation involving crumb rubber synthetic turf has focused on lead in the grass itself, and that litigation resolved in the mid-2000s when the

<sup>25</sup> 81 Fed. Reg. 8201, 8202 (Feb. 18, 2016).

<sup>26</sup> See 15 U.S.C. § 2080.

<sup>27</sup> Johnny Watterson, “Call for Inquiry into Health Effects of Rubber in Artificial Pitches” (March 14, 2016), available at <http://www.irishtimes.com/sport/call-for-inquiry-into-health-effects-of-rubber-in-artificial-pitches-1.2571489> (last viewed March 25, 2016).

manufacturers removed the lead content in new product.<sup>28</sup> The Canadian women's soccer players also filed a lawsuit before the last World Cup, but that lawsuit complained merely that the women were required to play on synthetic turf while the men continued to play on grass. The alleged but unproven "cluster" of soccer players with cancer has not yet produced any litigation, and activity on the plaintiff websites remains modest.

Nevertheless, the campaign against this product has many of the earmarks of orchestrated efforts to build consensus for litigation against the product. The Congressional attention and pronouncements, calls for hearings, alleged clusters of victims, declaring all the existing studies "inconclusive" or "inadequate," and the media's version of events are all indicative of past efforts to demonize targeted chemicals or products prior to the initiation of litigation.

Whether any litigation ensues, however, is still much in doubt. Litigants would face some substantial hurdles, first among them the lengthy series of independent studies and health board reviews finding no cause for concern. It is also difficult to prove in court an actual link between cancer and a claimed exposure, made more problematic here by several factors. For instance, to date the cancer claims have not focused on any one cancer or type of cancer but apparently include all forms of cancer. The plaintiffs' experts will face greater scrutiny if they cannot isolate a specific cancer resulting from a toxic exposure. In addition, the

typical latency between an exposure and cancer is decades, but crumb rubber has not been on the market long enough to connect these recent cancers with players using the fields only in the last few years.

Add to this the reality that no study to date has shown any releases of the carcinogenic materials in anything but highly inconsequential amounts. Success in a lawsuit would require a rather extreme version of the *any exposure* theory to succeed. A class action would be difficult to sustain, given the different manufacturers, the potentially different content of crumb rubber material, the varying circumstances of exposure, and the many alternative possible causes of cancer to consider. Medical monitoring litigation would involve a large number of potential litigants/patients for monitoring, with no clear link with any single cancer, and speculative claims of causation. And the fields themselves are not an easy target – they are beneficial for communities and schools, they provide children year-round exercise. Any mass replacement program would be enormously expensive for cash-strapped colleges, school districts, and cities.

Similar hurdles, however, do not always stop litigation – if the investigations come back with strong statements of concern, or if an epidemiology study claims to find a link, crumb rubber litigation in some form could be upon us. In the interim, the real burden of this storm of speculation about the product falls on the governments, schools, and sports teams who have to deal with the accusations and threats to expensive fields that otherwise are providing many benefits.

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<sup>28</sup> Consent Judgment as to Defendant Astro-turf, LLC, People of the State of California et al. v. Beaulieu Group, LLC et al. (No. RG 08407310, Super. Ct. Alameda County, Aug. 13, 2009).



# What's New in Immigration? A Few Thoughts for 2016

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## I. What is the status of the President's immigration programs, and how do they affect employers?

IN late November, 2014, President Obama announced several major initiatives intended to fix a number of problems with the current immigration system and promote a more predictable system going forward. The most publicized of the initiatives—deferral of removal of illegal parents of United States citizen children—became the target of lawsuits to prevent implementation. The significance of this measure, should it ultimately become effective, obliges employers to keep abreast of the status of this initiative, as well as other related measures. Several of the significant measures are addressed here.

## A. Deferred authorization for spouses of H-1B visa holders

H-1B is a common work visa. Dependent spouses and children hold H-4 status, but are not allowed to work. As of May 26, 2015, H-4 spouses (but not H-4 children) may apply for and receive work authorization. Work will be authorized where either (1) the H-1B principal has an approved Immigrant Petition (I-140) or (2) the H-1B principal has received an H-1B extension based on a permanent labor certification application or an I-140 petition already pending for at least one year. This is a significant change from past practice and brings the H-1B visa into line with other oft-used employment based visas by adding H-4 spouses to the group eligible to obtain work authorization. Employers who alert their H-1B employees to this opportunity will generate great good will.

## B. Deferred Action for Child Arrivals (“DACA”)

DACA was created to stem the removal of undocumented individuals below a certain age brought here as children who effectively grew up in the United States. It does not create a ‘lawful status’ for the participants but instead, provides immediate relief from the fear of deportation and allows for work authorization. The DACA program, first implemented in 2012, was to be expanded by the elimination of the upper age limit (birth date cut off of June 15, 1981 eliminated) and by shortening the required continuous U.S. residence period from June 15, 2007, to January 1, 2010. Additionally, work authorization would be issued for three years, instead of two years. It was anticipated that applications under the new rules would be accepted sometime in February 2015. The expansion of this program, however, was enjoined in the same proceeding which halted implementation of the Deferred Action for Parental Accountability, discussed next. If eventually implemented, employers should know of this initiative since by expanding DACA’s coverage it could affect employee’s children.

## C. Deferred Action for Parental Accountability (“DAPA”)

This brand new program, which mimics DACA, was created to benefit the *parents* of U.S. citizens or Lawful Permanent Residents (green card holders), where the parent is in the U.S. illegally. It is intended to address the problem of U.S. citizen or permanent resident children being stranded in the U.S., or being *de*

*facto* deported when their parents are removed due to illegal presence. Parents with good behavior and who have continuously resided in the U.S. since January 1, 2010, and were out of status as of November 20, 2014, would be eligible to apply for deferred action, relieving them from anxiety over removal. This initiative provides for employment authorization, which would be issued for three (3) years. At the time of announcement, it was anticipated that applications for this status would be accepted in May 2015. Before the injunction, substantial steps were taken to prepare for implementation of the DAPA initiative including planning for establishment of a 1,000 employee Citizenship and Immigration Services service center devoted to processing the expected millions of DAPA applications.

In a ruling announced on February 16, 2015, (*State of Texas, et. al. v. United States of America, et. al.*, Case 1:14-cv-00254) Judge Andrew S. Hanen, of the USDC, Southern District of Texas at Brownsville, Texas, entered a temporary injunction enjoining the implementation of the DAPA program described above, as well as the three primary expansions DACA also announced in November, 2014. Suit was brought by 26 States seeking injunctive relief alleging direct damage, if the DACA expansion and DAPA initiatives were implemented. The decision was announced on the eve of implementation of the DACA expansions. In November 2015, the injunction was sustained by the 5th U.S. Circuit Court of Appeals, and appealed by the Obama administration. In January 2016, the case was accepted for review by the U.S. Supreme Court. On March 1, 2016, the government filed its opening brief on appeal. A great deal of

speculation has arisen as to how the death of Justice Scalia will affect the Court's consideration of this case.

This case is significant because of the large number of people affected by the initiative. The prospect of no-removal and work authorization for millions is a development employers cannot ignore.

#### D. STEM Optional Practical Training

Under existing law, ("OPT") (Optional Practical Training), foreign students in F-1 status may work for up to 12 months after graduation. STEM<sup>1</sup> graduates were eligible to receive an additional 17 months for a total of 29 months of OPT. The President proposed increasing the 17-month extension period for STEM graduates and expanding the list of STEM fields. On March 11, 2016, USCIS announced implementation of important changes for STEM students, including the enlargement of the STEM extension period from 17 to 24 months.

## II. Avoiding national origin discrimination: A refresher on interviewing foreign nationals for employment

Considering the potential, just discussed for a substantial number of newly work-authorized individuals to enter the job market, a review of the issues attendant to interviewing foreign nationals for employment, in particular, avoiding national origin discrimination, is appropriate. The laws that cause the most confusion in the

recruitment and hiring of foreign nationals, including international students, are:

- **The Immigration Reform and Control Act of 1986 ("IRCA").** IRCA requires that employers only hire people who are authorized to work in the United States. Using the I-9 process, employers must verify an employee's identity and authorization to work in conjunction with the hiring process. It is therefore lawful for an employer to inquire about an applicant's authorization to work prior to, or during an employment interview.
- **Title VII of the Civil Rights Act (Title VII).** Title VII prohibits discrimination based on national origin, religion, or other protected classes of individuals. IRCA also protects workers against discrimination based on citizenship status. National origin discrimination occurs when an individual is denied an employment opportunity or is treated differently because of his or her birthplace, ancestry, cultural background, or heritage. The trouble starts when an employer inquires directly into an applicant's national origin (i.e. "Are you from India?" or "You must be from South Africa"). Asking such questions can give rise to claims that a decision not to offer a job was based on the national origin of the individual.

A couple of practical questions follow from these laws: How can an employer determine if a student is authorized to work, or if the student or EAD holder will require visa sponsorship, without asking improper questions regarding national origin, citizenship, and so forth? Also,

<sup>1</sup> "STEM" refers to science, technology, engineering or math.

what if an employer only wants to interview or hire U.S. citizens?

Some employers have adopted rules providing that they will only interview or hire U.S. citizens. As a general rule, an employer cannot legally limit job offers to "U.S. citizens only." An employer may require U.S. citizenship for a particular job only if U.S. citizenship is required to comply with a law, regulation, or executive order; is required by a federal, state, or local government contract; or, the U.S. Attorney General determines that the citizenship requirement is essential for the employer to do business with an agency or department of the federal, state, or local government.

These exceptions, by their very terms, are extremely limited in scope. An employer cannot, thus, impose a simple "citizens only" policy unless the job fits into one of the referenced categories. Even in those limited cases where a "citizens only" policy may be allowed, the citizenship requirement must be related to a specific job that has been identified in the government contract, by law, or by the U.S. Attorney General. For example, an employer that is a U.S. Department of Defense contractor cannot require U.S. citizenship for all of its jobs relating to the contract if the contract identifies only certain jobs as requiring U.S. citizenship.

As a result, employers should not ask a job applicant about his or her citizenship during a job interview, unless the employer is confident that the job falls into one of the lawful bases for requiring U.S. citizen applicants only. Questions, however, concerning an applicant's *authorization to work* are appropriate and lawful. It is perfectly lawful for an employer to refuse to interview or hire an international

student in F-1 or J-1 status who *will need future visa sponsorship in order to be authorized to work in the U.S.*

Many students in F-1 or J-1 status (two very common student visas) are authorized to work after graduation using F-1 Optional Practical Training or J-1 academic training. Students will eventually require sponsorship for work visas after expiration of their training period. An employer does not violate the law by refusing to sponsor an international student for an H-1B or other temporary work visa, or for permanent residence in the United States. Employers, therefore, do not have to interview, or hire foreign students in F-1 or J-1 status, if the employer does not wish to sponsor an employee for a work visa in the future. Moreover, if an employer extends an offer to the student, and subsequently learns the student will require visa sponsorship, the employer can lawfully revoke the offer.

However, by adopting a policy of refusing to interview or sponsor F-1 or J-1 students for a work visa (such as H-1B), employers may be excluding a significant pool of talented candidates. Employers may adopt these policies because they lack information of the visa options available to allow the foreign students to continue working after graduation, or the likely duration of work authorization which relies on prosecutorial deference. Regardless of whether the employer wishes to interview F-1 or J-1 students, or DACA, or future DAPA beneficiaries, all employers must take care not to violate IRCA or Title VII in their interviewing process.

Lawful questions an employer may ask on job applications or interviews can determine work eligibility and provide insight into an authorization's duration, without

asking about national origin, and should be asked of all applicants, not just “foreign” ones. Some examples of such questions are:

- Are you currently authorized to work in the United States on a full-time basis for any employer without restriction?
- Will you now or in the near future require employment visa sponsorship (i.e., H-1B visa)?
- If the applicant answers yes (that he or she will require visa sponsorship), the employer may then ask what the applicant’s current employment eligibility is based on, what the applicant’s immigration status is, and how long it will last.

If the applicant answers that he or she is authorized to work, and will not require visa sponsorship, no further questioning about employment authorization, visa status, and so forth, is permissible.

The questions outlined above can be stated on job applications, even prior to interview, and will allow employers to determine if an applicant will require work visa sponsorship. Employers can then determine if they want to pursue the applicant further. The recruiter should ask all prospects the same questions, not just those who may “look” or “sound” foreign. Selectively questioning and advising candidates of work authorization requirements could raise questions about

whether the employer is treating applicants unfairly based upon national origin. An employer should not ask the applicant’s country of origin or “native language,” or differentiate among applicants based upon their last name, color, or accent. Similarly, employers should not have a policy that disproportionately impacts employees of certain nationalities, e.g., for sponsorship or employment.

### III. H-1B season is in full swing!

As the economy has improved over the last several years, the squeeze on available H-1B visas has returned with a vengeance. H-1B is the most popular work visa in the U.S. It is available to individuals who have at least a 4 year bachelor’s degree (or the foreign equivalent) and who will work in a job that requires at least that type of degree to perform. The annual cap on H-1B visas remains at 85,000, which is a mix of bachelor’s and advanced degree candidates. The quota is released every year on October 1, and every year on October 1, all H-1B’s are already taken because of “pre-filings.” That is because employers may submit H-1B petitions as early as April 1 for the October 1 quota. It is anticipated that the quota will be met through the filings received by USCIS on April 1, and that, as in recent years, applications will exceed available visas by as much as two to one or more.

## Understanding the Defend Trade Secrets Act of 2016: “We’re Not in State Court Anymore”

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By: Peter J. Pizzi and  
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ON May 11, 2016, President Obama signed into law the Defend Trade Secrets Act of 2016 (“DTSA”), a powerful new statutory regime intended to bolster protections for U.S. trade secret holders. The statute will have an immediate impact on federal court practitioners, as it creates a private cause of action for the misappropriation of trade secrets and expressly confers jurisdiction of such actions to the U.S. federal district courts. The DTSA also contains a civil seizure mechanism through which an owner of a trade secret may apply to a district court for an order

compelling the seizure of property necessary to prevent the dissemination of the trade secret. In this way, the DTSA seeks not only to harmonize the substantial and diverse body of state trade secret law, but also to equip trade secret holders with new tools to safeguard their intellectual property.

The statute owes its origins in part to the Justice Department’s unsuccessful prosecution in *United States v. Aleynikov*,<sup>1</sup> in which the Second Circuit reversed the conviction of a Sergei Aleynikov, a former Goldman Sachs programmer, for theft of trade secrets, finding that proprietary computer code fell outside the scope of

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<sup>1</sup> 676 F.3d 71 (2d Cir. 2012).

the then-existing federal statutory schemes because it was not “produced . . . for interstate or foreign commerce.” Aleynikov had allegedly uploaded Goldman Sachs high-frequency trading code to a server in Germany as he was leaving Goldman’s employment for a Chicago hedge fund. In response to *Aleynikov* and related concerns about international and domestic “hactivism,” legislation was proposed to amend the Economic Espionage Act, and it is that amendment which President Obama signed into law earlier this month.

This article provides a brief overview of the DTSA and identifies the key provisions applicable to practitioners, employers, and private parties that work with or rely on trade secrets.

## I. Private Cause of Action (§ 1836)

The DTSA provides for a private cause of action by an owner of a trade secret that is misappropriated, provided the trade secret “is related to a product or service used in, or intended for use in, interstate or foreign commerce.” Under the DTSA, federal district courts have original jurisdiction of such actions. The DTSA is also forward-reaching in that it applies only to misappropriation that occurs after its enactment.

### A. Civil Seizure

As noted above, the DTSA contains a civil seizure mechanism. Under this provision, a district court may, based on an affidavit or verified complaint satisfying certain statutory requirements (discussed below), “upon ex parte application but only in extraordinary circumstances, issue

an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.”

### B. Requirements for a Seizure Order

A district court may not issue a seizure order unless it makes certain statutory-based findings. Specifically, the court must find that (1) an order pursuant to FRCP 65, or another form of equitable relief, would be inadequate to prevent the dissemination of the trade secret because the target of the order would evade, avoid, or otherwise not comply with such an order; (2) an immediate and irreparable injury will occur if the seizure is not ordered; (3) the harm to the applicant of denying the application outweighs the harm to the legitimate interests of the target of the seizure and substantially outweighs the harm to any third parties who may be harmed by such seizure; (4) the applicant is likely to succeed in showing that (i) the information is a trade secret, and (ii) the target of the seizure (a) misappropriated the trade secret of the applicant by improper means; or (b) conspired to use improper means to misappropriate the trade secret of the applicant; (5) the target of the seizure has actual possession of (i) the trade secret, and (ii) any property to be seized; (6) the application describes with reasonable particularity the matter to be seized and, to the extent reasonable under the circumstances, identifies the location where the matter is to be seized; (7) the target of the seizure, or persons acting in concert with the target, would destroy, move, hide, or otherwise make such matter inaccessible to the court, if the applicant were to proceed on notice

to such person; and (8) the applicant has not publicized the requested seizure.

### C. Elements of a Seizure Order

The DTSA further provides that any civil seizure order shall provide for the “narrowest seizure of property necessary” and “direct that the seizure be conducted in a manner that minimizes any interruption of the business operations of third parties and, to the extent possible, does not interrupt the legitimate business operations of the person accused of misappropriating the trade secret.” Additionally, the seizure order shall be accompanied by an order protecting the seized property from disclosure by (i) prohibiting access by the applicant or the target of the seizure order and (ii) prohibiting any copies, in whole or in part, of the seized property. The seizure order shall also set a date for a seizure hearing (discussed below) and require the applicant to provide adequate security to cover damages that result from a wrongful or excessive seizure or attempted seizure.

### D. Seizure Hearing

Under § 1836(b)(2)(F), a court that issues a seizure order must hold a hearing at the earliest possible time, and not later than 7 days after the order has issued, wherein the applicant must prove factual and legal bases supporting the order. If the applicant fails to meet that burden, the seizure order shall be dissolved or modified appropriately. In addition, a party against whom the order has been issued, or any person harmed by the order, may move the court at any time to dissolve or modify the order after giving notice to the party who obtained the order.

### E. Remedies

The DTSA provides for both injunctive relief and damages. Under § 1836(b)(3)(A), a court may grant an injunction so long as the injunction does not prevent a person from entering into an employment relationship or otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business. In addition, a court may grant an injunction requiring affirmative actions to be taken to protect the trade secret. Further, in exceptional circumstances where an injunction would be inequitable, the court may condition future use of the trade secret upon payment of a reasonable royalty for a period of time no longer than the period for which such use could have been prohibited by injunctive relief.

Under § 1836(b)(3)(B), a court may award damages for actual loss caused by the misappropriation of the trade secret, as well as damages for any unjust enrichment that are not connected to actual loss; *or* in lieu of actual damages, a reasonable royalty for the unauthorized wrongdoer’s disclosure or use of the trade secret. Furthermore, if the misappropriation is found to be willful or malicious, a court may award reasonable attorney’s fees and exemplary damages not more than two times the amount of the actual damages or reasonable royalties. A court may also award reasonable attorney’s fees if a misappropriation claim or a motion to terminate an injunction is made or opposed in bad faith.

### F. Statute of Limitations

Finally, the statute of limitations for a private cause of action for misappropriation



tion of trade secrets is three years from “the date on which the misappropriation with respect to which the action would relate is discovered or by the exercise of reasonable diligence should have been discovered.” For purposes of the statute of limitations, a continuing misappropriation constitutes a single claim of misappropriation.

## **II. Whistleblower Exception (§ 1833(b))**

### **A. Immunity**

The DTSA carves out a liability exception for individuals who disclose a trade secret to the government under certain circumstances. Specifically, § 1833(b)(1) provides that an individual is exempt from criminal and civil liability for disclosure of a trade secret that is made (1) in confidence to the government or an attorney and (2) solely for the purpose of reporting or investigating a suspected violation of law. The DTSA’s immunity provision also covers the disclosure of a trade secret that is made in a complaint or other document filed in a lawsuit or other proceeding, if the filing is made under seal.

### **B. Notice Provision for Employers**

Relatedly, the DTSA contains a notice provision applicable to employers that use contracts or agreements to govern an employee’s use of a trade secret or other confidential information. Under § 1833(b)(3), an employer that does not provide notice of the immunity set forth in the DTSA cannot be awarded exemplary damages or attorney’s fees in any civil action brought under the DTSA against an

employee to whom notice was not provided. That said, under this subsection, an employer complies with the notice requirement if the employer provides a cross-reference to a policy document provided to the employee that sets forth the employer’s reporting policy for a suspected violation of law. Significantly, this subsection defines “employer” as “any individual performing work as a contractor or consultant for an employer.”

## **III. Preserving Confidentiality of Trade Secrets in District Courts (§ 1835(b))**

The DTSA also includes a provision designed to safeguard the confidentiality of trade secrets in district court proceedings. Under § 1835(b), district courts are prohibited from authorizing or directing the disclosure of any information a trade secret owner asserts to be a trade secret unless the court allows the owner to file a submission under seal describing the owner’s interest in keeping the information confidential. This provision specifies that a trade secret owner’s disclosure of trade secret information, made under seal, shall not constitute a waiver of trade secret protection.

## **IV. Criminal Penalties for Organizations (§ 1832(b))**

Prior to the DTSA’s enactment, the penalties for an organization found guilty of theft of trade secrets was capped at \$5 million. Under the DTSA, those penalties have increased to “the greater of \$5 million or 3 times the value of the stolen trade secret to the organization, including expenses for research and design and other

costs of reproducing the trade secret that the organization has thereby avoided.”

## V. New Definitions (§ 1839)

### A. “Trade Secret”

The DTSA slightly narrows the definition of “trade secret.” Previously, a trade secret was defined as, among other criteria, deriving independent economic value from not being generally known to, and not being readily ascertainable through proper means by, “*the public*.” Under the DTSA, a trade secret retains the same definition with the exception that it derives independent economic value from not being generally known to, and not readily ascertainable through proper means by, “another person who can obtain economic value from the disclosure or use of the information.”

### B. “Misappropriation”

The DTSA provides a new definition of “misappropriation”: “(A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (B) disclosure or use of a trade secret of another without express or implied consent by a person who: (i) used improper means to acquire knowledge of the trade secret; (ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was—(I) derived from or through a person who had used improper means to acquire the trade secret; (II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or (III) derived from or through a person who owed a duty to the

person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or (iii) before a material change of the position of the person, knew or had reason to know that—(I) the trade secret was a trade secret; and (II) knowledge of the trade secret had been acquired by accident or mistake.”

### C. “Improper Means”

The DTSA also provides a new definition of “improper means”: “(A) includes theft, bribery, misappropriation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means; and (B) does not include reverse engineering, independent derivation, or any other lawful means of acquisition.”

## VI. Conclusion

To be sure, the DTSA’s benefits do not come without burdens. The DTSA will likely spark an uptick in trade secret litigation in the federal court system and, as federal court practitioners are well aware, most district courts are already overburdened and understaffed. How courts will manage an even greater caseload due to new federal causes of action does not appear to have been part of the equation lawmakers considered in enacting the DTSA. Moreover, the civil seizure provisions introduce an additional procedural mechanism that will require immediate (and highly substantive) responses from the courts. Without doubt, however, the DTSA is a powerful tool for protecting this country’s intellectual property.

Meanwhile, the *Aleynikov* saga — which highlighted the shortcomings of federal criminal and civil remedies for the misap-

appropriation of trade secrets — continues as of this writing. Mr. Aleynikov’s conviction of analogous New York state charges having been dismissed post-trial in 2015, Aleynikov is pursuing the recovery of millions in

legal fees from Goldman Sachs under by-law provisions which indemnify corporate officers (Aleynikov was a “Vice President”) who successfully defend against work-related civil or criminal charges.<sup>2</sup>

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<sup>2</sup> *See Aleynikov v. The Goldman Sachs Group*, Delaware Court of Chancery, Case No. 10636.

## The Number of “Occurrences” Dilemma

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ISSUES concerning excess insurance are now at the forefront of 21st century coverage litigation. While the role of excess insurance was previously reserved for the truly “once in a lifetime” type of loss faced by a major corporation, the prevalence of class actions, “mass tort” claims (e.g., asbestos, medical device, pharmaceutical products), environmental, clergy abuse and other large-scale claims has greatly increased the potential significance of even high layer excess insurance policies. Further, as older primary CGL policies have become exhausted in responding to these claims, policyholders are increasingly looking to their excess insurers as a potential source of recovering the staggeringly large sums that can be involved. Not surprisingly, particularly in light of the relatively small premiums that were paid for this coverage decades ago and the dollars at stake, excess insurers are more willing now than in the past to contest these claims for coverage.

These modern-era coverage disputes have spawned a number of complex issues as to how a multi-layer insurance program is to function in responding to these new claim situations. Nowhere has this trend been more evident than in a multitude of cases that have examined the issue of the number of “occurrences.” While the so-called “rules” for making such determinations—for example, the “cause” and “unfortunate event” tests—are not new, the ways in which these rules are being interpreted and used as strategic tools in coverage litigation are undergoing dramatic changes. In particular, the question of how many “occurrences” a given claim situation presents has created fertile ground for disputes not only between insurers and their policyholders, but *among insurers* within a policyholder’s program. Where a particular insurer “sits” in the layers of coverage can have a significant impact on how the insurer assesses its course of action. The issue is particularly complex because there is no one “right” answer that fits every situation. The challenge that faces insurers is how to use the relevant legal rules to their financial

advantage while not falling into traps that can come back to haunt them later. This issue is truly one that can put the insurer on the twin horns of an uncomfortable dilemma.

## I. The Sources of the Insurer's Dilemma

As with most disputes arising from the application of insurance policies to claims, the source of the "dilemma" relating to how to measure the number of "occurrences" inheres in the policy language itself. While there are certainly variations to be found in the language of liability insurance policies, a typical example of the operative provision states that "occurrence" means:

an accident, including continuous or repeated exposure to conditions, which results in bodily injury neither expected nor intended from the standpoint of the insured.

For the purpose of determining the company's liability, *all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.*

Apart from the policy language, the other major source of the "occurrences" dilemma is how coverage disputes have been shaped by the evolution of mass tort claims. For the "occurrences" issue to be significant and worth litigating, there must be an unusual cluster of circumstances, including (1) the insured must be liable; (2)

the policy must afford coverage for the claim (that is, the question is not whether there is coverage for the claim at all, but rather *how much* coverage is available and *the scope* of that coverage); and (3) the liability must exceed the conceded coverage and therefore raise the need to consider whether more than a single set of policy limits is available for the loss. These are issues that insurers (and for the most part policyholders) have shied away from litigating because there is no consistent "right" position that is always going to benefit the insurer or the policyholder in all situations. For example, an excess carrier seeking to escape liability on the theory that all of the costs should be borne by the primary layer because each individual claimant in a mass tort situation should be considered to be a separate "occurrence" must equally take into account that it may be the primary insurer in the next claim down the road. Thus, the insurer could be inadvertently creating bad law for itself in another case. Similarly, a policyholder may be cautious about arguing that a primary carrier should be saddled with the entire obligation for a loss when it has towers of excess insurance that it wants to access.

The number of "occurrences" dilemma is by no means limited to the mass tort context. The sheer range of cases in which the issue of the number of "occurrences" has been actively litigated demonstrates how critical the issue has become. The debate has played out in contexts as varied as asbestos,<sup>1</sup> to bad batches of peanut butter,<sup>2</sup> to imported

<sup>1</sup> *Appalachian Ins. Co. v. General Electric Co.*, 8 N.Y.3d 162, 863 N.E.2d 994 (N.Y. 2007).

<sup>2</sup> *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62 (Del. 2011).

drywall,<sup>3</sup> to clergy abuse cases,<sup>4</sup> to drowning cases.<sup>5</sup> The number of high-stakes cases involving the central issue of whether a claim situation involves one occurrence or more than one occurrence (and, if so, how many) indicates that the gloves are off. The cases that have emerged also reveal that the old dilemmas still remain. While a policyholder may generally favor an approach that trends in the direction of multiple “occurrences” so as to maximize the limits that are available to satisfy a loss, that won’t be true if the policyholder has significant SIRs that must be satisfied for each “occurrence” or if it wants to be able to “spike” its excess towers of coverage. Similarly, while insurers can generally be said to favor a one “occurrence” rule, their incentives to argue for a contrary position can increase exponentially when the insured has significant SIRs that can be called upon to pay on each and every claim in a mass tort scenario. This can also be the case when the insurer is excess (especially at a higher layer) and therefore views the number of “occurrences” issue as a way to forestall the likelihood that its coverage will ever be reached. How these scenarios play out in the context of actual coverage litigation readily illustrates the dilemmas that litigants on both sides must confront.

## II. A Case in Point: *Stonewall v. DuPont*

A cogent (and cautionary) example of how the factors discussed above can coalesce to generate high-stakes battles over the number of “occurrences” can be found in the Delaware Supreme Court’s decision in *Stonewall Ins. Co. v. E.I. DuPont De Nemours & Co.*<sup>6</sup> While arising out of a common product liability claims scenario, the convergence of the policyholder’s coverage profile and the litigating insurer’s position in the towers of coverage created a situation where the insurer attempted to stretch the literal terms of the policy to their breaking point and evidenced the unwillingness of some courts to follow the insurer over the cliff based upon economic realities.

The underlying claims arose out of a resin that was manufactured by DuPont and incorporated into polybutylene plumbing systems. At some point after DuPont began selling the resin for this use, claims surfaced that the product was causing the plumbing systems to leak. DuPont promptly ceased distributing the product. Thousands of claims were ultimately asserted against DuPont, which it defended and settled at a cost of nearly \$240 million. DuPont brought suit against its excess insurers in four different towers of coverage from 1983 to 1986. Significantly, the lowest layer in each tower did not attach until the losses exceeded a \$50 million SIR. DuPont settled with all insurers save for Stonewall and recovered nearly \$112 million from these other companies, at which point DuPont fixed its sights on the lone holdout.

<sup>3</sup> *Cincinnati Ins. Co. v. Devon International, Inc.*, 924 F. Supp.2d 587 (E.D. Pa. 2013).

<sup>4</sup> *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139, 991 N.E.2d 666 (N.Y. 2013).

<sup>5</sup> *Fellowship of Christian Athletes v. AXIS Ins. Co.*, 758 F.3d 982 (8th Cir. 2014).

<sup>6</sup> 996 A.2d 1254 (Del. 2010) (“*DuPont*”).

Stonewall only participated in the 1985 tower of coverage, providing \$1 million of limits in the first layer of excess policies and \$4 million in the second layer. A central issue in the case was whether all of DuPont's liability for the product arose out of a single "occurrence," which would mean that DuPont only had to satisfy a single SIR before it could recover under its excess policies, *or* whether the liabilities arose out of multiple occurrences which would trigger multiple SIRs. Stonewall's policies included fairly standard "occurrence" language with a slight wrinkle:

The term 'occurrence,' whenever used herein, shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. *All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.*<sup>7</sup>

The trial court ruled, as a matter of law, that all of the claims arose out of a single "occurrence" and that once DuPont satisfied a single \$50 million SIR it could access its excess coverage.

On appeal, Stonewall presented two distinct theories relating to the number of "occurrences" issue. First, Stonewall contended that there were disputed issues of fact that should be determined by a trial as to whether there were two distinct "causes" of the system failure: (1) chemical degradation and (2) the product's inability

to resist mechanical stresses. Second, Stonewall separately argued, based upon the language quoted above, that each of the some 469,000 locations at which a plumbing system was installed and failed should be treated as a separate "premises location" under the policy language and thus constituted a separate "occurrence."

The Delaware Supreme Court soundly rejected both propositions that were advanced by Stonewall. As to the first, the court concluded that Stonewall's position conflated the issue of what constitutes a "condition" with the issue of whether there were multiple occurrences. Whatever the specific cause or defect in the product might be (and whether there was a single defect or multiple defects) was irrelevant to the number of occurrences question. In every claim, it was the product that was the source of the leaking plumbing systems and resulting property damage. Accordingly, going behind this fundamental fact of product failure to determine whether there were different types of defects that inhered in the product was of no assistance in the occurrences analysis.

The court next held that Delaware, like the majority of states, would adopt the "cause" test for determining whether there was a single or multiple occurrences. The Court noted that "where a single event, process or condition results in injuries, it will be deemed a single occurrence even though the injuries may be widespread in both time and place and may affect a multitude of individuals."<sup>8</sup> Applying this test to the facts of the claims against

<sup>8</sup> 996 A.2d at 1257 (citing *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3rd Cir. 1982) (adoption of an employment practice that resulted in a multitude of claims for discrimination held to be one occurrence).

<sup>7</sup> 996 A.2d at 1257 (emphasis added).

DuPont, the court concluded that, in a products liability case, the “proper focus is . . . on production and dispersal—not on the location of injury or the specific means by which injury occurred. Therefore, Du Pont’s production of an unsuitable product triggered only one single occurrence under the policies.”<sup>9</sup>

The Delaware Supreme Court also made it very clear that its decision was based (at least in part) on the extreme nature of the position being advanced by Stonewall which, if accepted, would essentially deprive DuPont of any excess coverage for the plumbing system claims. Given the “per occurrence” SIR that was contained in the policy, requiring separate exhaustion of the SIR for each and every claim would render the policy meaningless. As the court stated:

Further, if Stonewall’s interpretation of the occurrence provision is correct, then each separate claim would constitute its own separate occurrence. As a consequence, DuPont must first expend \$50 million per occurrence for a total of approximately \$23,450,000,000,000 before being entitled to look to its excess insurers. It is inconceivable to imagine 469,000 occurrences generating almost \$24 trillion in damages. Such an interpretation would produce an absurd, unacceptable result that would render meaningless the excess insurance purchased by DuPont and deprive DuPont of the protection for which it paid.<sup>10</sup>

The *DuPont* case serves as a cautionary example for insurers of how aiming for a result that can be viewed as inconsistent with the parties’ economic expectations (even if supported by the specific terms of the policy) can cause the insurer to miss the target altogether.

### III. Practical Tips and Guidance

If there are any lessons to be gleaned from how these modern-era number of “occurrences” cases have been litigated, it is that the issue presents one of virtually boundless opportunities for both insurers and policyholders to craft new and creative arguments. The cases show how the tests of what constitutes the “cause” of an injury and whether “events” are related to one another can be molded to benefit either the insurer or the policyholder depending upon the particular facts of the claims at issue and how those claims intersect with the coverage profile. Equally, however, the cases (as well as common sense) suggest that for the insurer entering into this minefield it is essential not to have tunnel vision and be guided solely by the argument that will minimize (or entirely avoid) coverage in a particular case. Serious thought should be given to whether the insurer wants to champion the position adopted by the policyholder (as in the *Conning* case). Similarly, the insurer must consider whether it really wants to advocate for a position (as in *DuPont*) that the policyholder should not be able to access its excess towers of coverage that attach at \$50 million until it has paid out some \$24 trillion in losses. Insurers and attorneys representing them must contemplate how taking a particular position on the number of “occurrences” in the case

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<sup>9</sup> 996 A.2d at 1258.

<sup>10</sup> *Id.*



that is on the insurer's plate at the moment will affect other cases in which the insurer may be on a very different footing owing to its being positioned differently in the policyholder's insurance program. All of these questions create serious dilemmas for the insurer seeking a favorable outcome in

a particular case without setting up a situation to be skewered in the next case down the road. As Oscar Wilde once famously quipped: "In this world there are only two tragedies. One is not getting what one wants and the other is getting it."