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Insurance News

A NEWSLETTER FROM THE INSURANCE PRACTICE GROUP AT WIGGIN AND DANA LLP

FALL 2009

We are pleased to share this latest issue of the Wiggin and Dana Insurance Practice Group Newsletter. Our intent is to circulate this newsletter by e-mail periodically to bring to the attention of our colleagues in the insurance industry reports on recent developments, cases and legislative/regulatory actions of interest, and happenings at Wiggin and Dana. We welcome your comments and questions.

For more information about the content of this newsletter please contact our Editor and Insurance Practice Group Attorney, Rachel Priester.

A PDF of this newsletter can be viewed [here](#).

ATTORNEY NOTES

Effective October 1, 2009, **TIMOTHY A. DIEMAND** and **JOSEPH G. GRASSO** were appointed co-chairs of Wiggin and Dana's Insurance Practice Group. Tim's practice focuses on complex civil litigation, insurance coverage and reinsurance disputes, and professional malpractice defense. Joe's practice focuses on insurance and reinsurance coverage matters, as well as defense and monitoring of complex claims. Tim is resident in the Hartford office, while Joe divides his time between the firm's Philadelphia and New York offices.

JEFFREY R. BABBIN, an insurance specialist in the firm's Appellate and Complex Legal Issues Practice Group, has been selected to become a fellow of the American Academy of Appellate Lawyers. The Academy is a national, invitation-only professional association of accomplished appellate lawyers. Jeff also has been named co-chair of the Connecticut Bar Association's Appellate Advocacy Committee.

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ROTTERDAM RULES TO ENTER INTO FORCE

By Joseph G. Grasso and Christopher S. Clay

Current regimes of liability for loss or damage to cargo carried by sea may soon be replaced by the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as "The Rotterdam Rules." The Rotterdam Rules are the product of many years of effort by many interested groups (including shippers, carriers and insurers of cargo), as well as a Working Group created in 2002 by the United Nations Commission on International Trade Law (UNCITRAL) to promulgate a uniform law that reflects the realities of modern sea-going trade, and in particular door-to-door container transport and the use of electronic shipping documents.

The U.S. delegation to the Convention played a major role in drafting the Rotterdam Rules, which reflect several important changes sought by U.S. shipping interests. Several major compromises were also key to reaching consensus.

The Convention, which was opened for signature in Rotterdam in September, requires the signature of 20 countries to enter into force. This milestone was achieved in November, with 21 countries (including the U.S.) signing the Convention.

It is expected that the signing countries will take at least 2 to 3 years to implement the Convention; in the U.S., implementing legislation will be necessary to repeal the Carriage of Goods by Sea Act.

Some of the most significant provisions of the Rules are as follows:

Liability and Liability Limits: Perhaps the most noteworthy reform of the new Convention centers around freedom of contract. Under the Rotterdam Rules, parties to volume contracts will be free to contract for higher or lower liability limitations than provided for by the Rules' default provisions. However, such contractual derogations will not be binding on third parties without their consent.

The Rotterdam Rules reject the "tackle-to-tackle" approach in favor of the "door-to-door" approach, under which the Rules will apply as between the immediate parties to the contract, to the carrier's responsibilities for the entire contractual period of carriage, which in a multimodal shipment will often be from the carrier's receipt of the goods at an inland location in one country all the way to the carrier's delivery of the goods at an inland location in another country. Furthermore, the Rules provide for automatic Himalaya clause protection for maritime performing sub-contractors (including port terminal operators): they will receive all the defenses and limitations of the carrier. [Non-maritime performing parties will receive Himalaya clause protection only where contracted for.]

The liability limits for the carrier in the Rotterdam Rules are slightly higher than those contained in the Hamburg Rules. The limits adopted are 875 SDR per package or 3 SDR per kilogram. By contrast, the Hague/Visby limits are 667 SDR per package or 2 SDR per kilogram, and the limits in the Hamburg Rules are 835 SDR per package or 2.5 SDR per kilogram. Shippers and carriers may depart from these limits by voluntary agreement in a volume contract.

Delay: The Rotterdam Rules do not provide for liability on the part of the shipper for consequential damages — meaning those involving pure economic damages and no

Oct. 2 in New York City, **MICHAEL MENAPACE** presented a seminar on the Rotterdam Rules to members of the American Institute of Marine Underwriters, American Marine Insurance Forum, Association of Average Adjusters of the U.S., Marine & Insurance Claims Association, and Marine Claims & Recovery Forum.

JOSEPH G. GRASSO has been named Vice Chair of the Committee on Marine Insurance and General Average of the U.S. Maritime Law Association.

physical loss — arising from delay, thus leaving the matter to national or common law. Such liability for delay would apply to carriers only if there is an agreement to make delivery by a specific time.

Jurisdiction: The Rotterdam Rules sets forth a default provision which allows the claimant the option to pursue litigation in a jurisdiction contained on a list which includes: the domicile of the defendant; the place where the goods are received or the port where they are loaded on a ship; the place where the goods are delivered or the port of final discharge. However, in cases where the shipper and carrier have agreed to a specific jurisdiction for resolving disputes, that choice would be enforced if freely negotiated and contained in a volume contract. The forum selected would bind a third party if the clause is contained in a transport document, “timely and adequate” notice is given to the third party, and the forum is in one of the places set forth in the default provision. The provisions on jurisdiction will be applicable to trade only with countries which “opt in” to them. It is expected that the U.S. will opt in to these provisions.

There are many more provisions that would alter existing regimes. For a complete copy of the Convention, please see www.uncitral.org.

FROM THE COURTS

Supreme Court to weigh in on cargo damage liability issue. In the consolidated cases of *K-Line v. Regal-Beloit Corp.* (08-1533) and *Union Pacific Railroad Co. v. Regal-Beloit Corp.* (08-1554), the United States Supreme Court granted certiorari to address “Whether the Carmack Amendment to the Interstate Commerce Act of 1887, which governs certain rail and motor transportation by common carriers within the United States, 49 U.S.C. §§ 11706 (rail carriers) & 14706 (motor carriers), applies to the inland rail leg of an intermodal shipment from overseas where the shipment was made under a ‘through’ bill of lading issued by an ocean carrier that extended the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 Note, to the inland leg, there was no domestic bill of lading for rail transportation, and the ocean carrier privately subcontracted for rail transportation.” There has been a split among the Circuits on this issue following the Supreme Court’s decision in *Kirby v. Norfolk Southern Railway*, 543 U.S. 14 (2004). In *Kirby*, the Supreme Court upheld the rail carrier’s right to avail itself of the ocean carrier’s limit of liability, but it did not address the effect of the Carmack Amendment at all in that case.

Court clarifies insured’s duty to cooperate. *Double G.G. Leasing, LLC v. Underwriters at Lloyd’s, London* (AC 29998, Conn. App. Ct. Aug. 11, 2009). The Connecticut appellate court took the opportunity to opine on the scope of a cooperation clause and which party bears the burden of proof in a policy providing cover for physical damage due to fire. In this case, the plaintiff made a claim on its replacement cost basis policy, but failed to produce many documents requested by the insurer, including tax returns. The court held that under Connecticut law an insured forfeits coverage by failing to comply “with the insurance policy provisions regarding an examination under oath and the production of documents,” although the lack of cooperation must be substantial or material. This means that the insured’s disclosure and cooperation must be “fair, frank, and substantially full” to enable the insurer to prepare for, or to determine whether there is a genuine defense. The court ruled that in an arson case, information gleaned from tax returns can be of “crucial significance.” Moreover, the burden is on the plaintiff to prove cooperation by the insured. Here, the insurer was entitled to summary judgment because failure to provide

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the tax returns was a breach of the cooperation agreement and the plaintiff did not prove that the insurer was not prejudiced by the breach.

Members of an insured LLC may be entitled to coverage in their individual capacities.

Wilcox v. Webster Ins., Inc. (SC 18317, Conn. Supreme Ct. Nov. 24, 2009). The Connecticut Supreme Court clarified the relationship of an insured LLC and its members and issued a reminder as to the distinction between the concepts of mootness and collateral estoppel. After a tragic accident in which several people were killed by a runaway truck owned by the plaintiffs' LLC, the LLC was placed into receivership. The LLC and its members faced numerous lawsuits stemming from the accident. The insurers brought a declaratory judgment action in the District of Connecticut and the receiver did not oppose summary judgment denying insurance coverage. In this action, however, the members of the LLC sought coverage in their individual capacities. Originally, the trial court dismissed the action because the members lacked standing as they had no interests in the insurance policies distinct from those of the LLC. The Supreme Court reversed the trial court decision. Because the members were either named insureds under the policies, or possibly were insureds or third-party beneficiaries of the policies, and because the underlying suit named the plaintiffs in their individual capacities, the trial court should not have dismissed the plaintiffs' action. The Court also rejected the insurers' argument that the coverage decision by the district court made the coverage issue moot in this case. The Supreme Court observed that the defendants had confused the concept of mootness with that of collateral estoppel, and remanded the case to the trial court to review whether coverage should have been afforded to the plaintiffs.

Subrogation claims given low priority in Reliance liquidation. *Ario v. Reliance Ins. Co.* (980 A.2d 588, Penn. Supreme Ct. Oct. 5, 2009). Hundreds of subrogation claims pending against Reliance Insurance, now in liquidation, have been impacted by the Pennsylvania Supreme Court's recent ruling. The court held that subrogation claims are to be given (g) priority in the liquidation proceedings instead of a more preferential (b) priority, which is for direct claims under policies. The court reasoned that the insured is the true claimant and because the insured has already been compensated, the underlying insurance company pursuing a subrogation claim against Reliance was a third-party claimant. While the particular claim adjudicated in *Ario* was only worth \$7,000, the court decided to hear the case because of a need for uniformity among the various referees that will hear the thousands of subrogation claims brought in the context of a liquidation. A priority level of (g) is far down the list of claimants and renders most subrogation claims against Reliance unlikely to return much in the way of recovery.

Jury verdict in class action trial against insurer. On November 17, 2009, a civil jury returned a split verdict in *Artie's Autobody v. Hartford Fire Ins. Co.* The plaintiffs, auto body repair shops, claimed that Hartford had improperly "steered" its insureds to network shops, depriving the plaintiff shops of additional work. The plaintiffs also claimed that Hartford suppressed labor rates for auto body work by paying allegedly below-market rates. The jury rejected the plaintiffs' steering claim but awarded the plaintiffs \$15 million on the labor rate suppression claim.

Anti-concurrent causation clause held inapplicable. *Corban v. USAA Ins. Co.* (Miss. Supreme Ct. Oct. 8, 2009). In a highly anticipated ruling, the Mississippi Supreme Court ruled that an anti-concurrent causation clause in a homeowners' insurance policy does not apply when water and wind did not act in conjunction. This case is the first wind v. water dispute stemming from Hurricane Katrina. Neither party argued that an indivisible force

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ABOUT WIGGIN AND DANA'S INSURANCE PRACTICE GROUP

The Wiggin and Dana Insurance Practice Group represents insurers and reinsurers in a broad range of complex and sophisticated, as well as routine, commercial and personal lines insurance and reinsurance matters. The group provides advisory, regulatory, coverage, defense and general litigation, arbitration, dispute resolution services in individual and class actions, as well as investigative, appellate, and expert witness representation. We provide advice and representation on regional, national and international matters. A more detailed description of the Insurance Practice Group, and biographies of our attorneys appear at www.wiggin.com.

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occurred. First, the court held that “storm surge is plainly encompassed within the ‘flood’ or ‘overflow of a body of water’ portions of the ‘water damage’ [exclusion] definition, and no other ‘logical interpretation’ exists.” The court also held that the term “in any sequence,” a phrase used in the anti-concurrent clause, was ambiguous. The court ultimately ruled that the anti-concurrent clause “applies only if and when covered and excluded perils contemporaneously converge, operating in conjunction, to cause damage....” Thus, the court concluded that where wind and water separately caused damage, wind damage is covered while water damage is excluded.

Two recent circuit court and one district court decision dramatically illustrate an emerging split in how courts view claims against large emitters of greenhouse gasses for their contributions to global warming. In *Connecticut v. American Electric Power Co.*, Docket Nos. 05-5104-cv, 05-5119-cv (2d Cir. Sept. 21, 2009), the Second Circuit reversed the dismissal of two suits against the same six electric power corporations, one brought by eight states and the City of New York, and the other by three land trusts, seeking abatement of the defendants’ contributions to global warming. Plaintiffs asserted claims under a public nuisance theory, citing both federal common law and state nuisance law. The district court dismissed the actions, holding that the claims presented a non-justiciable political question. The Second Circuit marched through the six factors articulated in *Baker v. Carr*, 369 U.S. 186, 198 (1962) to determine whether the claims did present a political question, and held that they did not. The Second Circuit concluded, inter alia, that the claims were not exclusively within the realm of the legislative and executive branch; that the courts were capable of deciding the issues raised and redress the alleged injuries; and that the claims did not require the district court to resolve a fundamental policy issue more properly left to the legislative or executive branch. The Court noted that the federal courts have handled complex public nuisance claims for over a century, and held that plaintiffs otherwise demonstrated standing. Of particular interest, the Court held that on the issue of causation, for purposes of standing the alleged injury need only be “fairly traceable to the actions of the defendant,” and that the defendants need not be the sole source of the complained-of emissions; rather, it was sufficient that plaintiffs alleged that the defendants’ past and ongoing emissions contributed to global warming.

Soon after the *American Electric* decision, the Northern District of California dismissed an action brought by the Native Village of Kivalina against twenty-four oil, energy, and utility companies in which plaintiffs alleged that the defendants’ emissions contributed to global warming, which in turn diminished the Arctic ice that protects the Kivalina coast. *Native Village of Kivalina v. ExxonMobil Corp.*, Case No. C 08-1138 SBA (N.D. Cal. Sept. 30, 2009). As in *American Electric*, plaintiffs asserted public nuisance. The resulting erosion and destruction, plaintiffs claimed, will require the relocation of Kivalina’s residents. In dismissing the complaint, the *Kivalina* Court expressly rejected the Second Circuit’s *American Electric* reasoning and conclusions. The Court held that this case fundamentally involved policy issues, including whether defendants’ conduct was unreasonable in light of the impact on plaintiffs. Accepting *American Electric* and adjudicating *Kivalina* would require the Court to compare the social utility of the activity against the harm to the plaintiffs, determine what level of carbon emissions is unreasonable, and make a policy decision about who should bear the cost of global warming. The Court went on to hold that plaintiffs lacked Article III standing, because, even if the defendants’ conduct contributed to global warming, plaintiffs did not allege that the “seed” of their injury could be traced to any of the defendants.

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Celebrating our 75th Anniversary in 2009, Wiggin and Dana is a full service firm, with 135 attorneys, serving clients domestically and abroad from offices in New York, Connecticut and Philadelphia. For more information on the firm, visit our website at www.wiggin.com.

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Subsequently, in *Comer v. Murphy Oil*, No. 07-60756 (5th Cir. Oct. 16, 2009), the Fifth Circuit reversed the dismissal of a Katrina-related global warming suit brought by private landowners. The plaintiffs asserted claims based on Mississippi common law actions of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy. The Fifth Circuit held that plaintiffs had standing to assert their nuisance, trespass, and negligence claims, and that none of these claims present non-justiciable political questions, but plaintiffs lacked prudential standing for the remaining claims. The Fifth Circuit's reasoning largely accords with *American Electric* in concluding that the nuisance, trespass, and negligence claims did not present any specific question exclusively committed by law to the discretion of the legislative or executive branch. The Court noted that "[a] federal court's dismissal of litigation between private citizens based on state common law, as presenting a nonjusticiable political question, has rarely, if at all, been affirmed by a federal court of appeals," and that common law tort claims are rarely thought to present non-justiciable political questions.

REGULATORY DEVELOPMENTS

New policy endorsement for Green Building coverages. The American Association of Insurance Services announced it will initiate a filing in most states of a new optional Green Coverage Endorsement and accompanying schedules under its Commercial Output Program, a program combining property and inland marine coverage. The endorsement extends insurance to three categories of coverage: Green Building Coverages, which cover certain costs incurred to comply with "green" construction certification standards; Non-Green Building Coverages, which cover the costs to upgrade conventional but damaged property; and Green Income Coverages, which cover the income cost for the extension of a restoration period due to materials or procedures required to achieve a green certification. For more information on these endorsements, please see www.aaisonline.com.