

We are pleased to share this latest issue of the Wiggin and Dana Insurance Practice Group Newsletter. We 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.

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INSURANCE PRACTICE GROUP

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INDUSTRY NEWS

FDIC CONTINUES TO FILE CLAIMS AGAINST FAILED BANK DIRECTORS AND OFFICERS AND OTHER PROFESSIONALS, AND THE D&O COVERAGE CASES ARE FOLLOWING SHORTLY BEHIND

The FDIC recently reported that as of November 14, 2011, it had authorized suits in connection with "37 failed institutions against 340 individuals for D&O liability with damage claims of at least \$7.6 billion. This includes 16 filed D&O lawsuits . . . naming 124 former directors and officers." The FDIC also reported that it has authorized "23 other lawsuits for fidelity bond, insurance, attorney malpractice, appraiser malpractice, and RMBS claims."

With more lawsuits likely to be authorized in the future, and with banks continuing to fail, the number of lawsuits involving former directors and officers of failed banks is likely to continue to accumulate for several years.

The coverage disputes following on the heels of the FDIC lawsuits are now starting to arrive. For example, on August 8, 2011, the FDIC, as the bank's receiver, filed a lawsuit in the Eastern District of Michigan against a former officer of the Michigan Heritage Bank (which failed on August 29, 2009). The suit seeks over \$8 million in connection with allegedly bad loans made by the bank's former loan officer. Shortly after the FDIC lawsuit, on November 1, 2011, Michigan Heritage's D&O insurer filed a lawsuit seeking a judicial declaration that there is no coverage for the underlying lawsuit or for the bank officer's defense expenses under the bank's D&O policy. The carrier relies on the Insured vs. Insured Exclusion in the policy (i.e., the FDIC, as the bank, is suing its former officer) and the Loan Loss Carve Out Clause in the policy to argue that there is no coverage. See *Progressive Casualty Insur. Co. v. FDIC*, 11 CV 14816 (E.D. Mich)

U.S. INSURANCE REGULATIONS FOLLOWING DODD-FRANK ACT

Although the Dodd-Frank Act (Dodd-Frank Wall Street Reform and Consumer Protection Act - Public Law 111-203 - enacted on July 31, 2010) was primarily focused on the regulation of the banking industry, several of its provisions affect the insurance industry, including mandating the formation of several new entities: the Financial Stability Oversight Council (FSOC); the Federal Insurance Office (FIO); and the Federal Advisory Committee on Insurance (FACI). Regulations were issued this year to support these newly created entities.

ATTORNEY NOTES

Michael Menapace, Timothy A. Diemand and Joseph G. Grasso of Wiggin and Dana's Insurance Practice Group are the co-editors, along with former colleague Charles Platto, of the American Bar Association's *The Handbook on Additional Insureds*. This new work will be released in early 2012. If you are interested in learning more about this publication please contact us or look for future Wiggin and Dana or ABA Announcements.

Joe Grasso has been named to the Comité Maritime International's (CMI) International Working Group on Marine Insurance, the only American to receive this honor. Joe, as a U.S. representative, joins marine insurance professionals from around the globe to assess and advise on issues of importance to the marine insurance industry. For more information on CMI click [here](#).

This fall, **Joe Grasso** attended the annual IUMI conference (Paris), International Marine Claims Conference (Dublin), and the annual meeting of the American Institute of Marine Underwriters (New York) where he provided an update on legal issues.

Michael Menapace recently participated in the ARIAS - U.S. Fall 2011 conference in New York City.

Michael Menapace will chair a session at the ABA-TIPS conference in February 2012 in Phoenix, AZ.

Michael Menapace will once again teach Insurance Law at the Quinnipiac University School of Law during the Spring 2012 semester.

1. Financial Stability Oversight Council (FSOC)

The FSOC is responsible for determining whether nonbank financial institutions should be designated Systemically Important Financial Institutions (SIFI), which would result in supervision by the Federal Reserve and heightened prudential standards. An October 2010 Advanced Notice of Proposed Rulemaking posed 32 questions seeking input for setting the criteria for SIFI designations. In January 2011, the FSOC issued a notice of proposed rulemaking ("First Notice") that was criticized by commentators and members of Congress for not providing any indication of the FSOC's reaction to the public comments and providing little indication of how the FSOC would apply the statutory standards. Members of the FSOC acknowledged to Congress that they needed to reconsider their approach to SIFI designation.

The FSOC issued a Second Notice of Rulemaking on October 11, 2011 regarding its process for designating a nonbank financial company as a SIFI. The Second Notice provides new quantitative information to companies regarding their status as potential candidates for designation at the initial stage of review, but the FSOC would retain substantial discretion at subsequent stages. The Second Notice details a three-stage process for making a preliminary determination whether to designate a nonbank financial company as a SIFI. In Stage 1, the FSOC would employ a set of quantitative tests, based on widely available data that would apply to companies in all sectors of the financial services industry, in order to identify companies requiring further scrutiny. Following Stage 1, a company that has been preliminarily identified or otherwise flagged would be subject in Stage 2 to more comprehensive and company-specific analysis, addressing qualitative as well as quantitative factors. If the FSOC then believes that further review is necessary, in Stage 3 it would review data requested directly from the company. The FSOC will notify a company if it decides to consider making a preliminary determination, and give the company an opportunity to submit written materials within a time period determined by the FSOC.

2. Federal Insurance Office (FIO)

The FIO is a non-regulatory entity which was established to advise the Treasury Department on major domestic and prudential international insurance policy issues, including all lines of insurance, except health insurance. The FIO has authority to collect and request insurance industry data, identify gaps in insurance regulation, and recommend tighter regulation for insurers that may pose a risk to the health of the economy. The FIO also assists the Treasury Secretary in administering the Terrorism Risk Insurance Program, and it plays a role in representing U.S. interests in connection with international agreements relating to insurance. It has limited power to pre-empt state regulations in certain international insurance matters. On June 13, 2011, Michael T. McRaith was appointed the first Chairman of the FIO. The exact size and funding of the FIO staff has yet to be determined.

3. Federal Advisory Committee on Insurance (FACI)

The Federal Advisory Committee on Insurance (FACI) was established by the Treasury Department on May 9, 2011. The FACI will provide advice to the FIO and Treasury Department, including the FIO Director in his role as a member of the FSOC.

In early November 2011, fifteen members of the FACI were appointed; they include several state insurance commissioners and several executives of U.S. insurers.

On December 8, 2011, legislation was approved by a House panel which would strip the FIO and FACI of any power to subpoena information directly from insurance companies; prospects for passage of the legislation are uncertain.

ABOUT WIGGIN AND DANA'S INSURANCE PRACTICE GROUP

Highly regarded and deeply experienced, the Wiggin and Dana Insurance Practice Group provides international, national and regional insurers, reinsurers, brokers, other professionals and industry trade groups with effective and efficient representation. Our group members regularly advise clients in connection with coverage issues, defense and monitoring of complex claims, regulatory proceedings, policy wordings, internal business practices, and state and federal investigations. We also defend clients faced with individual lawsuits and class actions - both at trial and on appeal; and represent clients in insurance and reinsurance arbitrations. We have broad experience in many substantive areas, including property, commercial general liability, inland and ocean marine, reinsurance, E&O, D&O and other professional liability, environmental, energy and aviation. A more detailed description of the Insurance Practice Group, and biographies of our attorneys appear at www.wiggin.com.

FROM THE COURTS

BP NOT ENTITLED TO COVERAGE AS ADDITIONAL INSURED UNDER TRANSOCEAN'S POLICIES

In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010

We previously reported on the action commenced by Transocean's insurers against BP, filed in May 2010, in which Transocean's insurers challenged BP's claims as an additional insured under Transocean's insurance policies. (*West's Insurance Litigation Reporter*, Vol. 32, No. 9; Vol. 32, No. 14; Vol. 33, No.1)

On November 15, 2011, the U.S. District Court for the Eastern District of Louisiana denied BP's motion for judgment on the pleadings, holding that BP is not an additional insured and is not entitled to coverage under Transocean's insurance policies for the claims in question (i.e., relating to oil pollution risks). 2011 U.S. Dist. LEXIS 131693.

The Court stated the issue as follows: "Simply stated, the issue is the extent of 'additional insured' coverage, if any, to which BP is entitled by virtue of the insurance contracts procured by Transocean as the named insured. Ranger, the Excess Insurers, and Transocean argue for a limited scope of coverage for BP: only to the extent that Transocean is obligated in the Drilling Contract to indemnify BP. BP argues for broad coverage: coverage is not limited by the Drilling Contract and is interpreted solely in reference to the terms of the Insurance Policies." *Id.* at *6-7.

Thus, while the parties agreed that while BP was named as an additional insured under Transocean's policies, the scope of that coverage was in dispute. BP argued that the court need look no further than the insurance policy to determine the scope of coverage, citing the holding in *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008). However, the court distinguished *ATOFINA* and held that the proper inquiry in this case required the court to review the terms of the contract between Transocean and BP in order to determine the scope of coverage afforded to BP as an additional insured under Transocean's policies. Part of the court's rationale for looking at the drilling contract between Transocean and BP was the fact that Transocean's policies only allowed Transocean to name additional insureds to the extent required under contract. *Id.* at *20.

The Court therefore held that: "Because Transocean did not assume the oil pollution risks pertaining to the Deepwater Horizon Incident--BP did--Transocean was not required to name BP as an additional insured as to those risks. Because there is no insurance obligation as to those risks, BP is not an "Insured" (or "additional insured") for those risks." *Id.* at *75.

We will continue to follow the litigation and endeavor to report on further developments, including any appeal from this decision.

CHOICE OF NEW YORK LAW CLAUSE ENFORCED BY FIFTH CIRCUIT

St. Paul Fire & Marine Insurance Company v. Board of Commissioners of the Port of New Orleans v. Aon Corporation, et al., No. 10-30395 (5th Cir., March 15, 2011)

This case involved a bumbershoot policy insuring the Board of Commissioners of the Port of New Orleans. A coverage dispute arose, and the trial court first had to determine whether to enforce a choice of law (New York) clause in the policy. The District Court held that the clause should be enforced as written, and it certified for interlocutory appeal its ruling. The Fifth Circuit affirmed the lower court's grant of partial summary judgment in favor of the excess insurers.

ABOUT WIGGIN AND DANA LLP

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

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The Fifth Circuit agreed that the district court had admiralty jurisdiction because it found that the bumbershoot policy was a maritime contract, and its choice of law clause designating New York law as controlling should be enforced. (Under New York law, late notice of the underlying claim provided a complete defense to coverage for the underwriters of the bumbershoot policy.)

On appeal, the insured and underlying insurers had argued that the district court had only diversity jurisdiction, and that it therefore should have applied the law of the forum state, Louisiana, to hold the choice of law clause ineffective. The Fifth Circuit concluded, however, that the district court correctly found that it had admiralty jurisdiction, which in turn meant that it should apply federal maritime choice of law rules, as it did.

The Fifth Circuit cited the Supreme Court's decision in *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 24, 125 S.Ct. 385, 393 (2004), reasoning that to determine admiralty jurisdiction in a contract action such as this, the court must examine the nature and character of the contract, and that the true criterion is whether it has reference to maritime service or maritime transactions. The boundaries of admiralty jurisdiction are conceptual rather than spatial, and the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce. Accordingly, the inquiry should focus on whether maritime commerce is the principal objective of the contract. The court went on to conclude that the policy before it was "mixed," covering both traditional maritime risks such as collision, towing and salvage liabilities, as well as the Port's general liability for personal injury and property damage. Looking at the type and terms of the policy, and the nature of the Port's business, the Fifth Circuit agreed that the primary object of the policy was maritime commerce. It also noted that bumbershoot policies are widely recognized as a common type of marine insurance policy.

Furthermore, the terms of the bumbershoot policy before the court provided excess coverage to other marine insurance contracts and specifically included traditional marine insurance coverages. The court also rejected the underlying insurers' argument that the dispute was "inherently local" and governed by Louisiana law, because it involved a personal injury suit by a Louisiana resident for a land-based injury. It found that the "inherently local" inquiry does not directly determine the district court's admiralty jurisdiction, concluding that the lower court properly determined that the policy was a maritime contract and exercised admiralty jurisdiction.

Finally, the Fifth Circuit also found that the district court correctly applied admiralty choice of law rules to enforce the New York choice of law clause. Under federal maritime choice of law rules, contractual choice of law provisions are generally recognized as valid and enforceable, unless the chosen state has no substantial relationship to the parties, or the transaction or the state's law conflicts with the fundamental purposes of maritime law, none of which were the case. The New York law at issue, allowing late notice of a claim as a complete defense to coverage, has no federal admiralty counterpart and therefore is not contrary to any fundamental purposes of maritime law.

FEDERAL APPEALS COURT DENIES OFFICE DEPOT DEFENSE COST FOR VOLUNTARILY RESPONDING TO AN INFORMAL SECURITIES AND EXCHANGE COMMISSION (SEC) INQUIRY

See Office Depot, Inc. v. National Union Fire Ins. Co. et al., No. 11-10814 (11th Cir.)

On October 13, 2011, the U.S. Court of Appeals for the Eleventh Circuit affirmed that Office Depot's E&O policy did not cover defense costs spent responding to an SEC informal inquiry. Relying on the terms of the primary and follow form excess policies, the Eleventh Circuit rejected Office Depot's arguments that the policy's definitions of "Securities Claim," "Claim," and "Defense Costs" contemplated coverage for legal fees it spent in responding to the informal SEC inquiry into possible securities law violations.

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Office Depot had voluntarily cooperated with the SEC and settled immediately after a suit was filed, though it incurred \$24 million in fees investigating and complying with SEC requests. The Court ruled that the costs of investigating a defense before a claim is actually made were not covered by Office Depot's policies.

SECOND CIRCUIT HOLDS THAT POLLUTION EXCLUSION DOES NOT APPLY TO RESTAURANT ODOR

Barney Greengrass, Inc. v. Lumbermens Mut. Cas. Co., 2011 U.S. App. LEXIS 22442 (2d Cir.)

On November 4, 2011, the Second Circuit upheld a New York district court's rejection of an insurer's contention that restaurant odors constitute a pollutant for the purpose of the exclusion. The trial court (in an entertaining decision) had explained: "To read 'pollution' as encompassing 'restaurant odors,' as defendant urges here, would contradict 'common speech' and the 'reasonable expectations of a businessperson,' who has come to understand standard pollution exclusions as addressing environmental-type harms ... Defendant's suggested interpretation of the exclusion is unreasonable because it would mean that plaintiff, the 'Sturgeon King,' procured liability insurance for its business while at the same time agreeing to exclude coverage for all 'losses' caused by a byproduct integral to that business: the aromas which many people (other than Mr. Bohn, of course) apparently find quite pleasant. See *Curt Gathje & Carol Diuguid, eds., ZAGAT: NEW YORK CITY RESTAURANTS 2009* ('The smells alone are worth the price of admission.'). We reject that interpretation, which 'would infinitely enlarge the scope of the term 'pollutants.'" ... Indeed, while the quality of plaintiff's restaurant smells may be in the nose of the beholder, defendant's 'pollution' argument -- as addressed to the odors here -- is malodorous to this Court."

FROM THE REGULATORS

CONNECTICUT INSURANCE DEPARTMENT PROMULGATES NEW REGULATION OF THIRD PARTY ADMINISTRATORS, EFFECTIVE OCTOBER 1, 2011

New regulations that became effective on October 1, 2011, are aimed at regulating third party administrators (TPAs). Registration and licensing forms are available on the CID's web site at <http://www.ct.gov/cid/cwp/view.asp?a=1269&Q=487676>.

NEVADA ISSUES BULLETIN ADDRESSING CERTIFICATES OF INSURANCE

Nevada is the latest state to clarify that certificates of insurance cannot alter or amend the terms of the policies they reference. A recent bulletin from the Nevada Division of Insurance states that misrepresenting policy terms and conditions on a certificate is in violation of a state law passed earlier in 2011. In contrast to the requirements of other states, Nevada does not require that certificates be filed, and does not indicate that certificates from certain providers are permitted. The bulletin is available at <http://www.doi.nv.gov/sinfo/bulletin/11-014.pdf>.

NEW YORK PROMULGATES NEW REGULATIONS EXEMPTING COMMERCIAL POLICIES FROM CERTAIN REGULATIONS

The New York State Department of Financial Services announced that it has issued new regulations to implement a recently adopted state law that deregulates most insurance business for large, sophisticated companies. The law exempts insurers from rate filing and form approval requirements when issuing a policy to companies that generate annual P/C insurance premiums totaling over \$25,000. The exemption allows insurers to issue policies to these insured without

submitting rate or form filings to the New York State Financial Services Department. To view regulations click [here](#).

FROM WIGGIN AND DANA'S SUPREME COURT UPDATE: ENFORCEABILITY OF ARBITRATION AGREEMENTS

In *KPMG LLP v. Cocchi* (10-1521), the Court again made clear that if you're hoping to have certiorari granted and bring home a win, your best bet is to bring a case attempting to enforce an arbitration agreement. In a long line of decisions, culminating in last Term's *AT&T v. Conception*, the Court has reiterated that these agreements will be enforced, per their terms, under almost all circumstances. The *KPMG* case involved a situation where limited partners brought suit against KPMG for its auditing of certain funds in which the partnership had invested. KPMG's auditing agreement with the funds required arbitration of any disputes relating to its services, including any claim by a person or entity for whose benefit the services were provided. The plaintiffs asserted four claims, including two claims that the Florida courts below had found to be "direct claims" by the limited partners, and thus not subject to the arbitration agreement. The Florida courts then denied KPMG's motion to compel arbitration, apparently not considering whether or not the other two claims were subject to arbitration. The Court swiftly reversed in a per curiam decision. A court cannot decline to require arbitration of arbitrable claims just because they are combined with claims that may be not arbitrable, even if this results in potentially inefficient piecemeal litigation. The Court did not address the substantive issue of whether the remaining two claims were in fact arbitrable, leaving that to the Florida Court of Appeal in the first instance.

Lively, informal and written in a format that is easy to read, Wiggin and Dana's Supreme Court Updates reveal the essence and significance of the U.S. highest court's decisions. When the court is in session look to the Updates to get a play-by-play of cases. <http://www.wiggin.com/supremecourtupdates.aspx>