WIGGIN AND DANA *A Newsletter from the Insurance Practice Group at Wiggin and Dana LLP*

INSURANCE NEWS

WINTER 2013

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.

TIMOTHY A. DIEMAND
JOSEPH G. GRASSO
MICHAEL P. THOMPSON

FROM
TheCOURTS

Insurers Who Disclaim Duty to Defend Do So at Their Own Peril

K2 Inv. Group, LLC v. Am. Guar. & Liab. Ins. Co., 21 N.Y.3d 384, 993 N.E.2d 1249 (2013)

New York's highest court has recently held that an insurer who declines to provide defense to its insured may thereby waive its right to subsequently contest coverage or therefore be required to indemnify the insured under the policy regardless of coverage. While the decision is currently the subject of an application for reconsideration (and may therefore be reversed or otherwise modified), it has had a major impact on insurers' decisions as to whether to provide a defense to their insured's where questions of coverage may exist.

This case arose from a business dispute in which the plaintiff, K2 Investment Group, loaned approximately $2.8 million to a corporation, secured by mortgages on property held by the corporation's two principals. K2 soon discovered the mortgages were not recorded, which prejudiced its rights as a creditor when the corporation defaulted and entered bankruptcy. K2 sued the corporation and the principals. Among the claims asserted by K2 was a cause of action for legal malpractice against one of the principals, an attorney, who had also been responsible for preparing K2's mortgages. The attorney's legal malpractice carrier, American Guarantee, disclaimed its duty to defend on the grounds that the principal was acting as a businessman, not an attorney, when he neglected to record the mortgages. K2 obtained a default judgment and an assignment of rights from the principal. It then sued American Guarantee for breach of contract. The trial court granted judgment in favor of K2; the Appellate Division and the Court of Appeals, in turn, upheld the result. American Guarantee has moved for reargument, which the Court of Appeals granted; reargument is scheduled for January 2014. This decision relayed a clear message to liability insurers: disclaim the duty to defend a policyholder at your own peril. If the decision stands following re-hearing, an insurer who is later found to have disclaimed the duty to defend unjustifiably, may not thereafter deny coverage and must instead indemnify its policyholder "even if policy exclusions would otherwise have negated coverage."

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United States Supreme Court Rejects Art Investors' Attempt to Upset Insurer's Win in $22 Million Art Loss

Renaissance Art Investors LLC v. AXA Art Insurance Corp., No. 13-438, U.S. Dec. 9, 2013

The U.S. Supreme Court declined to hear a group of art investors' appeal from a New York state court's finding that an AXA SA subsidiary doesn't have to cover $21.6 million in losses from a notorious gallery swindle. Renaissance Art had argued that AXA was improperly given a second chance to avoid coverage when it was allowed to proceed with a declaratory judgment suit in state court that was identical to a federal case it had already voluntarily dismissed. AXA won, securing a declaration that it had no duty to indemnify Renaissance for 155 pieces of art that allegedly were never recovered after being sold off by gallery chief Lawrence B. Salander. The state court held that because AXA didn't intend to abandon its claims, (although it did walk away from its federal suit), the second suit wasn't barred. But Renaissance argued that AXA's intent was irrelevant, and that the high court should review the case to resolve a split among the Federal Circuits over whether the res judicata effect of a voluntary dismissal with prejudice is absolute. The losses came on a $42 million portfolio of 328 artworks by master painters that Renaissance consigned to the now-defunct Salander-O'Reilly Galleries for resale. From 1994 to 2007, Salander defrauded art dealers, investment firms and other businesses, including Renaissance, by selling artwork he didn't own. In 2010, Salander pled guilty to the crime. Renaissance was able to recover some of the art, but pieces insured for $21.6 million were never found. When Renaissance turned to AXA, the insurer stated that the Gallery's failure to return the artwork or to turn over sales proceeds was not a fortuitous loss qualifying for coverage. Renaissance's petition for certiorari to the Supreme Court argued that the case should have ended as soon as AXA's voluntary dismissal was entered in federal court and that the state courts' decisions to the contrary break with Second Circuit directives that such dismissals bar subsequent suits, regardless of whether one party allegedly intended or believed that a second suit would be allowed.

Ninth Circuit Finds that the Contractual Liability Exclusion in a CGL Policy Precludes Coverage

APL Co. Pte. Ltd. v. Valley Forge Ins. Co., No. 11-18065, 9th Cir. Ct. App. Oct.11, 2013

The Ninth Circuit Court of Appeals held that the Valley Forge Insurance Co. did not have any liability to APL Co. Pte. Ltd. in connection with a claim by APL against Valley Forge insured U.G. for damages sustained as a result of the leakage of

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hair care products shipped by APL for U.G. from Turkey to the United States. APL filed suit against U.G. (the purchaser), the purchasing agent and the seller on contract and negligence theories. The District Court granted summary judgment against APL on the negligence theories and granted summary judgment for APL on the contract theories, and APL was awarded judgment. Subsequently, APL commenced proceedings against Valley Forge, U.G.'s insurer, to collect. Valley Forge argued that the contractual liability exclusion in U.G.'s CGL policy precluded coverage; APL argued that the "insured contract" exception applied. The policy excluded coverage "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." Under the Bill of Lading, U.G. agreed to indemnify APL for damages it sustained when third parties packed the container. APL argued that because a third party prepared the container for shipment, U.G. was obligated to indemnify APL for any damage and therefore the Bill of Lading was an "insured contract." However, the Ninth Circuit reversed the District Court and held that APL's argument was at odds with the plain language of the "insured contract" exception because it only applied if the insured had assumed a contracting party's tort liability against a third party, and the Bill of Lading was not an "insured contract" under the policy. Thus, Valley Forge had no duty to indemnify APL.

Lloyd's Underwriters Succeed in Rescinding Marine Policy

Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Servs. Inc., No. 3:11-cv-02093, D.P.R. Oct. 10, 2013

Following a bench trial, underwriters at Lloyd's of London won a ruling that they could void a marine insurance policy because the policyholder misrepresented the value and condition of a dry dock that later sank. The Court upheld Underwriters' rescission of the insurance policy issued to San Juan Towing & Marine Services Inc., which had represented that the floating dry dock was worth $1.75 million even as it put the dock up for sale for $700,000. Because of San Juan Towing's overvaluation of the dock and because of its failure to disclose the dry dock's deteriorated condition, the court held that Underwriters were within their rights to void the policy and return the premiums. The Court ruled that San Juan Towing violated the doctrine of uberrimae fidei, which holds that a policyholder must fully disclose all material facts to the insurer even if the insurer doesn't inquire about particular facts.

Search Warrant and Subpoena Satisfy Definition of a D&O "Claim" and Trigger Defense Obligation Even Without a Formal Complaint or Demand

Protection Strategies, Inc. v. Starr Indem. & Liab. Co., 1:13-cv-00763, E.D. Va. Sept. 10, 2013

The U.S. District Court for the Eastern District of Virginia held that corporations that receive investigator letters, subpoenas and search warrants, even when no formal demand or claim has been made, should promptly review their professional liability insurance policy to determine whether it provides coverage. A security contracting firm who is under investigation for allegedly defrauding various agencies in a $31 million kickback scheme sued its insurer, alleging that the insurer refused to pay for its legal defense even though it should be covered. Protection Strategies Inc. alleged that Starr Indemnity & Liability Co. reneged on its obligation to cover defense costs stemming from NASA and federal investigations, and has paid only a portion of Protection Strategies' legal fees. Protection Strategies allegedly first notified Starr of the investigation in February 2012, and the insurer agreed to participate in the company's defense the next month. In April 2012, Starr approved defense counsel for Protection Strategies and its employees. However, over the ensuing months, Starr refused to pay certain defense costs, saying

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it did not approve of defense counsel; Starr further argued that it was not obligated to pay for the defense of the entire company, but only the individual defendants. The court found that Starr's policy broadly defined "Claim" to include any "written demand for monetary, non-monetary, or injunctive relief made against an Insured," as well as any "judicial, administrative, or regulatory proceeding, whether civil or criminal, for monetary, non-monetary or injunctive relief commenced against an Insured . . .by (i) service of a complaint or similar pleadings; (ii) return of an indictment, information, or similar document (in the case of a criminal proceeding); or (iii) receipt or filing of a notice of charges." The court therefore held that the search and seizure warrant, subpoena and letter constituted a Claim under the definition.

New Jersey Supreme Court: Insurer with Obligation to Defend and Indemnify Has Direct Contribution Rights Against Co-Insurer of Continuous Property Damage

Potomac Ins. Co. of Ill. v. Pennsylvania Manufacturers' Assoc. Ins. Co., A-2-12 (070756), N.J. Sup. Ct. Sept. 16, 2013

The New Jersey courts further committed to their pro rata allocation doctrine by holding that one insurer can obtain contribution directly from a co-insurer in a continuous injury case, such that each insurer pays its pro rata share, even if the policyholder had released the co-insurer after it paid less than its pro rata share. The New Jersey Supreme Court, applying New Jersey law, affirmed that one insurer with an obligation to indemnify and defend the policyholder under a commercial general liability policy has a direct claim for contribution against its co-insurer for defense costs arising from continuous property damage, even where the co-insurer settled with the policyholder. This decision may dramatically effect an insurer's ability (and interest) to settle with an insured when the insured has coverage under policies issued by other insurers that apply to the same loss. The holding essentially requires a settling insurer to obtain the agreement of other co-insurers or face an additional exposure.

Primary Insurers Must Pay for Multiple Occurrences For Each Delivery of Contaminated Product

Axis Ins. Co. et al. v. Buffalo Marine Serv. Inc., No. 12-0178, S.D. Texas Sept. 12, 2013

In this case, the U.S. District Court for the Southern District of Texas held that each separate loading and delivery of contaminated liquid petroleum cargo constituted a separate occurrence under an insured's primary CGL policies.

Insured's Property Damage From Chemical Reaction is Covered As It Was Not Faulty Work

Westfield Ins. Co. v. B.H. Green & Son Inc., et al., No. 11-00010, W.D. Ky. Sept. 18, 2013

In this case, Westfield, as insurer of contractor B.H. Green, had been defending B.H. Green under a reservation of rights in state court litigation regarding damage to the concrete used in B.H. Green's construction of a school. Westfield then sued in federal court for a declaratory judgment on whether B.H. Green's insurance policy covered the case. The court held that the alleged property damage from a latent manifestation of a chemical reaction was an "accident" and, thus, was an "occurrence" under commercial general liability and commercial umbrella insurance policies because the accident was not attributable to poor workmanship.

Judge Orders Injunctive Relief Against Reinsurer In Arbitration Dispute

Savers Prop. & Cas. Ins. Co. et al. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, No. 13-cv-13807, E.D. Mich. Sept. 12, 2013

A federal judge granted a motion for a temporary restraining order and preliminary injunction to a group of insurers, finding that the insurers would suffer irreparable harm, including damage to the plaintiffs'

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reputations, goodwill, and standing in the insurance industry, if an arbitration between the insurers and their reinsurer was not paused to examine allegations of ex parte communications between certain arbitrators.

Appellate Victory for The Hartford

Property Casualty Insurance Company of Hartford v. Levitsky, Supreme Court, Appellate Division, First Dept. N.Y., Oct.15, 2013

An intermediate New York appellate court held that the law firm, Handelman Witkowicz & Levitsky LLP failed to properly notify its insurer of a possible malpractice claim over the dismissal of a personal injury action. The Court therefore affirmed that a Hartford Financial Services Group Inc. unit did not have to defend or indemnify the law firm. The unanimous opinion upheld the trial court's ruling in favor of The Hartford. The law firm was required under its liability policy to give notice of any circumstance that could trigger a claim, to give notice if a claim did result and to "lock in" coverage for a possible claim even if that claim didn't occur until after the policy period, the court said. "Despite these circumstances, defendants did not notify plaintiff as to the potential claim until August 2008, after their client's case was dismissed" July 30 of that year, the First Department said. In the underlying case, the plaintiff had sought to recover for injuries he allegedly sustained in 2003. However, the attorney initially targeted the wrong defendant in a suit that ultimately was dismissed, according to court filings. According to The Hartford, which sued in August 2011 seeking a declaration that it was not required to fund a defense or a malpractice judgment, the Levitsky firm continued to target the wrong defendant after learning it was not correct. Furthermore, by the time the firm targeted the actual defendant, the applicable statute of limitations had expired.

California Court Limits Bad Faith Claims Against Insurers

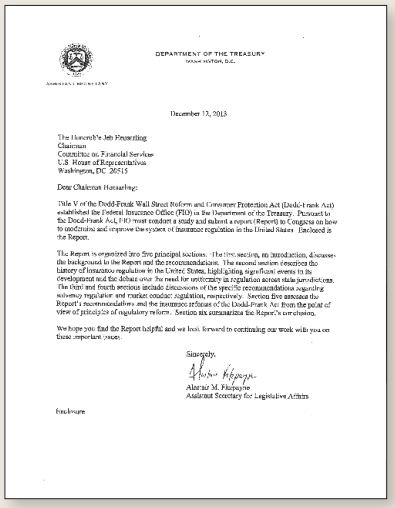
Paul Reid v. Mercury Ins. Co., B241154, 2d Cir. (CA), Oct. 8, 2013

The California appellate court limited insurers' exposure to bad faith claims by holding that carriers are not required to proactively settle a claim just because it's clear that the stakes are higher than the limits of their policies. This published ruling marks a victory for Mercury Ins. Co. in a coverage fight over a $5.9 million judgment awarded to a now-deceased victim of a serious car accident caused by a Mercury policyholder. According to the decision, an insurance company is not obligated to initiate settlement negotiations merely because there's a good chance that the claim could surpass policy limits. When a victim has not made a settlement demand or shown that he or she is interested in settling with the insurer, the insurance carrier cannot have acted in bad faith by failing to settle, even if there's a significant risk of a judgment that surpasses policy limits, the appeals
court said.

FROM
TheREGULATORS

Federal Insurance Office Issues Long-Awaited Report

On December 12, 2013, the Federal Insurance Office (FIO) released its long-awaited report regarding the modernization and improvement of insurance regulation. In its report, the FIO embraced the state-based system for supervising insurers, and recognized that the federal government may only step in where state regulators' powers are limited, or if the states do not achieve the necessary modernization reforms in the near term. Still, the report does not suggest authority to displace state insurance regulation, as the FIO is not a regulatory agency.



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

December 12, 2013

The Honorable Jeb Hensarling
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Hensarling:

Title V of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) established the Federal Insurance Office (FIO) in the Department of the Treasury. Pursuant to the Dodd-Frank Act, FIO must conduct a study and submit a report (Report) to Congress on how to modernize and improve the system of insurance regulation in the United States. Enclosed is the Report.

The Report is organized into five principal sections. The first section, an introduction, discusses the background to the Report and the recommendations. The second section describes the history of insurance regulation in the United States, highlighting significant events in its development and the debate over the need for uniformity in regulation across state jurisdictions. The third and fourth sections include discussions of the specific recommendations regarding solvency regulation and market conduct regulation, respectively. Section five assesses the Report's recommendations and the insurance reforms of the Dodd-Frank Act from the point of view of principles of regulatory reform. Section six summarizes the Report's conclusion.

We hope you find the Report helpful and we look forward to continuing our work with you on these important issues.

Sincerely,

Antonio M. Fitzpatrick
Assistant Secretary for Legislative Affairs

Enclosure

Attorney Notes

Wiggin and Dana Adds Veteran Federal Prosecutor to its White Collar and Art Law Practice Groups

Wiggin and Dana is pleased to announce that **David L. Hall** has joined the firm as a partner in its Philadelphia office. Mr. Hall is a member of the firm's Litigation Department, including the Art Law and Museum Practice Group.

He is a trial lawyer and draws upon his years of experience as a highly-respected federal prosecutor in his representation of corporations and individuals in investigations and prosecutions conducted by the Department of Justice, the Securities and Exchange Commission, the State Department, the Department of Homeland Security, and other federal and state regulators.

David, who joins the firm after a distinguished 23-year career as an Assistant United States Attorney in the Department of Justice, focuses on representing clients in the defense, financial, art, and health care industries.

David's experience is an excellent fit for the firm's Art Law and Museum Practice. Lawyers in our art law practice group have represented foundations, universities, individuals, companies, insurers, and sovereign nations in complex disputes, including one that involved a famous Vincent Van Gogh painting against a claim that Russia nationalized it in violation of international law. Our group has also represented a university in a highly publicized dispute over the ownership of ancient artifacts, and many other similar matters. David's considerable experience will bolster our well-respected practice in this highly specialized area.

When he was with the Justice Department, Mr. Hall served as the Special Prosecutor for the FBI's Art Crime Team where he successfully investigated and prosecuted many cultural property crimes. He negotiated the return of stolen Norman Rockwell paintings from Brazil and led the successful undercover investigation and prosecution of Marcus Patmon, an art thief who sold stolen works by Picasso, valued at nearly $500,000. Shortly after the death of iconic American artist Andrew Wyeth, forged Wyeths found their way to market. Mr. Hall seized and forfeited them, including "Snow Birds," which was offered for sale at a major auction house with an expected price of between $300,000 and $500,000. Mr. Hall forfeited and returned to Iraq a collection of Mesopotamian artifacts, and effected the return to Peru of a gold Moche monkey head (circa 300 A.D.) that had been looted from the royal tombs of Sipan. Mr. Hall also seized, forfeited, and returned to Peru four stolen Spanish colonial paintings of the Cuzco School. Mr. Hall successfully prosecuted Wyatt Yeager, a museum curator who embezzled nearly $1 million in rare coins and seized and forfeited the Rosenberg Diary, the long-lost diary of Alfred Rosenberg, Nazi propagandist and Reich Minister for the occupied eastern territories. The Rosenberg Diary is now part of the Holocaust Museum collection.

Mr. Hall has also served in the United States Navy Reserve for nearly thirty years as an intelligence officer, attaining the rank of Captain. He has commanded three intelligence units and served with the Defense Intelligence Agency, the Office of Naval Intelligence, the Joint Chiefs of Staff, in addition to numerous Navy commands. He was awarded the Defense Meritorious Service Medal, Meritorious Service Medal, Joint Service Commendation Medal, Navy and Marine Corps Commendation Medal, and numerous other personal awards, unit citations, and service awards.

Wiggin and Dana Expands Litigation and White Collar Practice

Wiggin and Dana is pleased to announce that **Margery Feinzig** has joined the firm as a partner in its New York and Stamford offices. Margery is a member of the firm's Litigation Department, including the White Collar Defense and Investigations Practice Group.

Margery joined the firm after a distinguished 18 year career as a federal prosecutor in the Southern District of New York where she held senior positions, including Senior Trial Counsel and Chief of the White Plains Division of the U.S. Attorney's Office.

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Attorney Notes CONTINUED

When she held senior positions in the Southern District U.S. Attorney's Office, Margery supervised the investigation and prosecution of a broad spectrum of federal criminal offenses, including insurance, corporate, bank, securities, and tax fraud; public corruption; and money laundering. Ms. Feinzig received notable honors and awards during her government service career, including the Director's Award for Superior Performance and the Justice Department's coveted John Marshall Award for Outstanding Legal Achievement.

Ms. Feinzig began her legal career as an associate in the New York office of Cravath, Swaine & Moore. She graduated, *cum laude*, from Tufts University and received her law degree from the University of Chicago Law School.

Joe Grasso, Michael Thompson and **Dave Hall** will be making presentations for the Lloyd's Market Association and International Underwriting Association in late January; on January 28th, they will give a 2-hour master class on "Art Theft and Fraud: Litigation, Risks and Prevention" for the LMA in the Old Library at Lloyd's; and on January 29th they will give a 1-hour briefing on "Legal Implications of Electronic Communications, Including Cyber Risks" for the IUA at America Square.

Michael Menapace was a panelist for a program on Cyber Risks and Insurance at the Connecticut Bar Association Annual Meeting. He presented a program entitled Ethics in E-Discovery at the Annual Convention of the National Foundation of Paralegal Associations. Attorney Menapace will again be teaching Insurance Law at the Quinnipiac University School of Law in the Spring of 2014.

Michael Thompson attended the Fall Conference of the International Association of Claims Professionals (IACP) in Arizona in October. Michael also presented at the Autumn Technical Meeting of the International Alliance of Asbestos and Pollution Reinsurers (INTAP) held at Gen Re's Cologne, Germany office on December 4-5. Michael spoke on recent legal developments in the US concerning reinsurance litigation and arbitration.

Joe Grasso attended the annual conference of the International Union of Marine Insurance in London in September. He was a speaker at the International Marine Claims Conference in Dublin later that month (speaking on coverage for "latent defects") and he chaired the meeting of the Committee on Marine Insurance and General Average at the fall meeting of the US Maritime Law Association in Puerto Rico in October.

Joe presented the "Legal Update" at the Annual Meeting of the American Institute of Marine Underwriters in November, and he will again be a panelist at the annual Maritime Claims Conference in Houston in February 2014, hosted by American Conference Institute.

Dave Hall spoke at the IMUA conference in Atlanta in September on Art Loss Prevention. In October, he presented on the topic of investigating and prosecuting cultural property cases at the Royal Judicial Academy in Cambodia for the U.S. Department of State. Later that month, he spoke at the University of Pennsylvania Law School on art theft. In November, he spoke at the Pollock-Krasner Symposium in New York on the topic of art fraud. Later in November, he presented training on art and antiquities crime to HSI agents at the Smithsonian Institution. In December, he presented at the UN ISPAC International Conference on Protecting Cultural Heritage in Courmayer, Italy.

About Wiggin and Dana's Insurance Practice Group

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 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.

About Wiggin and Dana LLP

Wiggin and Dana is a full service firm with 150 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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