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

INSURANCE NEWS

SPRING 2016




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
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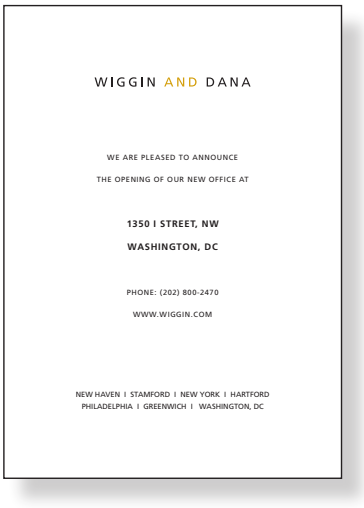
IN THIS ISSUE

Wiggin and Dana Expands!

In January 2016, Wiggin and Dana opened its office in Washington, DC. The office is centrally located at 1350 I Street NW. "The opening of our Washington, DC office will allow the firm's deep bench of partners and associates to continue to provide responsive and experienced counsel to our clients. We plan to expand our practice areas there to facilitate better access and service for our clients that have headquarters or embassies in DC, or business before DC-area courts and regulators," said Paul Hughes, the firm's Chairman.


WIGGIN AND DANA

WE ARE PLEASED TO ANNOUNCE
THE OPENING OF OUR NEW OFFICE AT

1350 I STREET, NW
WASHINGTON, DC

PHONE: (202) 800-2470
WWW.WIGGIN.COM

NEW HAVEN I STAMFORD I NEW YORK I HARTFORD
PHILADELPHIA I GREENWICH I WASHINGTON, DC

The Washington, DC office is the firm's seventh, complementing six other offices in Connecticut, New York and Philadelphia.

Litigation Firm of the Year Wiggin and Dana is pleased to announce that its Litigation Department has been selected as the 2016 Connecticut Litigation Department of the Year by *Benchmark Litigation*. This is the second consecutive year Wiggin and Dana has won the award. The award was announced at the Fourth Annual *Benchmark Litigation* U.S. Awards Ceremony on February 11, 2016, at the Essex House in New York. Several individual attorneys from Wiggin and Dana were recognized, including Insurance Partners **Timothy Diemand** (litigation) and **Jeffrey Babbin** (appeals). For more information, **CLICK HERE**.

Navigating Cyberrisk

The marine industry faces a number of potential cyberthreats. For marine insurers, the challenge is how to evaluate the risks and determine whether and how they may be insured. *By Joseph G. Grasso and David L. Hall*

We have been involved with data protection, privacy, cybersecurity and related insurance issues for many years. While there is some commonality across industries, there are often concerns to our clients that are specific to the business arena in which they operate. Here is an article written by Wiggin and Dana partners Joe Grasso and David Hall that addresses issues in the marine industry. A version of this article was recently published in Best's Review (December 2015). From time to time, we will share additional articles that discuss risks that arise in other industries.

Hackers interfere with a GPS signal, causing a vessel's onboard navigation systems to falsely interpret position and heading. Somali pirates employ hackers to infiltrate a shipping company's network to identify vessels in the Gulf of Aden carrying valuable cargo. Hackers cause a floating oil platform to list to one side.

These and other similar incidents have happened, as noted in a July 2014 International Maritime Organization proposal for the development of guidelines on maritime cybersecurity. They will surely happen again.

All sectors of the economy have become aware of the potential costs of a cyberattack, and the marine industry is no exception. Cyberrisk is therefore of particular concern to marine underwriters. But in a risk-based business like marine underwriting, that's not the end of the story. Other factors are at work, such as the likelihood of such intrusions, the frequency, and the resulting costs. The challenge for the marine insurance industry is how to evaluate these risks, and whether and how they may be insured.

CYBERRISK IN CONTEXT

A significant factor in cyberrisk analysis is the increasing reliance placed by all businesses on big data. The very data sets that generate efficiency and commercial effectiveness also create new challenges: Data sets are so large and complex that traditional data management tools and data processing applications quickly become outdated and inadequate. Thus there is the need for powerful data management systems using supervisory control and data acquisition and industrial control systems software.

But just as this software increases productive efficiency in managing large data sets, so it increases destructive efficiency by hackers when they intrude in networks. All of this occurs in a world that is increasingly interconnected: The distribution of cyber-based infrastructure is global, particularly in the marine industry where everyday business requires electronic interaction among a multitude of integrated networks.

Increasing automation aboard ships, improved global communications and navigation systems, and enhanced electronic inventory control systems are only a few of the many ways in which the marine industry has benefited from technological innovation. However, these advances also create vulnerability in the marine industry.

THE MARINE INDUSTRY HAS TAKEN NOTE

For example, the U.S. Coast Guard now has a Cyber Command which is tasked with assessing cybersecurity and mitigating cyberrisks in the marine environment. In June of this year, the USCG released its Cyber Strategy, outlining issues relating to marine cybersecurity.

Cybersecurity is also on the agenda of the International Maritime Organization and the U.S. Maritime Law Association has formed a Cybersecurity Committee. Many other organizations are dealing with the issue as

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Navigating Cyberrisk CONTINUED

well, such as the U.S. Maritime Resource Center. And the U.S. Naval Academy announced that it will once again teach celestial navigation to its midshipmen, having previously discontinued the class with the advent of GPS in the mid-1990s.

PROPERTY INSURANCE POLICIES

Property insurance, such as hull and machinery and cargo insurance, generally provides coverage for loss of and damage to physical assets and in some cases, business interruption losses. However, such policies may specifically exclude loss from cyberattack.

Moreover, U.S. courts are divided on the question whether damage from a cyberattack to software or computer systems qualifies as covered physical damage to tangible property. Some courts have held that damage to data is a covered tangible property loss. In *Am. Guarantee & Liab. Ins. Co. v. Ingram Micro Inc.*, the court ruled that corruption of electronic data was physical damage to tangible property. In *Lambrecht & Assocs. Inc. v. State Farm Lloyds*, the court ruled that damage to data is loss of tangible property.

Other courts have held that data loss is a loss of intangible information, and thereby upheld denial of coverage for any loss beyond the physical storage medium. In *Ward Gen. Ins. Servs., Inc. v. Emp'rs Fire Ins. Co.*, for instance, the court held that the loss suffered by the plaintiff was a loss of information and the plaintiff did not lose the tangible material of the storage medium.

The lack of statistical data and claims history presents a challenge for marine insurance underwriters. Moreover, there are issues of accumulation of risk, such as a disruption in a port caused by cyberattack, which further complicate the exercise.

MARINE GENERAL LIABILITY INSURANCE POLICIES

MGL policies, like comprehensive general liability policies, are intended to cover claims for bodily injury, property damage, and other losses claimed by third parties against the insured, caused by a business' operations or products. Historically, CGL policies have been read to exclude loss of electronic data from property damage coverage. In *Magnetic Data Inc. v. St. Paul Fire & Marine Ins. Co.*, for instance, the court held that electronic data erased from a hard drive was intangible and not covered under property damage definition.

Indeed, after 2001, many policies specifically exempted electronic data from the property damage definition. And after 2004, ISO wording excluded "damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data." More recently, in some policies, the electronic data liability endorsement has reintroduced electronic data into the definition of property damage.

MGL policies may also specifically exclude cyberattack through, for example, inclusion of the London Clause 380, which was released in 2003. While many marine insurance policies now incorporate this exclusion, it has yet to be tested in the courts.

CGL and MGL policies also generally cover personal and advertising injury, which includes "publication … of material that violates a person's right of privacy," and loss of personally identifiable information (PII).

The courts are divided on whether personal injury coverage applies to losses from cyberattacks. For example, in *Zurich Am. Ins. v. Sony Corp.* a New York court found that because hackers—not the insured—caused the loss of personal data, the insurer had no duty to defend or pay damages. But a federal appeals court came to an arguably differing conclusion in a case involving SmartDownload software that collected claimants' internet usage information for advertising purposes. In *Netscape Commc'ns Corp. v. Fed. Ins. Co.*, the court found the claims to be within personal injury coverage and ruled that the insurer had a duty to defend, even in the absence of disclosure of PII to a third party.

PROFESSIONAL LIABILITY POLICIES

Professional liability policies, such as D&O policies, provide coverage to corporations and corporate management for, among other risks, claims related to alleged failures to mitigate risk. However, many D&O policies also have exclusions for cyberrisks. And most D&O policies will not provide coverage for property damage, environmental impairment, or business interruption, including that caused by a cyber intrusion.

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Navigating Cyberrisk CONTINUED

Moreover, many D&O policies do not cover officer and director liability for failure to carry adequate insurance. So, the failure to anticipate the need for cyber insurance coverage could have significant personal implications for officers and directors. There are other exclusions typically found in marine liability policies, including war risks, environmental damage and terrorism.

CYBERRISK EXCLUSIONS

As noted above, many marine insurance policies exclude cyberrisk outright. Such exclusions are subject to judicial interpretation. Courts construe insurance policies according to general rules of contract construction to ascertain the parties' intent, examining the agreement as a whole. Generally, courts apply the doctrine of "contra proferentem" when a policy term is deemed to be ambiguous. The courts thus interpret such provisions against the party that drafted them, typically the insurer. As one court put it in *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*: "The court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent." As a general proposition, cyberrisk exclusions have not been fully tested in the courts.

STAND-ALONE CYBER INSURANCE POLICIES

To fill the gap created by cyberrisk exclusions, stand-alone cyber coverages have become increasingly available in the nonmarine market, and demand for them has been rapidly growing. But even here, there are challenges. There is no standard policy wording; to the contrary, the language of such policies varies greatly among insurers. And again—standard or not—the language has not been fully tested in the courts.

Moreover, stand-alone cyber coverage is generally limited to damage to data sets, data management systems, and remediation expenses—and the policy limits currently available tend to be relatively small. Cyber insurance policies might thus cover the loss of intellectual property, financial information, and proprietary data—and other intangible property—of the insured. Some London market cyber policies have also provided some property damage and business interruption coverages. Cyber policies also cover the cost of remediation, including the costs of attorneys, forensic analysis, repair of data systems, notification to customers, public relations, and notification to third parties. But they generally do not cover third-party damages, including those resulting from the most alarming cyber scenarios, such as the catastrophic loss of a vessel or pollution from an oil spill.

THE ALL-IMPORTANT ISSUE OF CAUSATION

Perhaps more important is the question of causation. Even if the damage caused by a cyberevent appears to be excluded by a policy, there will be thorny causation issues to resolve. Imagine a scenario where a hacker's intentional interference with a vessel's on-board systems results in a collision and subsequent explosion in a densely populated urban area. Did the vessel cause the collision and explosion or did the hacker? This is a question that will be resolved only after a great deal of time and a significant expenditure of resources.

Cyberrisk presents challenges to the marine industry, and therefore to the marine insurance industry. Insurance is an obvious cyberrisk mitigation tactic for the marine industry. The challenge to the marine industry is to find the right coverage at the right price to address the right risk. These issues are being addressed by individual companies, and organizations like the United States Coast Guard. Cyberrisk management should be on the agenda of every company board in the maritime industry.

FROM
TheCOURTS

Massachusetts Supreme Judicial Court Rules in Favor of Equitable Contribution

Wiggin and Dana successfully represented the Insurance Company of the State of Pennsylvania (ISOP) in a recent case before the Massachusetts Supreme Judicial Court affirming insurers' rights to equitable contribution from co-insurers and rejecting the so-called selective tender doctrine in Massachusetts. ISOP issued a workers' compensation insurance policy to a Massachusetts company, Progression. One of Progression's employees was seriously injured while traveling abroad on business, and Progression notified ISOP of the incident. ISOP promptly began paying workers' compensation benefits to the employee. Shortly afterward, it learned that Progression had also purchased a workers' compensation policy from Great Northern that insured against the employee's accident. But when ISOP asked Great Northern to contribute its share of the workers' compensation benefits, it refused, citing Progression's failure to notify it of the injury. ISOP sought a declaratory judgment in federal court that the doctrine of equitable contribution applied, under which Great Northern was required to split the costs of the claim with ISOP. But the district court agreed with Great Northern that Progression's failure to notify Great Northern of the claim, which it assumed was intentional, relieved Great Northern of any coverage obligation. On appeal, the First Circuit certified to the Massachusetts Supreme Judicial Court the question of whether an insurer could obtain equitable contribution from another insurer when an employer had deliberately tendered the workers' compensation claim only to the first insurer.

The Massachusetts Supreme Judicial Court concluded that under Massachusetts law, Great Northern was obligated to contribute to the claim. First, as a matter of Massachusetts's workers' compensation law, the Court noted that workers' compensation insurers directly insure injured workers; they do not insure an employer who is then liable to its workers for their injury. Given this structure, the Court concluded that an employer like Progression had no right to decide which insurer should cover the claim, so it did not matter whether Progression's failure to notify Great Northern of the injury was intentional or accidental (an issue the parties disputed). Second, under general principles of insurance law, the Court rejected the so-called selective tender doctrine implicitly advocated by Great Northern. This doctrine, accepted in only a handful of states, permits an insured to "selectively tender" a claim to just one of its insurers in cases where the claim is covered by multiple policies, which then forecloses the tendered insurer from obtaining equitable contribution from the non-tendered co-insurers. The Court found this doctrine inconsistent with Massachusetts's notice-prejudice rule, under which an insured's failure to provide prompt notice of a claim to an insurer only relieves the insurer of its coverage obligation if the insurer is prejudiced by the late notice. The selective tender doctrine would run contrary to this rule, because it would relieve the non-tendered insurer of its coverage obligation (and defeat the tendered insurer's equitable contribution

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FROM
TheCOURTS CONTINUED

claim) even when the insured suffered no prejudice from the lack of notice. The Court thus instructed the First Circuit that under Massachusetts law Progression's failure to tender the claim to Great Northern did not relieve Great Northern of its coverage obligation or defeat ISOP's equitable contribution claim. *ICSOP v. Great Northern,* 473 Mass. 745 (2016).

Wiggin and Dana Gains Major Victory for War Risk Underwriters

On March 29th, Wiggin and Dana's clients (a group of underwriters) were granted summary judgment in a coverage dispute with a shipowner in the US District Court for the Southern District of New York, in a claim for constructive total loss of a vessel due to an arrest and detention of the vessel in Libya in 2008. In a nutshell, the court held that (1) commercial arrests are not covered under the American Institute hull clauses or war risks clauses, and (2) that the owner in this case failed to demonstrate any sovereign involvement in the arrest at issue.

Submission of Counsel's Claims Advices through Broker Risks Waiver of Privilege

A Magistrate Judge in the US District Court for the Eastern District of New York recently held that the attorney-client privilege had been waived by certain underwriters at Lloyd's of London with respect to communications from their US lawyers, because the communications had been sent to the London broker for transmission to the underwriters (as has been the custom for over 200 years), and the lawyers could not identify the individual recipients from their client underwriters. The Magistrate Judge deemed this procedure to constitute transmission of the privileged material to a third party and therefore found waiver of the privilege.

While the decision is currently the subject of a motion for reconsideration by the underwriters (who will have to identify the individual underwriters' representatives who received the communications in question), the holding provides a cautionary note to lawyers representing underwriters of subscription policies, in terms of dissemination of counsel's reports and other communications. *Certain Underwriters at Lloyd's v National Railroad Passenger Corp.,* Docket 1:14-cv-47 17(FB) (E.D.N.Y. Feb. 19, 2016).

New Jersey Supreme Court Rules that Insurer is Not Required to Show Prejudice for Late Notice of Claims Made Policies, even though Appreciable Prejudice is Required to Disclaim under Occurrence Policies.

The issue before the New Jersey Supreme Court was whether, to disclaim coverage, an insurance company must show it was prejudiced by an insured's failure to comply with the notice provision in a Directors and Officers claims made policy. In this case, the defendant in the underlying case provided National Union with notice of the suit six months after the suit was filed. The Court notes that the fact that this was a claims made policy, as opposed to an occurrence policy, was important to its consideration and it took considerable time distinguishing between the two and why the differences matter to the question at hand. The Court previously held that for occurrence policies, an insurer is required to show appreciable prejudice due to late notice if it decides to disclaim coverage. However, the Court reasoned that the D&O claims made policy was not a contract of adhesion but was agreed to by sophisticated parties, therefore the insurer is not required to show it suffered prejudice before enforcing the terms of the policy. *Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co.,* (A-18-14) (074572).

Connecticut District Court Clarifies the CGL "theft" Exclusion

A court federal judge recently considered the meaning of the CGL "theft" exclusion. The policy covered losses due to vandalism but not for "damage caused by or resulting from theft." After invaders entered the insured's building, they ripped apart walls, ceilings, fixtures and the electrical system apparently to steel copper pipping. The insured tendered a claim for the damages sustained to the building arguing that the damage to the building was vandalism committed in the attempt to steal something. The insured argued that the damage resulted from theft. The judge found a third way. He found that coverage depended on the intruder's intent, but not only the intruders' initial intent. "What might start as an escapade by hooligans to vandalize a building may morph into a thieving spree as valuable items happen to be found; what might start as a burglary may morph into vandalism and vengeful destruction of

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FROM
TheCOURTS CONTINUED

property if no valuable items for the taking are found." The intruding party may have more than one purpose, and the insurer, therefore, cannot defeat a claim for coverage simply by showing that the intruders entered the building intending to steal. The judge denied summary judgment but held that the theft exclusion means the insurer does not have to pay for the value of the items stolen nor for the damage to the property that was necessary to or in furtherance of the theft. Because the policy did extend coverage to damage resulting from an act of *attempted but unsuccessful* theft, an item-by-item review of the lost and damaged property was required to determine whether a specific loss was the result of vandalism or theft. *Mercedes Zee Corp., LLC v. Seneca Ins. Co.*, 2015 WL 9311343 (D. Conn. Dec. 22, 2015).

New Hampshire Joins Majority of Courts on Defense Obligation Trigger for Excess Insurers

The First Circuit Court of Appeals certified a question to the New Hampshire Supreme Court about when an excess insurer's duty to defend is triggered. New Hampshire has joined the majority of jurisdictions in that the excess insurer's duty to defend is triggered only once the primary insurer's coverage has been exhausted. The Court reasoned that the fundamental goal of interpreting insurance policies to carry out the intent of the contracting parties and acknowledged that this majority rule reflects the reality of how the insurance system operates. Primary insurers anticipate paying for the cost of the duty to defend they can build that expense into their premiums and the majority rule places the expense of the defense on the insurer who has control over the defense. The Court concluded: "Until the excess insurer has indemnity exposure, there is no reason it should have a role in making strategic decisions regarding the defense of an insured, nor should it be required to pay a share of the defense costs." *Old Republic Ins. Co. v. Stratford Ins. Co.*, No. 2015-0123 (N.H. Jan. 26, 2016).

FROM
TheREGULATORS

CONNECTICUT

The Connecticut Insurance Department continues to grow as a captive insurer domicile. Commissioner Wade recently announced that the 10th Connecticut captive has formed since a significant restructuring of the state's captive laws and regulations was undertaken several years ago. For additional information on the Department's announcement, **CLICK HERE**.

The Connecticut Insurance Department has issued Bulletin S-17, which concerns a new type of indexed-linked annuities recently submitted by insurers for approval. Because there is no guarantee of principal in these newer products, the Department has set forth standards for disclosure to purchasers of these annuities. For additional information, **CLICK HERE**.

PENNSYLVANIA

The Pennsylvania Insurance Department recently announced that it has set-up a new web-page, providing one-stop shopping for consumers wishing to purchase private flood insurance. Most private market flood insurance in Pennsylvania is sold on the surplus market. The new webpage is available by going to www.insurance.pa.gov, and clicking on "Flood" under Top Pages.

Point of Interest on Cyber Guidelines for Ships

A group of leading shipping organizations has launched a set of guidelines to help the global shipping industry prevent major safety, environmental and commercial issues that could result from a cyber incident onboard a ship. The cyber guidelines launched this week are a first for the shipping industry, developed by international shipping associations, comprising BIMCO, CLIA, ICS, INTERCARGO and INTERTANKO - and with support from a wide range of stakeholders. The Guidelines on Cyber Security Onboard Ships are free to download from the BIMCO website, **CLICK HERE**.

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 more than 135 attorneys serving clients domestically and abroad from offices in Connecticut, New York, Philadelphia and Washington, DC. For more information on the firm, visit our website at www.wiggin.com.

AttorneyNOTES

Joe Grasso taught part of the Introduction to Ocean Marine program in February at the American Institute of Marine Underwriters. He also moderated a panel on Machinery Damage Claims at the 2015 IMCC in Dublin.

Michael Menapace is now admitted to practice in the Commonwealth of Massachusetts. Wiggin and Dana lawyers regularly appear in the state and federal courts in Boston. Michael's admittance and physical presence in our Hartford office, makes representation in Western Massachusetts very convenient. Please contact Michael or your Wiggin and Dana relationship partner if we can be of assistance in Massachusetts.

Michael is also teaching Insurance Law at the Quinnipiac University School of Law this semester.

Michael Thompson will be attending the ARIAS Annual Spring Conference from May 11-13, 2016, in Palm Beach, Florida.

This Newsletter is a periodic newsletter designed to inform clients and others about recent developments in the law. Nothing in the Newsletter constitutes legal advice, which can only be obtained as a result of personal consultation with an attorney. The information published here is believed to be accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues. In certain jurisdictions this may constitute attorney advertising.

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