Wiley Rein & Fielding

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The Executive Summary

Developments Affecting Professional Liability Insurers

No Coverage for Section 11 Claims Because Not a "Loss"

An Indiana state trial court has held that no coverage is available under an excess D&O policy for claims against a company alleging violations of Section 11 of the Securities Act of 1933. The court reasoned that damages paid to settle Section 11 claims are restitutionary in nature and that, as a result, there was no "Loss" under the policy. *Conseco, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., et. al.*, No. 49D130202CP000348 (Ind. Cir. Ct. Dec. 31, 2002).

Conseco had a $100 million D&O insurance program in which the primary policy provided that the insurers would "pay the Loss of the Company arising from a (i) Securities Claim first made against the Company, or (ii) Claim first made against the Directors or Officers, during the Policy Period…for any actual or alleged Wrongful Act…." "Loss" was defined to include "damages, judgments, settlements and Defense Costs." Conseco and 15 of its directors and officers were sued in both securities and derivative lawsuits arising out of alleged material misstatements and/or omissions. After several of its D&O insurers denied coverage for these claims, Conseco filed coverage litigation against the insurers. Thereafter, Conseco settled the securities litigation for $120 million, of which $81.84 million was attributed to the Section 11 claims and $38.16 million was attributed to the Section 10(b) claims asserted in the securities litigation. Certain underwriters at Lloyd's, which had provided $25 million in coverage in excess of $75 million in underlying limits, refused to contribute to the settlement, arguing that the $81.84 million payment in connection with the Section 11 violations was not a "Loss" under the policy, and thus, its coverage layer was not implicated.

The court agreed with Lloyd's that there was no coverage for violations of Section 11 because payment to settle such claims did not constitute a "Loss." The court reasoned that, in settling the Section 11 claims, Conseco was simply returning funds "it wrongfully took from the investing public" because the alleged misrepresentations resulted in the public paying more money to Conseco for the shares than it would have absent the misrepresentations. Thus, according to the court, "[t]he $81.84 million portion of the Securities Litigation settlement was in character payments representing the disgorgement of profits to which Conseco was never entitled." The court rejected Conseco's argument that the Section 11 portion of settlement represented compensatory damages, concluding that the Section 11 was restitutionary in character because the damages represented ill-gotten gains.

The court also rejected Conseco's contention that the insurance coverage for securities claims afforded under the D&O policies would be illusory if the damages sought for Section 11 violations do not constitute "Loss." The opinion reasoned that Conseco could still benefit from the coverage for securities claims that do not allege violations of Section 11, including claims for violations of Section 10(b). The court also rejected Conseco's argument that it had a reasonable expectation of coverage, opining that, under Indiana law, the court will only consider such expectations if a policy is ambiguous or illusory, which the policy language in this case was not. The court further rejected Conseco's argument that it was entitled to coverage because the individual directors and officers could have been found personally liable under Section 11 and those individuals

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Also in This Issue

Validity of Conseco Coverage Decision Challenged in Bankruptcy Proceeding

Conseco has filed an adversary proceeding in its pending bankruptcy case in the U.S. Bankruptcy Court for the Northern District of Illinois, arguing that the continued litigation of an insurance coverage action filed by Conseco in Indiana state court and an order entered in that action *(see page 1 of this issue)* violated the automatic stay of the Bankruptcy Code. The bankruptcy court had not ruled on that motion when this issue of *The Executive Summary* went to press.

On November 26, 2002, an Indiana trial court presiding over the coverage litigation arising out of securities litigation against Conseco stated that it would grant the insurer's motion to dismiss in a telephonic status conference, although it did not issue the dismissal order at that time. Thereafter, the insurers each submitted a draft opinion and order to the trial court. On December 17, 2002, before the Indiana court had issued its order, Conseco filed a voluntary chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Illinois. On December 27, 2002, Conseco instituted, under Section 362 of the Bankruptcy Code, an adversary proceeding in the bankruptcy court seeking to enforce the automatic stay and to enjoin the coverage action. Four days later, the trial court issued an opinion and order dismissing the case. According to Conseco, the trial court signed the exact opinion and order submitted by one of the insurers.

Conseco's argument challenging the trial court's order in the coverage action is based on Section 362 of the Bankruptcy Code, which provides that the filing of a bankruptcy petition operates as a stay of the "commencement or continuation…of a judicial, administrative, or other action or proceeding against the debtor." 11 U.S.C. § 362. Although Section 362 on its face applies only to actions "brought *against* the debtor," and the Indiana action was "brought *by* the debtor," Conseco argued that because the coverage action was a declaratory judgment action, the roles of plaintiff and defendant are effectively reversed. Thus, according to Conseco, unlike an ordinary lawsuit, its assets are at risk in the coverage action, and an adverse ruling would effectively diminish the estate's assets by forcing Conseco to satisfy the settlement in the underlying securities litigation out of its own pocket.

In their responsive pleadings, the insurers made three arguments. First, the insurers argued that the automatic stay does not apply because the trial court had issued an oral ruling dismissing the coverage action three weeks before Conseco filed for bankruptcy protection. Thus, according to the insurers, the trial court's written opinion simply memorialized the oral order rendered by the court prior to Conseco's filing for bankruptcy. Second, the insurers argued that the automatic stay is inapplicable because Conseco instituted the coverage action. The insurers relied on 7th Circuit precedent, such as *In re Hall*, 304 F.3d 743, 745 (7th Cir. 2002), that holds that claims brought by a debtor are not automatically stayed. Moreover, the insurers contended that Conseco was obligated to satisfy the settlement agreement pre-petition, and thus any judgment it obtained in the coverage action would expand the bankruptcy estate by reimbursing the estate for the amount it was already obligated to pay under the settlement agreement. Similarly, if Conseco was unsuccessful in the coverage action, it would remain in the same pre-petition posture – it would still be obligated to satisfy the settlement agreement. Conseco's assets therefore were not at risk in the coverage action. Finally, the insurers contended that even if the coverage action had been subject to the automatic stay, an order dismissing the case would not have violated the stay because the trial court took the motion to dismiss under advisement prior to the bankruptcy petition being filed. ✦

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had not benefited from the "ill-gotten" gain, reasoning that the individuals had not, in fact, been obligated to pay any portion of the settlement.

Finally, the court rejected an argument by Conseco that the insurers had fraudulently induced it to purchase the excess policies by representing that the policies would provide coverage for Section 11 violations. The court found that the insureds had failed to plead fraud with the appropriate particularity since its claim was based only on the policy language. The court explained that a "coverage grant in an insurance policy that is limited by another provision does not provide the basis for a claim for fraud." ✦

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D&O Policy Proceeds Not Property of Estate; Shareholder Suit Related to Bankruptcy Action Preliminarily Enjoined Under Section 105(a)

A bankruptcy court has held that D&O policy proceeds are not property of a bankruptcy estate, and that the automatic stay therefore did not bar the continued litigation of a shareholders suit pending in district court that implicated a debtor's D&O policies. The bankruptcy court did, however, stay the litigation pursuant to Section 105(a) of the Bankruptcy Code because the trustee was pursuing an action against the same defendants that could implicate the same insurance policies. *See Maxwell v. Megliola*, *et al. (In re marchFIRST)*, No. B 2472, 02 A 00589, 2002 WL 31957768 (N.D. Ill. Bankr. Dec. 16, 2002).

The debtors were a group of affiliated companies that were in chapter 7 bankruptcy. The debtors had a $50 million D&O liability program that included entity coverage. Prior to the debtors' bankruptcy, shareholders filed a class action against the debtors and their directors and officers, alleging violations of federal securities laws. Subsequently, the bankruptcy trustee filed an adversary proceeding against the directors and officers, alleging breaches of state law fiduciary duties owed to the debtors and their creditors. Both suits potentially implicated the debtors' D&O policies. After filing against the directors and officers, the bankruptcy trustee initiated an adversary proceeding against the shareholders, seeking to enjoin them from pursuing their litigation.

Reasoning that Section 362 of the Bankruptcy Code applies only to property of the estate, the court rejected the trustee's argument that the shareholders suit should be stayed because it violated the automatic stay under Section 362(a)(3). The court held that, while "[t]here is no question that the policies themselves are estate property," the proceeds of the policies are not property of the estate. The court reasoned:

> When an insurer pays for the defense of an action against the directors and officers, it does so with a reservation of its rights. No one has a property interest in the proceeds of the insurance policies unless and until there is a judgment requiring that the insurers issue payment. Any property interest in the proceeds has not yet matured and may never mature.

The court did, however, preliminarily enjoin the shareholders suit, relying on Section 105(a) of the Bankruptcy Code, which provides that the "court may issue any order, process, or

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Judge Harmon Rules on Secondary Actors' Motions to Dismiss in Enron Litigation

A federal court in Houston, Texas recently ruled on the motions to dismiss by the banks, law firms and accountants that were sued in *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, No. H-01-3624 (S.D. Tex. Dec. 19, 2002) (*In re Enron Litigation*). Judge Melinda Harmon granted the motions of Deutsche Bank AG and Kirkland & Ellis altogether and dismissed the claims against Lehman Brothers and Bank of America Corporation based on Section 10(b) of the Exchange Act of 1934 (Section 10(b)) and Securities Exchange Commission (SEC) Rule 10b-5 (Rule 10b-5). It denied the motions of the other secondary actors. In ruling on the motions to dismiss, the court, among other holdings, made several rulings regarding the contours of liability for secondary actors under Section 10(b) and Rule 10b-5.

The court initially acknowledged that, under the U.S. Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1993), there is no liability for aiding and abetting or conspiracy under Section 10(b), and secondary actors therefore can only be liable under Section 10(b) as a primary violator. Because the U.S. Supreme Court's *Central Bank of Denver* decision did not determine what conduct of a secondary actor would constitute a primary violation, the court observed that the lower federal courts have adopted two divergent approaches – the "bright-line" test and the "substantial participation" test.

The U.S. Court of Appeals for the 2nd Circuit has adopted the "bright-line" test to determine what conduct constitutes a primary violation of Section 10(b) and Rule 10b-5. *See Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998). For a secondary actor to be liable as a primary violator under this standard, the plaintiff must present evidence that the secondary actor: (1) made a material misrepresentation *and* (2) "the misrepresentation must be attributed to [the] specific actor at the time of public dissemination." According to the 2nd Circuit, requiring that the plaintiff prove the misrepresentation was attributable to the secondary

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actor "in advance of the investment decision" ensures that the element of reliance is not "undermined."

In contrast, the U.S. Court of Appeals for the 10th Circuit has adopted the "substantial participation" test. *See Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996). Under this test, there is no requirement that the alleged misrepresentation be specifically attributable to the secondary actor at the time of dissemination. Instead, the plaintiff need only prove that the secondary actor: (1) made a material misrepresentation and (2) "knew or should have known that his representation would be communicated to investors." Stated differently, a secondary actor is liable under the "substantial participation" test where "there is 'substantial participation or intricate involvement' of the secondary party in the preparation of fraudulent statements even though that participation might not lead to the actor's actual making of the statements."

In the *In re Enron Litigation*, the SEC, as *amicus curiae*, criticized both the "bright-line" and the "substantial participation" tests and advocated a third test in its briefing. The SEC's proposed test would make a secondary actor a "primary violator" of Section 10(b) if the actor, "acting alone or with others" with the requisite scienter, "creates" a misrepresentation on which investors relied. Under this view, to be liable as a primary violator, it is not necessary for the secondary actor "to be the initiator of a misrepresentation." Rather, an actor "can be a primary violator if he or she writes misrepresentations for inclusion in a document to be given to investors, even if the idea for those misrepresentations came from someone else."

After reviewing all three tests, the court adopted the SEC's test for primary liability for a material misrepresentation or omission under Section 10(b) because the court found it most accurately reflected the holding of *Central Bank of Denver* and most reasonably balanced the interests of "victimized investors" and "harassed defendants." The opinion also reasoned that the SEC's construction of a statute for which it has been given rulemaking authority is entitled to deference. Because there is no clear and narrow definition of "substantial participation or intricate involvement," according to the court, the "substantial participation" test "may fail to differentiate between primary liability and aiding and abetting." The court also found that the "bright-line" test would provide a "safe harbor" for all secondary actors except those that signed the document containing the misrepresentation or that were otherwise identified to the public as the maker of the representation, which would allow the creators of misrepresentations to escape liability "as long as they concealed their identities." Furthermore, the opinion found that a secondary actor could be liable under Rule 10b-5(a) and (c) if it "actively employed a significant material device, contrivance, scheme, or artifice to defraud or actively engaged in a significant, material act, practice, or course of business that operated as a fraud or deceit upon any person in connection with the purchase or sale of any security" with the requisite scienter.

Additionally, the court observed that to survive a motion to dismiss, the plaintiff must meet the heightened pleading standards of the Private Securities Litigation Reform Act of 1995 (PSLRA). The PSLRA provides that a plaintiff asserting a claim under Section 10(b) for making material misrepresentations or omissions must "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading." In the U.S. Court of Appeals for the 5th Circuit, the pleading standards of the PSLRA "at a minimum, incorporate the standard for pleading fraud under" Rule 9(b) of the Federal Rules of Civil Procedure. *ABC Arbitrage Plaintiffs Group v. Tchurak*, 291 F.3d 336, 349-50 (5th Cir. 2002). The court noted that the PSLRA also mandates that a plaintiff asserting a claim that has a scienter requirement must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." In the 5th Circuit, the requisite level of scienter for Section 10(b) claims is "severe recklessness." *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 408 (5th Cir. 2001). According to the court, "severe recklessness" is "an extreme departure from the standard of ordinary care, and that present[s] a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it."

In early January 2003, the secondary actors filed Motions For Section 1292(b) Certification for Immediate Appeal of the court's decision. On January 23, 2003, the court denied the motions, finding that immediate appeals were not warranted. ✦

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Stockholders of One Company Lacks Standing for Securities Claim Against Another Company; Soft-Opinions May Be Actionable

The U.S. District Court for the Southern District of New York has held that shareholders of one company lack standing to bring a securities fraud class action lawsuit against a second company based on alleged misrepresentations regarding the value of the second company. In the same opinion, the district court also denied a motion to dismiss a class action lawsuit brought by shareholders of the second company, holding, *inter alia*, that "soft-opinions" may be actionable if made without genuine or reasonable belief as to their truth. *In re Nortel Networks Corp. Sec. Litig.,* No. 01 Civ. 1855 (RMB), 2003 WL 42015 (S.D.N.Y. Jan. 6, 2003).

Investors brought a securities fraud class action against a company (Company A) and its directors and officers alleging misrepresentations about the company's financial prospects. A second group of investors who held stock in a different company (Company B), which sold assets to Company A in exchange for stock in Company A, also brought a securities class action lawsuit against Company A and its directors and officers alleging that the value of their shares of Company B's stock were harmed by the alleged misrepresentation by Company A.

The court dismissed the claims by the shareholders of Company B, holding that they lacked standing to bring the lawsuit. The court based its decision on *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), in which the U.S. Supreme Court held that "the plaintiff class for purposes of a private damage action under Section 10(b) and Rule 10b-5 [is] limited to actual purchasers and sellers of securities." Since the shareholders of Company B did not own shares in Company A, the district court held that they could not bring a claim against Company A and its directors and officers. The court did note, however, that the plaintiffs' claim was the "essence of a derivative claim" and that Company B might have its own cause of action against Company A.

In its opinion, the court also issued a ruling denying the motion to dismiss the lawsuit brought by the shareholders of Company A. The court rejected a variety of arguments by defendants concerning, among other things, materiality, scienter and the bespeaks caution doctrine. The court also held that purported "soft-opinions" or "puffery" were actionable, reasoning that "[s]tatements regarding projections of future performance may be actionable under Section 10(b) or Rule 10b-5 if they are worded as guarantees or are supported by specific statements of fact, or if the speaker does not genuinely or reasonably believe them." Here, the investors alleged that the defendants did not genuinely or reasonably believe that the purportedly "soft" statements were true, and were in fact made with actual knowledge or with reckless disregard that they were false or misleading. The court found that those claims sufficiently alleged that the defendants had knowledge of facts or access to information contradicting their public statements and thus found that the purchasers of stock in Company A stated a sufficient claim for relief. ✦

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judgment that is necessary or appropriate to carry out the provisions of this title." The court relied on the decision in *Fisher v. Apostolou*, 155 F.3d 876, 882 (7th Cir. 1998), in which the 7th Circuit held that "in limited circumstances, the trustee may temporarily block adjudication of claims that are not property of the estate by petitioning the bankruptcy court to enjoin the other litigation, if it is sufficiently 'related to' [ ] her own work on behalf of the estate." The bankruptcy court reasoned that the suit between the shareholders and the directors and officers was sufficiently related to the trustee's administration of the estate because the shareholders suit could potentially reduce the amount of D&O insurance proceeds that the trustee would be able to recover in his adversary proceeding against the directors and officers. The court therefore preliminarily enjoined the shareholders from pursuing their action, with the exception of discovery, until the trustee had completed his adversary proceeding, at which point the shareholders would be permitted to proceed with their district court action. ✦

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Member of Condominium Association Lacks Standing to Sue Condominium Board's D&O Insurer

A California appellate court, in an unpublished opinion applying California law, held that an individual member of a condominium association lacked standing to sue an insurance company that had issued a D&O policy to the board of directors of the condominium association and had tendered a defense to the insurer in an action brought by the individual member. *Walsh v. Truck Ins. Exch. Co.*, No. 318289, 2003 WL 121997 (Cal. App. Jan. 13, 2003).

An individual member of a condominium association sued her condominium association's board of directors, as well as certain non-insureds, including the property manager and other tenants of the condominium, claiming that the board had permitted the unit owners above her to remove carpet and padding, thereby damaging her unit. The insurer provided a defense to the board members and agreed to extend its defense to the non-insureds. The individual member subsequently sued the insurer alleging that by providing a "courtesy" defense to non-insureds, the insurer had breached an implied covenant of good faith and fair dealing and aided and abetted the board's breach of the fiduciary duty it owed to her.

The appellate court held that the individual member of the association lacked standing to sue the insurer. The court initially noted that "an insurer's duty of good faith and fair dealing is owed *solely to its insured and, perhaps, any express beneficiary of the insurance policy*." The court pointed out that the individual member was not a party to the D&O policy or a named or additional insured under the policy. The court rejected the argument that the individual member nevertheless had standing because she was a "mandatory member" of the condominium association, reasoning that the association was a distinct entity from its individual members who "stand in the same position as shareholders to a corporation."

The court also rejected the individual member's argument that she had standing to sue as a third-party beneficiary because the board's D&O policy was purchased by the condominium association and paid for with dues from individual members. The court stated that this fact was insufficient to establish standing and also pointed out that the individual member was the plaintiff in the underlying action. She therefore had no defense to tender or liability to be indemnified under the policy.

The court next rejected the individual member's argument that the insurer was estopped from denying her benefits of the policy because it had extended a defense to non-insureds. The court explained that a necessary element of estoppel was to show ignorance of the true facts, and the individual member could not make this showing because her allegation that the insurer was wrongfully extending defense to non-insureds demonstrated she was aware of the relevant facts. The court further explained that the individual member could not establish the necessary elements of estoppel because she failed to proffer facts that she detrimentally relied on the insurer's decision to provide a "courtesy" defense to non-insureds. Thus, even setting aside the fact that the individual member had no defense to tender because she was the plaintiff in the underlying action, the court still found she lacked standing.

Finally, the court rejected the individual member's claim that the insurer aided and abetted the board's breach of a fiduciary duty it owed to her. The court explained that even though insurers and insureds have a special relationship, it does not give rise to a fiduciary duty. If an insurer has no fiduciary duty to an insured, the court stated that an insurer, *a fortiori*, has no duty to a non-insured. In addition, the court reasoned that the insurer, as a non-fiduciary, could not be found to have aided and abetted the board in breaching its duty because non-fiduciaries cannot conspire to breach a duty that only a fiduciary owes. ✦

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Laura A. Foggan, Program Chair
February 18-19, 2003

Annual Insurance Coverage Litigation Committee Meeting, Tort Trial and Insurance Practice Section of the American Bar Association, Miami, FL

Daniel J. Standish, Speaker, "The Corporate Sky Is Falling - Who Picks Up the Mess? Insurance Coverage and the Financial Collapse of a Business"
February 21, 2003

Mealey's Practical Training for the Claims Professional Conference, Stamford, CT

John D. Cole*, Speaker, "Overview of Insurance Coverage Litigation - Managing Outside Counsel"
March 3, 2003

Insurance Coverage Litigation Committee 15th Annual Meeting, American Bar Association Litigation Section, Tucson, AZ

Laura A. Foggan, Program Co-Chair
March 6-8, 2003

American Bar Association Litigation Committee, Insurance Coverage Section, Tucson, AZ

Daniel J. Standish, Speaker, "Directors and Officers Liability Coverage for the New Frontier: From Enron to Sarbanes and Beyond"
March 7, 2003

Insurance Law 2003: Understanding the ABC's – Practising Law Institute, New York, NY

Laura A. Foggan, Speaker, "Tripartite Relationship"
April 14, 2003

Appellate Advocacy Seminar, Defense Research Institute, Chicago, IL

Laura A. Foggan, Speaker, "*Amicus Curiae*: The Keys to Writing Persuasive *Amicus* Briefs and Successfully Recruiting *Amicus* Support"
May 1, 2003

American Conference Institute Conference on Directors and Officers Liability, New York, NY

Daniel J. Standish, Speaker, "The D&O Policy and Corporate Bankruptcies"
May 15, 2003

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Florida Court Honors New York Order Staying Litigation

A Florida appellate court, in a decision not yet released for publication, held that a Florida court should honor an order by a New York court that indefinitely stayed all proceedings against an insurer in rehabilitation. *Frontier Ins. Co. v. Am. Title Serv.*, No. 5D02-2611, 2003 WL 131638 (Fla. Dist. Ct. App. Jan. 17, 2003). The insurer issued a professional liability insurance policy to a title services company. After the title services company was sued for allegedly providing negligent services, the insurer disclaimed coverage. Thereafter, the title services company and the claimants filed suit against the insurer. After the coverage litigation had been commenced, a New York court found that the insurer was financially distressed and directed the superintendent of insurance to take possession of the insurer's property for purposes of rehabilitation. The order of rehabilitation provided for a six-month stay of all proceedings in which the insurer was obligated to defend a party pursuant to an insurance contract. The rehabilitation order also provided for an indefinite stay of all cases in which the insurer was a defendant. Six months after entry of the rehabilitation order, the title services company and other plaintiffs in the coverage action sought to lift the stay, arguing that the six-month stay had expired. The Florida appellate court rejected that argument and held that the stay should not be lifted because, since the litigation was against the insurer, an indefinite stay applied. The court stated that "[i]t is the public policy of Florida to cooperate with reciprocal states in delinquency proceedings involving an insurer." ✦

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