HOWREY LLP

RISK NEWSLETTER

Legal Issues in Insurance Coverage

4TH QUARTER '07

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Delaware Court Keeps D&O Case, Orders Carriers To Immediately Advance Defense Costs

By Andrew Reidy and Catherine Serafin

A Delaware Superior Court judge on June 20, 2007 issued two decisions, denying excess D&O insurers' motion to stay or dismiss the case in favor of prior related Canadian proceedings, and granting the insureds' motion for partial summary judgment, ordering the insurers' to advance defense costs in connection with an Illinois class action securities claim. *Sun-Times Media Group, Inc., et al. v. Royal & SunAlliance Ins. Co. of Canada, et al.*, No. 06C-11-108 RRC (Del. Super. June 20, 2007).

The Chicago-based, Delaware corporation Sun-Times Media Group ("STMG"), formerly known as Hollinger International, Inc. ("International") and nine of its former directors and officers, sued various insurers who comprised the third and fourth excess layers of International's directors and officers ("D&O") liability insurance program. The case involves the rights of the nine U.S. and U.K.-based former directors of International, as well as the rights of International itself, to the excess coverage. Multiple securities claims arising out of alleged fraudulent and negligent conduct of Lord Conrad Black and other former International directors and officers have been filed, and the underlying D&O insurers paid their respective policy limits to settle other claims. Lord Black, a U.K. citizen, and Hollinger Inc. ("Inc."), the Canadian-based parent of International, had instituted proceedings in Canada involving the same policies and coverage for some of the same securities claims. The Canadian court had ruled that Lord Black's and Inc.'s claims were "premature" and Inc. has appealed that decision.

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General Liability Coverage for Suits Alleging Employment-Related Causes of Action

by: Douglas Gastélum

Employers frequently assume, in part because their CGL carriers frequently assert, that their CGL policies will not respond to any suit alleging wrongful termination, sexual harassment or other employment-related causes of action. Those assumptions and assertions may not be accurate. Such suits may include claims for other personal injuries such as defamation or invasion of privacy that are not excluded. The non-employment related claims may obligate the CGL carrier to defend all or at least part of the action. It is true that the CGL carrier may request that defense costs be segregated and later seek reimbursement for defense costs associated strictly and entirely with the employment-related causes of action. Nevertheless, many defense costs are not segregable, and costs associated entirely with other personal injury claims should be covered. In addition, many CGL policies include endorsements for Employee Benefits Liability that may apply.

> Because the alleged defamatory statements could not have been made in the context of the claimant's employment, and were not directed to her job performance, the alleged defamation was outside the scope of the exclusion.

CGL Carriers May Have to Defend When Covered Allegations Occur Outside The Employment Relationship

In *H.S. Services, Inc. v. Nationwide Mutual Ins. Co.*, 109 F.3d 642 (9th Cir. 1997), a company president, Mr. Cade, had been terminated and then sued the company for wrongful termination. At about the same time that the suit was filed, the company learned that Cade had informed the company's vendors that the company was experiencing financial difficulty. In an attempt to counteract those statements, the company instructed its sales representatives to respond to inquiries regarding the company's financial status with statements including that Cade had been terminated for acts involving dishonesty. Thereafter, Cade amended his complaint to add a claim for defamation. The company tendered the defamation claim under its CGL policy and the insurer refused to defend. In the ensuing coverage action, the insurer argued that the employment-related practices exclusion applied to the defamation claim because the claim arose out of the employment relationship. The trial court agreed.

On appeal, the Ninth Circuit recited that the insurance carrier bears the burden of bringing itself within a policy's exclusions and that exclusionary clauses are construed to protect the policyholder's reasonable expectation of coverage. The court held that, even though the content of the statements was directed to Cade's employment, the statements were not made in the context of his employment. The court further held that, because the statements were made in defense of the company's position in the marketplace, "[w]hile it may be literally true that the remarks 'related' to Cade's employment, that relationship was too indirect and attenuated to qualify under the exclusion."

Similarly, the court in *Great American Ins. Co. v. Hartford Ins. Co.*, 85 Ohio App. 3d 815, 621 N.E.2d 796 (Ohio App. 1993), held that a former employee's allegations of invasion of privacy that took place after his

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Update: The Insurance Aftermath of Hurricane Katrina

by: Jenifer J. Liu

Two years after the devastation of Hurricane Katrina, insurance companies have paid an estimated $40.6 billion to policy holders on approximately 1.7 million claims for damage to homes, businesses, and vehicles.[1] As a consequence, insurance premiums have reached an all time high, and some view insurance costs as the "'third storm' to hit the region—behind Katrina itself and the legal disputes over insured damage.[2]" Take for example, Citizens Property Insurance Corp., Florida State's insurer of last resort that suffered heavy losses during 2004 and 2005, who subsequently hit its own policy holders with $2.7 billion in premium surcharges.[3]

Curiously enough, in the midst of such a costly environment, private insurance companies have been able to generate profit. For the year 2005, the private insurance industry recorded profits of $43 billion and in 2006, $64 billion. Perhaps the profits can be attributed to the settlement of almost 95% of the Katrina-related claims (according to insurance industry statistics) by paying policyholders much less than the actual insured loss; or perhaps, it is because insurance companies have diverted their financial costs and liability to state and federal governments. Likely, the answer is a combination of both.

Indeed, the notoriety of insurance companies for making low-ball payments on insurance claims is such that state agencies actually monitor the payments made by insurance companies. Policyholders in Louisiana, for example, can file a complaint of a low insurance award with the Louisiana Department of Insurance who, after an investigation and determination that the complaint is legitimate, will negotiate a higher payment amount with the insurance company on the policy holder's behalf. Whether the state agency is an efficient mechanism

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Case Highlights by Daniel Dorfman

These summaries are not intended to be an exhaustive analysis of legal developments in the insurance field. Rather, they are an overview of recent "highlights" of developments in selected states. Should the need arise, Howrey is able to assist its clients in a more detailed analysis of recent legal developments pertaining to insurance coverage in any state.

OHIO

Insurer obligated to defend policyholder for allegations arising out of trade dress and trademark infringement.

Westfield Ins. Co. v. Factfinder Marketing Research, Inc., 860 N.E.2d 145 (Ohio App. 2006).

Factfinder Marketing Research, Inc. and its proprietor, Ralph McGinnis ("Factfinder"), entered into a licensing agreement with a competitor, Message Factors, Inc. ("MFI"), for exclusive use of MFI's proprietary methods, trade dress and trademarks related to market research services. After MFI canceled the licensing agreement, it sued Factfinder for breach of the license agreement, misappropriation of trade dress, trademarks, and proprietary methods.

Factfinder tendered its defense to Westfield Insurance Company ("Westfield"), its business owner's liability insurer. Factfinder argued that Westfied was required to provide a defense because MFI was seeking damages for "adverting injury." Although Westfield agreed to defend, it did so under a reservation of rights and subsequently filed a declaratory judgment action seeking a finding that it had no duty to defend. The trial court granted summary judgment for Westfield, and held that the claims brought against Factfinder were not covered. Factfinder appealed.

In determining whether Westfield had a coverage obligation, the appeals court explained that it must determine whether (1) the underlying complaint states a claim for an offense covered under the adverting injury provision of the business owner's policy and (2) whether the alleged advertising injury was caused by Factfinder in the course of advertising.

Upon review of the underlying complaint, the appeals court held that the underlying complaint did state a claim for an offense covered under the advertising injury provision. MFI sought damages for trade dress and trademark infringement, as well as unauthorized used of trade secrets. Specifically, MFI alleged that Factfinder violated the licensing agreement by providing market research services that used licensed material without paying a licensing fee. These reports, according to the underlying complaint, had the "appearance, feel, content manner of presentation, manner of analysis and terminology of MFI reports and incorporated MFI's trade dress." Based on these allegations, the appeals court concluded that the trade dress and trademark infringement claims arguably fall within the "advertising injury" provision because they constitute a claim for the misappropriation of advertising ideas or style of doing business. However, as to the allegations of trade secret misappropriation, the appeals court found that the advertising injury provision is not triggered because the underlying complaint alleges misappropriation of advertising ideas, "not secret ideas for advertising the products and services."

After determining that some of the claims in the underlying complaint potentially trigger coverage, the appeals court then determined whether Factfinder committed the advertising injury in the course of advertising. The appeals court found that trade dress and trademark infringement inherently involve advertising because one must clearly advertise the mark or dress in order to allegedly infringe. As such, the appeals court held that Westfield was required to defend Factfinder under the business owner's policy.

INDIANA

The Indiana Court of Appeals held that a chose in action arises as soon as the

occurrence takes place and thus rejects the California Supreme Court's Henkel opinion holding that a chose in action does not arise until a sum of money is due.

Travelers Cas. and Sur. Co. v. U.S. Filter Corp., 870 N.E.2d 529 (Ind. App. 2007).

The Plaintiffs, U.S. Filter and Waste Management, sought coverage for liability arising out of bodily injury claims allegedly caused by exposure to silica under insurance policies that were issued to predecessor or affiliate companies. Beginning in 1932, Plaintiff's predecessors and affiliates manufactured a product called the "Wheelabrator blast." The Wheelabrator blast mechanically cleaned pieces of metal. However, the by-products of this machine—mixed dust—was linked to the development of silicosis, an occupational lung disease.

The Plaintiffs filed a declaratory judgment action against various insurers seeking coverage for these underlying product liability lawsuits claiming rights to coverage by way of their predecessors' interest. Insurers admitted to having issued the liability policies to Plaintiffs' corporate predecessors, but denied coverage. On motions for summary judgment, the trial court granted U.S. Filter's motion and found that it had a right to insurance coverage under the various insurance policies. Insurers appealed.

Insurers argued that U.S. Filter may not claim an interest in these insurance policies because the corporate transaction under which U.S. Filter claims coverage, by way of its predecessors' interest, did not comply with the consent-to-assignment clause. These clauses require any assignment of interest in the liability policies to be first consented to by the insurer prior to binding the insurer to the new assignment of interest. U.S. Filter admits that no consents were sought or obtained during the relevant corporate transactions.

The appeals court held that the issue is not whether U.S. Filter complied with the consent-to-assignment clause, but rather whether the right to coverage arises from an injury that occurred during an insurers' policy period. The appeals court continued, "[s]uch a right would constitute a chose in action, which is a property right in personam, such as debt owed by another person or a claim for damages in tort or a right to bring an action to recover a debt, money or thing." The appeals court addressed the question "when does a chose in action become an enforceable right"? This was the same issue the California Supreme Court faced in *Henkel Corp. v. Hartford Accident & Indemnity Co.*, 29 Cal. 4th 934 (2003). In *Henkel*, the California Supreme Court held that no chose in action existed at the time of the corporate transfer because the claims "had not been reduced to a sum of money due or become due under the policy...."

In disagreeing with the *Henkel* holding, the appeals court held that a chose in action arises under a occurrence-based insurance policy at the time of the covered loss, not at the time the loss is reduced to a defined amount of recovery. The appeals court explained that, "[here], the underlying claimants' continuous or repeated exposure to silica and other conditions that caused injury during the policy period triggered a right under the policy; a right in the insured to seek indemnification under the policies. This right was a fixed claim, i.e. a chose in action, and was freely transferable asset." As such, although the consent-to-assignment clause may prevent the transfer of the *insurance policies* to Plaintiffs, this clause does not prevent U.S. Filter from seeking coverage from insurers for losses that occurred during the insurers' policy period. Stated differently, the consent-to-assignment clause applies to assignments before a loss, but does not prevent an assignment after a loss, "for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising thereunder … ."

ILLINOIS

Under the New York Convention, in the absence of choice-of-law provisions in an international agreement, federal common law, opposed to state law rules of decision apply to strictly enforce contractual deadlines even where deadlines fall on a weekend or legal holiday.

Certain Underwriters At Lloyd's London v. Argonaut Ins. Co., No. 06-3395, 2007 WL 2433139 (N.D. Ill. August 29, 2007).

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Certain Underwriters at Lloyd's London ("Underwriters"), a reinsurance syndicate whose participants include citizens of the United Kingdom, entered in to a reinsurance contract (the "contract") with Argonaut Insurance Company ("Argonaut"), a California-based insurer. According to the contract, all disputes were to be arbitrated. Specifically, the contract mandated the following procedure in order to pick three arbitrators: one chosen by each party and the third chosen by the two party arbitrators. The contract provided that if "either party refuses or neglects to appoint an arbitrator within thirty days after receipt of written notice from the other party requesting it do so, the requesting party may nominate two arbitrators, who shall choose the third."

On August 4, 2004, after a dispute over coverage arose, Argonaut sent Underwriters a demand for arbitration and a request that Underwriters name its arbitrator. On August 6, 2004, Underwriters nominated its arbitrator and sent a demand for Argonaut to name its arbitrator. Argonaut's thirty-day limit to nominate an arbitrator landed on Sunday, September 5, 2002. Argonaut did not nominate its arbitrator on that day. Neither did Argonaut nominate its arbitrator the following day, Monday, September 6, 2002, as that was Labor Day in the United States, where Argonaut is located. On September 6, 2002, however, Underwriters faxed a letter to Argonaut invoking the default provision of the contract and naming a second arbitrator. Argonaut objected and argued that it was not bound by the strict thirty-day deadline because its terminus was a Sunday followed by a legal holiday, thus it was allowed to nominate its arbitrator on Tuesday, September 7, 2002. Underwriters filed a petition in the Northern District of Illinois seeking a confirmation of the appointment of its two nominees under the contract.

Thereafter, Argonaut sent a letter to Underwriters notifying it was withdrawing its demand "without prejudice." Argonaut also filed a Rule 12(b)(1) motion seeking to dismiss the district court case for lack of jurisdiction. In granting summary judgment for Underwriters, the district court held that it had jurisdiction under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and that Argonaut could not circumvent Underwriters' right to nominate the second arbitrator by ending the first arbitration "with a clear intent to begin a new one." The district court also held that federal common law applied to provide the rule of decision, opposed to state law, because of the need for unitary standards by which International agreements are enforced. Argonaut appealed.

The Seventh Circuit agreed with the district court. The issue presented to the Seventh Circuit was whether an international agreement under the New York Convention, which contains no choice of law provision, should be interpreted under state law or federal common law rules of decision. Importantly, if state law is applied, there may be variants in whether weekend or what legal holidays are excluded in determining time frames under international agreements.

The Seventh Circuit, in reviewing the purpose of the New York Convention, noted that the contracting nations to this Convention "shared [an] understanding of the necessity for uniform rules to facilitate efficient international arbitration." To this end, applying varying state standards in cases falling within the New York Convention would be in tension with the need for uniformity. Therefore, in the absence of a choice of law provision, federal common law applies, as there is a federal interest in consistent and uniform interpretations of international agreements governed by the New York Convention.

As such, the Seventh Circuit concluded under federal common law that the parties are bound to the explicit language of the contract, with no state-specific exceptions that would extend contractual deadlines due to weekends or legal holidays. "Thirty days must *mean* thirty days. When the end of the thirty days falls on a Saturday, Sunday, a national holiday or a state or parochial holiday, the parties will be bound nonetheless to comply with the deadline for which they bargained."

The Forum Decision

Superior Court Judge Richard Cooch denied the excess insurers' motion to dismiss or stay the Delaware case under *McWane v. Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co*., 263 A.2d 281 (Del. 1970) in favor of the previously-filed Canadian proceedings because the Court was "not sufficiently confident" that the Canadian court could provide the parties with "prompt justice," a *McWane* requirement. *STMG* Forum decision at 2, 14. Because the "prompt justice" requirement was not met, the Court found it did not need to decide whether the other *McWane* requirements, such as a substantial identity of issues and parties, were met. *Id*. at 14.

The Court likewise denied the carriers' motion to stay or dismiss the Delaware case on *forum non conveniens* grounds, finding that this was not one of the "rare cases" in which a plaintiff's choice of forum should be defeated. *Id*. Examining five relevant factors set out by the Delaware Supreme Court in *General Food Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964) on motions to dismiss or stay on forum non conveniens grounds, the Court found that the insurers had not met their burden of proving hardship if the case was litigated in Delaware. The insurers had not identified specific pieces of evidence that could not be produced in Delaware or witnesses that could not be compelled to testify in Delaware. By contrast, the Canadian court's ability to compel witness testimony and order third-party discovery was more limited than a Delaware court's ability. *STMG* Forum decision at 16-17. The Court found that, even assuming Canadian law might apply (which was disputed by plaintiffs), that factor was entitled to little weight because Delaware Courts frequently applied the law of other states and foreign countries. *Id*. at 17. Rejecting the insurers' contention that Delaware had "little, if any, interest" in the dispute, the Court noted that Delaware had a significant interest in making its courts available to resolve commercial disputes involving Delaware companies. *Id*. at 18.

The Defense Costs Decision

STMG and its nine former officers and directors moved for partial summary judgment relating to the excess insurers' obligation to defend an Illinois securities class action. The policy at issue requires advancement of defense costs prior to the final disposition of the claim. However, the excess carriers refused to pay defense costs arguing, among other things, that 1) the "personal conduct" exclusions barred coverage, and 2) the insureds had breached the cooperation and consent-to-settle provisions in the policy by settling a separate action.

The Court granted the motion for partial summary judgment. *STMG* Defense Costs decision at 3. First, the Court rejected the insurers' argument that a plea

The insurers had not identified specific pieces of evidence that could not be produced in Delaware or witnesses that could not be compelled to testify in Delaware.

by David Radler, a former officer and director, was imputed to STMG and triggered "personal conduct" exclusions. *Id*. at 28-29. The Court relied upon the fact that the plea was not co-extensive with the allegations in the Illinois securities class action and the fact that the policy contemplates advancement. *Id*. Second, the Court held the cooperation clause and consent-to-settle provision were not breached. *Id*. at 30-32. The Court found that the excess insurers could not rely upon the cooperation clause because they had reserved their rights (*id*. at 31), reasoning that an insurer that reserves its rights "should not have 'veto' power over the settlement process." *Id*. Similarly, the consent-to-settle provision applied only to insurers that were actually funding the settlement. *Id*. at 32.

The Court also rejected the insurers' argument that the former directors had no claim for defense costs as a matter of law because STMG is indemnifying them pursuant to the corporate by-laws. In order to obtain declaratory relief, the Court held it was sufficient that the former directors were incurring defense costs. *Id*. at 26. Further proceedings were ordered to determine the amount of defense costs to be paid.

termination, and after he had filed a claim with the civil rights commission, triggered the defense coverage of a CGL policy. The former employee alleged that the employer threatened to publicly disclose private facts about the employee if he did not drop his employment-related claims. The court held that "the invasion of privacy claim may not arise out of 'discrimination or humiliation' directly or indirectly related to [the employee's] employment but may be found to arise out of threats made subsequent to [his] employment" and that the employment-related practices exclusion would not defeat the insurer's duty to defend.

In *Golden Eagle Ins. Co. v. Rocky Cola Cafe, Inc.*, 94 Cal. App. 4th 120 (2001), the court held that a CGL carrier had a duty to defend against a complaint that alleged causes of action for sexual harassment, retaliation, intentional infliction of emotional distress, defamation, wrongful termination, and negligent hiring and supervision. The complaint against Rocky Cola alleged that following the employee's attempt to curtail a consensual sexual relationship with a supervisor, the supervisor harassed her and communicated to numerous other persons that the employee was sexually promiscuous and "by use of sexually aggressive tactics, maneuvered him into an unwanted sexual relationship in order to obtain on-the-job favors from him." The complaint further alleged that the employer republished the supervisor's remarks for its own purposes.

Rocky Cola tendered the claim to its insurer on grounds that the alleged defamatory statements arose out of the policyholder's business. The insurer argued that the same facts that made the claim arise out of Rocky Cola's business triggered operation of the employment-related acts exclusion. The court disagreed. Like the *H.S. Services* court before it, the *Rocky Cola* court recited that in many states, "coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured [and],

exclusionary clauses are interpreted narrowly against the insurer." The *Rocky Cola* court held that it was difficult to see how the supervisor's alleged statements were employment-related, because the employment-related practice exclusion is not interpreted so broadly. The court concluded that, because the alleged defamatory statements could not have been made in the context of the claimant's employment, and were not directed to her job performance, the alleged defamation was outside the scope of the exclusion. See also *Low v. Golden Eagle Ins. Co.*, 128 Cal. Rptr. 2d 423 (2002).

There Is No Bright Line Rule

Notwithstanding the foregoing, neither the passage of time nor a pre/post-termination distinction alone is a satisfactory basis on which to make a decision regarding whether allegations of personal injury will trigger the defense provision of a CGL policy. The *H.S. Services* court held that "[i]t is entirely possible that post-termination, injury-causing acts or omissions, even months after termination, could arise directly and proximately from the termination or be so related" that the exclusion would be triggered.

Similarly, in *Frank and Freedus v. Allstate Ins. Co*., 45 Cal. App. 4th 461 (1996), the court held that the employment-related practices exclusion applied. In that case, a lawyer had been terminated and brought a lawsuit alleging that the firm terminated him "because he was gay and had tested positive for HIV." The lawsuit also included a cause of action for defamation based on statements allegedly made by a partner in the law firm after the lawyer had been fired. The complaint alleged that the partner attempted to address concerns regarding staff morale by instructing the office administrator to inform the staff that the "real reason" the employee was fired was "failure to perform and develop as an associate." The *Frank and Freedus* court held that, because the remarks were alleged to have been regarding the termination and to address issues important to it as an employer, the employment-related practices exclusion of the CGL policy applied to those allegations. See also *Buyers Home Warranty Co. v. General Agents Ins. Co.* of Am., 2001 WL 1469083; *Pace Integrated Systems, Inc. v. RLI Ins. Co.*, 169 Fed. Appx. 514 (9th Cir. 2006).

CGL Policies Frequently Cover Employee Benefit Liability

Although CGL coverage forms expressly exclude employment actions and ERISA claims, many companies purchase endorsements for "Employee Benefits Liability." Many of those companies, and their brokers, do not know that they have this coverage or do not understand what it covers. The market includes both "claims made" and "occurrence" versions of the endorsements, and the differences may be very important. A full discussion of application of the endorsement is beyond the scope of this article, but employers facing employment related actions should at least take time to fully examine their policies to determine whether such endorsements have been purchased.

Conclusion

Employers who are sued for employment-related causes of action and their lawyers should review both the complaints and their insurance policies, including CGL and D&O policies, with care. There may be more coverage available than first appears.

for resolving insurance claims is to be seen but in 2006, the Department did receive 4,700 formal complaints.

The propensity of insurance companies to offer absurdly low payments or even to flatly deny claims citing flood exclusions has spurred a flush of litigation. Although the Insurance Information Institute estimates that only two percent of Hurricane Katrina insurance claims are being disputed through either mediation or litigation, the disputed claims have received extreme media attention and appear numerous.

Although the Insurance Information Institute estimates that only two percent of Hurricane Katrina insurance claims are being disputed through either mediation or litigation, the disputed claims have received extreme media attention and appear numerous.

As of July 27, 2007, there were 537 lawsuits pending against insurers in Mississippi, including one brought by the Mississippi State Attorney General on behalf of state policy holders alleging that insurance companies wrongfully denied their claims. In Louisiana, 3,700 insurance-related lawsuits are pending in the federal district court. Cases that have been decided have emerged with varying results.

We earlier reported a significant victory for Hurricane Katrina policyholders in RISK's 1st Quarter of 2007 newsletter when the Eastern District of Louisiana found that ambiguity with respect to the term "flood" existed in the exclusions of certain all-risk insurance policies. In re *Katrina Canal Breaches Consol. Litig.*, Civ. A. No. 05-4182, 2006 U.S. Dist. LEXIS 85777 (E.D.La. Nov. 27, 2006). The District Court could not determine whether the insurance policies' flood exclusions intended "flood" to include both "man-made" floods and natural occurring floods. Thus, the District Court refused to apply the flood exclusions to damage suffered by policyholders who asserted damage based on "man-made" floods. The Eastern District of Louisiana's decision was a beacon of relief for policyholders and was projected, "[i]f upheld,…[to open] the door to billions of dollars in coverage for [plaintiff] policyholders."

On August 2, 2007, however, in an expedited appeal, the Fifth Circuit overturned the District Court's decision. Disagreeing with the lower court's finding of ambiguity in the term "flood," the Fifth Circuit held that "the flood exclusions in the plaintiffs' policies unambiguously preclude their recovery." In re *Katrina Canal Breaches Litig.*, Civ. A. No. 07-30119, 2007 WL 2200004, at *1 (5th Cir. Aug. 2, 2007). Thus, the Fifth Circuit found that insurance companies properly denied the payment of claims for damages arising from the levee breach to which the flood exclusion applied.

In a case with a different outcome, a Southern District of Mississippi Judge found that denial of a claim based upon total reliance of the flood exclusion was evidence of bad faith on the part of the insurance company. The District Court found that punitive damages were warranted because under Mississippi law, "an insurer has a continuing duty to act reasonably and in good faith in investigating and paying legitimate claims under its policies." *Broussard v. State Farm Fire and Casualty Co.*, Civ. A. No. 06-6 (LTS), 2007 WL 113942, at *3 (S.D.Miss. Jan. 17, 2007). The Court thus awarded the plaintiff couple $211,222, the amount recoverable under their insurance claim, and left the determination of punitive damages to the jury. The jury returned with an astounding award of $2.5 million. Ultimately, the Court reduced the award to $1 million but it was clear from the result that policy holders have a powerful ally in juries.

This was confirmed when a jury decided on September 28, 2007 that damage to a landmark home in Bay St. Louis, Mississippi, was caused by wind damage and not a storm surge as the insurer contended. *Webster v. USAA Casualty Ins. Co.*, Civ. A. No. 05-00715 (LTS) (S.D.Miss. Sept. 28, 2007) (special interrogatory finding). The same evening the jury's decision was released, the parties settled for an undisclosed amount.

Insurance companies have been quick to attribute

damage to flood rather than wind because most insurance policies have flood exclusions. In addition, federally insured flood damage is recoverable under the federal government's National Flood Insurance Program. The National Flood Insurance Program has reportedly paid around $15.7 billion in federal flood insurance claims related to Hurricane Katrina, more than a third of what the private insurance industry has paid in total. Indeed, a Louisiana whistleblower suit under the False Claims Act charges insurance companies with intentionally attributing damages to flooding so as to purposefully divert claims to the federal National Flood Insurance Program while also underestimating wind damage.

In a Congressional Hearing on a proposed bill to add wind coverage to the federal flood insurance program, the surreptitious behavior of insurance companies was duly noted. Congressman Gene Taylor (D-Mississippi) cited an internal company memo of State Farm which instructed employees that all claims would be paid as flood claims because flood claims were paid by the federal government, even if the damage was caused by wind. The multi-peril bill passed in the House on September 27, 2007 and now faces the Senate and a probable Presidential veto. If the bill passes, our country will take another step in the direction of the shift from private insurance to public insurance.

[1]"Hurricane Katrina: Fact File 2007," Insurance Information Institute, available at http://www.iii.org/media/research/katrinafacts07 last visited 10/4/07.

[2]Chu, Kathy, "Insurance Costs Become 3rd Storm," USA Today, available at http://www.usatoday.com/money/perfi/insurance/2007-04-02-gulf-recovery-usat_N.htm last visited 8/6/07.

[3]Pleven, Liam, "Hurricane Warnings. As Insurers Flee Coast, States Face New Threat, 'Last Resort' Carriers Could Shift Liability to the Broader Public," The Wall Street Journal Online, June 7, 2007, available at http://online.wsj.com/article_print/SB118118169877827318.html last visited 6/21/07.

[4]*Risk, 1st Quarter 2007, p. 2.*, "Significant Victory for Hurricane Katrina Policyholders" by Koorosh Tlieh and Averitt Buttry.

HOWREY LLP INSURANCE IN THE NEWS

Speaking Engagements

Mary Craig Calkins (Los Angeles) will be a Panelist, "Insurance as a Climate Change Risk Management Tool" at the "Managing the Legal Liabilities and Regulatory Risks of Climate Change," *American Conference Institute, Advanced National Forum*, New Orleans (November 30, 2007).

On October 15, 2007, **Dave Steuber** (Los Angeles) presented a Mock Oral Argument, "Adopting An All Sums or Pro Rata Approach" at Mealey's Scope of Coverage Conference: All Sums Versus Pro-Rata Allocation, Methods of Exhaustion, Reallocation and Settlement Credits on October 15, 2007.

Awards and Honors

On July 30, 2007 **Mary Craig Calkins** (Los Angeles) was listed in Business Insurance, "Women to Watch."

Howrey congratulates **James Bernald** (Los Angeles) and **Tara Kowalski** (Los Angeles) on their promotion to Senior Associate.

Published Articles

Michael Turrill co-authored with **Tara Kowalski** (LA), "*Fiduciary Duties in Limited Partnerships: A Necessary Legal Protection or an Interference with Freedom of Contract Principles*" in ***ABA Section of Litigation Business Torts Journal*** (08/01/2007)

Ty Childress' (Los Angeles) article "Minimize Coverage Disputes With Better Communication" was the featured article in the June 2007 issue of IRMI's The Risk Report.

News Coverage

Jill B. Berkeley (Chicago) was quoted in "Client shift pushes some insurance lawyers out of firms," *National Law Journal* (10/08/2007).

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