CUG.COMments

A Newsletter from Chicago Underwriting Group, Inc.
Underwriters of D & O and Professional Liability Insurance

Issue 75 **July 2011**

WHATEVER HAPPENED WITH … ?

In this issue … we revisit some items from previous newsletters to see what has developed.

1. CUG.COMMENTS ISSUE 69, JULY 2010

Item: Under Dodd-Frank, a federal insurance office is to be set up, with a director of that office to be named.

Development:

The first Director of the Federal Insurance Office was finally named during a meeting of the Financial Stability Oversight Council on March 17, 2011. The director will be Michael McRaith, formerly the Director of the Department of Insurance for the State of Illinois.

Coming from a position within the current state regulatory system, it will be interesting to see Mr. McRaith's required reports on how that system could be modernized and improved. The insurance industry's reactions to the appointment have been generally favorable.

2. ISSUE 70, SEPTEMBER 2010

Item: the Basel Committee on banking supervision and the Basel III proposals

Development:

The Basel III proposals for banking capital adequacy were endorsed by the G20 leaders in November 2010. They now must be translated into national laws and banking regulations.

The Basel III framework continues to be attacked by some as being too punitive to banks and by others as not tough enough:

> *We find that the amount of equity capital that is likely to be desirable for banks to hold is very much larger than banks have held in recent years and also higher than targets agreed under the Basel III framework. (Bank of England Discussion Paper No. 31)*

The turmoil in the worldwide banking sector is not over, and it is quite possible that the Basel III requirements could undergo further adjustments at the national level.

3. ISSUE 72, JANUARY 2011

Item: the movement to eliminate tax advantages enjoyed by offshore-domiciled reinsurers (the "Neal Bill").

Development:

The federal budget for the 2012 fiscal year (October 2011 through September 20, 2012) was introduced by President Obama on Feb 14, 2011, and did include a refined (some say "super-charged") version of the Neal Bill. The issue therefore remains up in the air until the budget is finalized.

4. ISSUE 73, March 2011

Item: The Securities and Exchange Commission (SEC) is getting ready to announce the final rules on whistleblowing.

Development:

Scheduled to be released by the SEC on April 17, 2011, the final rules on implementing the whistleblowing provisions of Dodd-Frank were eventually made public over a month later on May 25. By a 3-2 vote, the SEC commissioners essentially preserved the ability of potential whistleblowers to bypass their company's internal reporting and compliance process. The final rules do contain incentives for internal reporting, but these incentives fall short of the mandatory internal reporting that opponents of the rules were seeking.

5. ISSUE 74, MAY 2011

Item: The case of Erica P. John Fund v Halliburton Co is being heard by the Supreme Court: Should courts consider the merits of a securities litigation case when ruling on class certification?

Development:

The case was decided on June 6, 2011 shortly after the newsletter was distributed. In a rare unanimous opinion delivered by Chief Justice Roberts, the Court reversed the Fifth Circuit decision and found that the merits of a case should not impact the class-certification process:

> *To prevail on the merits in a private securities fraud action, investors must demonstrate that the defendant's deceptive conduct caused their claimed economic loss. This requirement is commonly referred to as "loss causation." The question presented in this case is whether securities fraud plaintiffs must also prove loss causation in order to obtain class certification. We hold that they need not.*

The Fifth Circuit had affirmed the district court denial of class certification holding that loss causation must be proved to obtain class certification. This was inconsistent with other federal circuits; as attorneys for Erica P. John Fund stated in their original petition to the Supreme Court, "The Fifth Circuit is the only court that requires plaintiffs to prove loss causation in order to trigger the fraud-on-the-market presumption at class certification. Its rule has been rejected by the Second, Third, and Seventh Circuits." This decision brings the Fifth Circuit in line with those other circuits, and provides a clear signal to all circuits.❖

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