

A NEWSLETTER FROM
MANNHEIMER SWARTLING

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Insurance bulletin



LEGALLY RESPONSIBLE

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Recent developments

THE TURNER REVIEW

A review carried out by the Chairman of the British FSA, Lord Turner, (the "Review") examining the reasons behind the global financial crisis has been recently published.

Whilst the Review deals principally with the banking sector it provides a detailed explanation of the fundamental causes of the current financial crises. The Review identifies the following key causes:

- **Macro economic imbalances** in respect of the largest nations' (in economic terms) surpluses or deficits helped drive the rapid growth in credit extension and an exaggerated search for yield.
- **Financial market innovation** in the form of new and complex products, inter alia credit default swaps, were imperfectly understood and monitored. In particular, the Review states, overconfidence in sophisticated mathematical models such as the Value At Risk method resulted in a failure to control risk and a false sense of assurance.
- There were **deficiencies in the current regulation and supervision models** where global banks are supervised by national authorities. The Report refers to a statement by the Governor of the Bank of England, Mervyn King, that "global banking institutions are global in life but national in death". Hence, when crises occur, national central banks are the lender-of-last-resort and national governments provide fiscal support. If there is a failure, bankruptcy procedures are dealt with at a national level and it is essential to identify which legal entity the creditor should claim against.

The Review then discusses potential courses of action to avoid future crises from occurring, or at least from reaching a similar magnitude. The proposals are – at this stage – principally dealing with regulation



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and supervision of banks. However, it is likely that if the suggestions are implemented for banks, at least some will also be applied to insurance companies. The following suggestions are of potential relevance to the insurance sector:

- Need for a systemic approach
- Fundamental changes to capital, accounting and liquidity requirements
- Other important changes: credit ratings, remuneration and counterparty risks
- A new approach to supervision: more intrusive and more systemic
- Governance and risk management: firm responsibilities and structures
- The regulation and supervision of cross-border banks: globally and within Europe.

It remains to be seen which – if indeed any – of the suggestions in the Report will ultimately be implemented. Some of the proposed amendments would have a significant impact if they were also implemented for insurers and we will therefore follow developments closely. The Report can be found at www.fsa.gov.uk

BY FREDRIK FORSSTRÖM

From the courts

INTERPRETATION OF INSURANCE CONTRACTS

(Case No. T-6393-08, Svea Court of Appeal)

As a result of an increase in temperature in its cold storage room, the insured florist company suffered damage as the cut flowers it was storing had to be discarded. The insured had installed an operational alarm that should trigger an alarm signal in the storage room as well as dial two separate telephone numbers to the owner in case of an increase in temperature. The owner was however travelling on the day in question and no call reached him, probably due to network problems.

The insured sought compensation under the terms of an all-risk insurance policy. According to the policy wording, compensation was payable if the insured had installed an operational alarm and if such alarm was “in service and in working order”.

The insurer who recognized that the policy did not require that the alarm signal could be forwarded outside the premises, asserted that the purpose of the policy wording “in service and in working order” was that someone always could be reached by the alarm.

By considering the policy wording and the purpose behind it as well as what objectively would be a reasonable and fair result, the district court ruled, and the court of appeal confirmed, that “in service and in working order” could not be interpreted to mean that the alarm must reach someone at any time. Instead the district court found that the wording “in service and in working order” shall mean that the alarm merely is switched on and in working order. In the district court’s opinion, both these criteria were at hand in the present case. The court also noted a contradiction in the argument put forward by the insurer, i.e. that there was a requirement that the alarm could reach someone at all times although it did not follow from the

policy terms that the alarm signal could be forwarded outside the premises.

In conclusion, the court found no support in the policy wording for the somewhat contradictory interpretation made by the insurer. This is not to say that the courts based their reasoning on the *in dubio contra stipulatorem* principle (i.e. that an unclear or ambiguous contract term should be construed against the drafter, in this case the insurer). The reasoning in this case seems to be in line with the precedent from the Supreme Court, which states that the application of the *contra stipulatorem* principle should only be used as a last resort. It may be noted that the application of the *contra stipulatorem* principle should have led to the same result achieved by the courts in the present case.

BY HANS HAMMARBÄCK & ROSMARIE SÖDERBOM

TIME-BAR OF RECOURSE CLAIMS BETWEEN INSURANCE COMPANIES

(Case No. T-4825-07, Supreme Court)

In a recent judgment, the Supreme Court found that the relevant starting point for calculation of the time bar period in traffic-related recourse claims between insurance company is when settlement is reached.

The facts of the case were that two cars were involved in a traffic accident in 1991 where one driver (“Driver A”) was insured by ‘If Skadeförsäkringar’ (“IF”) whilst the other driver (“Driver B”) was insured by Motor Union. The insurance companies agreed that the accident was caused by Driver B, and Motor Union reimbursed IF for the payments IF had made to Driver A. In 1998, Driver A claimed compensation under the insurance for personal injuries resulting from the traffic accident. IF rejected the claim and was sued by Driver A. In connection herewith, IF gave a notice of claim to Motor Union. A few months later, IF and Driver A reached a settlement and IF put forward a recourse claim against Motor Union for the settlement amount. Motor Union objected that the claim was time-barred. IF therefore sued Motor Union for the settled amount. Under the Traffic Damage Act (Sw. Trafikskadlagen) a recourse claim is time-barred if it is not made within three years from receiving knowledge of the original claim. The key question concerned the timing at which IF should be considered to have gained knowledge of the claim for personal injuries – was it when the claim was made in 1998 or when the settlement was reached in 2002?

The District and Appellate Courts held that the claim was indeed time-barred but IF appealed to the Supreme Court, which granted leave to appeal. The Supreme Court held that a claim from an insurance company differs from that of an injured individual since the individual receives knowledge at the time of injury, while the insurance company cannot have knowledge of the payment to the injured, upon which the recourse claim is based, until a settlement with the injured is reached or a judgment is rendered. Hence, IF could not have had knowledge of the claim prior to such date as the settlement was reached. Less than three years had passed from when IF reached the settlement with Driver A to when IF submitted its recourse claim against Motor Union and the recourse claim was therefore not time-barred.

BY SAM SEDDIGH

AN INSURANCE MEDIATOR WAS NOT LIABLE FOR NON-PAYMENT OF PREMIUM

A private individual, (the "Claimant") had given the insurance mediator, EDP Assurance, (the "Broker"), the assignment to find a cheaper health insurance to replace the Claimant's current health insurance which was about to expire. The Broker accepted the assignment but could not find a better alternative than the Claimant's current insurance. It was uncontested that the Broker did not remind the Claimant that the current insurance was about to expire and that the Claimant had failed to pay the premium on time. The Claimant became ill a few days after the original health insurance policy had lapsed. He therefore sued the Broker, alleging that the Broker was in breach of its duty to act in accordance with good insurance mediation practice since it had failed to remind the Claimant of the expiration date.

The Claimant lost in the **District Court** and therefore appealed to the **Court of Appeal**, which found that this case had similarities with a previous Supreme Court ruling, NJA 1992 p 792, the so-called 'Södertälje Stadshotell' case. In that ruling, a client had instructed an insurance mediator to find a new insurance solution. The mediator did so and the client accepted. The client then failed to pay the premium on time and when a fire subsequently occurred, the insurer rejected the claim. The Supreme Court held that the mediator had not taken sufficient care in informing its client and was therefore liable.

Returning to the case at hand, the **Court of Appeal** found that the facts of the case before it were different from those in Södertälje Stadshotell in that the assignment to the Insurance mediator was not very specific and furthermore that the insurance mediator had not found a new insurance policy. Consequently the original insurance contract should have been renewed and the Claimant was well aware of when the policy period ended. The Claimant had also received two letters from the insurer, which had stated that the insurance was about to lapse. The Appellate Court therefore did not find the insurance mediator liable to the Claimant. The Court of Appeal decision was not appealed.

BY FREDRIK FORSSTRÖM

From the legislator

IMPLEMENTATION OF EC DIRECTIVES ON CROSS-BORDER MERGERS

The EC Directive 2005/56/EC on cross-border mergers within the EU was implemented in Sweden on 15 February 2008 for ordinary limited liability companies and cooperative societies. The Directive has not yet been implemented for corporations in the financial sector such as banking corporations and insurance companies. However, the Government has proposed (in a bill of 23 April 2009) that cross-border mergers should be possible for certain corporations in the financial sector, including banking corporations and limited liability insurance companies. On the whole, the proposed new rules correspond to the existing rules for cross-border mergers in relation to companies in the non-financial sector. As regards insurance companies it should be noted that the proposed new rules will not be applicable in relation to mutual insurance societies and that both

the surviving and the dissolved company must be limited liability insurance companies. The new rules are proposed to enter into force on 15 July 2009. It should be noted that, on the 4th of June this year, and following an application from the EU Commission, the European Court of Justice held that Sweden had not fulfilled its obligations regarding the implementation of the Directive. Sweden has conceded the Commission's action.

BY NIKLAS HAGBARD

NO STATUTORY AUDIT COMMITTEES FOR SWEDISH INSURANCE COMPANIES

The EC directive 2006/43/EC on the statutory audit of annual accounts and consolidated accounts will be implemented in Sweden on 1 January 2010. The implementation will lead to several amendments to the Accountants Act (Sw. Revisorslagen) and the Companies Act (Sw. Aktiebolagslagen). There will also be a few modifications in the Insurance Business Act (Sw. Försäkringsrörelselagen). However, the previously contemplated requirement for all insurance companies to implement separate audit committees was not effected and the implementation is therefore not anticipated to have any far reaching effect on the insurance companies.

BY SAM SEDDIGH

CAPTIVES AND SOLVENCY II

The draft Solvency II Directive initially envisaged the same treatment for all types of insurance and reinsurance companies and would thus include insurance companies operated by larger corporations to provide insurance for its own exposure ("Captives"). This led to concern amongst the owners of Captive insurance companies regarding their ability to meet some of the requirements in the Solvency II Directive, in particular regarding capitalization and the need for internal risk control functions.

However, the final outcome may prove to be significantly less onerous to the Captive owners than initially thought. The European Parliament has acknowledged the difficulties that the Directive may potentially impose on Captives and has proposed several amendments concerning, inter alia, technical provisions and governance. The Parliament states that whilst Captives are not to be excluded from Solvency II, their limited size and specific nature of the risks they assume means that a simplified form should be applied. Some of the more specific aspects of how the Captives will be regulated under Solvency II are still open for discussion; in particular the question of solvency capital calculation. The Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) is currently inviting comments from parties concerned. More information can be found at www.ceiops.org.

BY FREDRIK FORSSTRÖM

REVIEW OF THE INSURANCE BLOCK EXEMPTION REGULATION

The Insurance Block Exemption Regulation (Regulation (EC) No 358/2003) grants an exemption to the application of competition rules to certain types of agreements in the insurance sector. Four categories of agreements are currently covered by the regulation.

These are:

- Joint calculations, tables and studies
- Standard policy conditions (SPCs) and models on profits
- Common coverage of certain types of risks (pools)
- Security devices/safety equipment

The Regulation will expire on 31 March 2010. In March 2009 the Commission submitted a report to the European Parliament and Council on the functioning of the Regulation accompanied by a detailed Working Document on proposals for amendment in the light of the experience.

The Commission's preliminary findings, which are reflected in the Report and the Working Document, suggest that two forms of cooperation that are specific to the insurance sector, namely agreements in relation to joint calculations, tables and studies and co(re)insurance pools, should continue to be facilitated by an Insurance Block Exemption Regulation. The Commission is of the view that, even if the risk of non-cooperation in these areas may be low, the possibility of diminishing pro-competitive cooperation should be avoided. If the Commission decides to renew these exemptions it has expressed the view that it will consider whether their structure, scope and drafting should be amended.

The Commission also considers at this stage that neither agreements on SPCs nor agreements on security devices appear to be specific to the insurance sector. The Commission points out that SPCs are also agreed in other sectors, in particular in the banking sector, without the need for a Block Exemption Regulation. The Commission has stated that it may envisage guidance in this area in the event of non-renewal. Security devices and their installation currently benefit from guidance under the EU Guidelines on horizontal cooperation agreements.

On 2 June 2009, the Commission held a public event in order to hear further representations on the Report and accompanying Working Document. The Commission will now decide whether to renew or partially renew the Insurance Block Exemption Regulation. If it decides to renew any parts of it the Commission will consult on a draft regulation. If the Commission decides not to renew any part of it, it will publish a communication to that effect before the end of 2009.

BY SVEN VAXENBÄCK

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