MasudaFunai

Litigation Update

November 2008

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Improper Designation In Your Customers' Insurance Policies Could Be Disastrous

As a CFO or Credit Manager of a company that finances the sale of equipment or other personal property to a customer, you should make sure that your company's interest in that property is insured by your customer for the length of the financing and that your company is properly designated in the policy. The applicable contractual documents with your customer should require that your company be named on the customer's insurance policy as an "additional insured" and/or the correct type of "loss payee." There is much confusion associated with the insurance industry "loss payee" term and, depending on the situation, may not be the appropriate designation to protect your company's interest in the property. Indeed, many times both the company and the customer will confuse the "loss payee" term with the other insurance term, "additional insured." The two terms are very different. Confusing one with the other or being designated improperly in the policy could be a real problem if the property is damaged or destroyed during the term of the lease/loan.

A "loss payee" is an entity that will be paid if there is a "loss" as defined under the customer's applicable insurance policy. However, a covered "loss" may not include a loss caused by the customer. The company leasing/loaning the property will want to be paid by the insurance company regardless of any acts or omissions by the customer under the terms of the policy and no matter what the situation may be between the customer and its insurance company. That is where the proper designation of your company under the policy is of critical importance.

As the seller/financier of the property, the insurance proceeds that you think rightfully belong to you as a result of a "loss" may not, depending on whether your company has in fact been named a "loss payee" – not an "additional insured" – and the correct type of "loss payee." "Additional insured" status is different from a "loss payee." In many instances, you will want to be designated as both an "additional insured" and a "loss payee." As an "additional insured," your company would have coverage under the policy for injuries to a third-person caused by the property. However, being named an "additional insured" will not protect your company where the property is damaged or destroyed as a result of a fire, Act of God, or other covered peril. Instead, depending on the situation, the proper "loss payee" designation would be required. It is important for the CFO/Credit Manager to follow up with the customer to make sure that the company is named as a loss payee and un-

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der the correct category, usually entitled the "lender loss payee," for the applicable policy, so that the conduct of the customer is not taken into consideration, or is not a condition precedent to your company being paid proceeds under the policy by the insurer. It would be advisable to check with counsel to assist you in this rather tedious and confusing process.

This alert was prepared by Anthony J. Bruozas (abruozas@masudafunai.com). Please contact him or other members of Masuda, Funai's Litigation/Distribution Practice groups for more information.

Your Customers' Plan Of Reorganization May Release Your Third-Party Guarantor

As the Seventh Circuit has recently made clear in Airadigm Communications, Inc. v. FCC, bankruptcy courts have the discretion under Bankruptcy Code §524 to approve a release contained in a Plan of Reorganization of a party which did not seek bankruptcy protection. Such a non-debtor release is more likely to be approved by the bankruptcy court where the creditors do not object to the confirmation of the Plan or vote to approve the Plan. The adverse affect of such a release on a creditor's ability to pursue a non-debtor guarantor or other obligor of the debtor's debt, whether it is a corporate or individual guarantor, is obvious. Therefore, in the event one of your customers files for bankruptcy and attempts to discharge through a release included in a Plan or otherwise its debts to your organization but a third-party is also liable to your organization with respect to the same debt as a result of a guaranty or some other legal obligation, you should closely review the proposed Plan to make sure the debtor is not attempting to over-reach by including in the release/discharge of its general debts the debts of third-parties. Otherwise, you may find that your customer's bankruptcy filing has also foreclosed your ability to pursue third-party obligors such as guarantors.

This alert was prepared by Rein F. Krammer (rkrammer@masudafunai.com). Please contact him or other members of Masuda, Funai's bankruptcy group for more information.

Masuda Funai's Litigation Members in Action

Rein Krammer, Gerald Morel and Rey Tanig recently represented the estate of victims of an airplane crash and favorably settled an insurance claim in which the insurer initially refused to pay under the policy unless the decedents' estates first agreed to subrogate to the insurer the estates' rights in any recovery in the underlying airplane crash personal injury lawsuits. The insurance company was relying on language in the insurance policy as well as common law subrogation rights. The decedents purchased their airline tickets with a credit card which provided accident insurance as part of its customer benefits. After the estates filed their claims with the insurance company, the insurer attempted to subrogate the proceeds from any personal injury recovery arising from the airline crash based on the right of subrogation allegedly provided for in the underlying insurance policy and the common law. Messrs. Krammer, Morel and Tanig successfully raised and argued that, among other things, the insurance provided under the credit card benefits was effectively life insurance which was not subject to any express or implied subrogation rights. The insurer settled in favor of the decedents' estates and provided payments constituting over 97% of the amounts claimed from the insurer.

For more information about this or any other litigation law topic, please contact Gary Santella, Chair of the Litigation Group, at 312.245.7500 or via email at gsantella@masudafunai.com.

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About the Litigation Group

The Litigation Group at Masuda Funai provides a broad range of dispute resolution and litigation services, including trial and appellate representation in federal and state courts throughout the United States and before arbitration tribunals, mediation neutrals and administrative agencies. We are devoted to providing premier services to domestic and foreign clients involved in both simple and complex commercial disputes. We understand that each client has different legal and business goals, and we strive to work closely with each client to develop a strategy that meets those objectives.

About Masuda Funai

Masuda Funai has approximately 40 attorneys in three offices, located in downtown and suburban Chicago and Los Angeles. Our practice focuses on representing international companies operating and investing in the United States. We assist clients in every aspect of business, including establishing, acquiring, financing and selling operations and facilities; transferring overseas employees to the U.S.; hiring and managing employees from different countries; and structuring the distribution and sale of products and services throughout the U.S.

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