

# Nebraska Supreme Court Upholds Regulatory Exclusion

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The Supreme Court of Nebraska has affirmed a lower court's ruling that a regulatory exclusion in a D&O policy applied to the state director of insurance acting as liquidator for the policyholder insurance company and was not void as against public policy. *State ex rel. Wagner v. United Nat'l Ins. Co.*, 2009 WL 563151 (Neb. Mar. 6, 2009).

The insurers in this case issued excess D&O policies containing regulatory exclusions to a now insolvent insurer. The regulatory exclusion in the lower-level excess policy provided that:

This Policy does not apply to any Claims brought by or on behalf of any insurance regulatory agency or supervisory authority including but not limited to any state or local insurance department or Commission, or any state or local Insurance Guaranty or Insolvency Fund . . . including any type of legal or equitable action which such Agency has the legal right to bring as receiver, conservator, liquidator or assignee of the insured . . . whether such action or proceeding is brought in the name of such Agency or by or on behalf of such Agency in the name of any other entity(ies) or solely in the name of any third entity(ies).

The Nebraska director of insurance, acting as liquidator for the policyholder, filed a lawsuit alleging that the policyholder became insolvent due to the wrongful conduct and breach of fiduciary duties of its officers and directors. The liquidator also filed the instant action against the insurers asking that the court invalidate the regulatory exclusions in the policies. The lower court granted summary judgment for the insurers, ruling that the regulatory exclusion applied to the liquidator and was not void as against public policy.

On appeal, the court first ruled that plain language of the regulatory exclusion applied to the liquidator. The court rejected the liquidator's argument that the liquidator was an officer of the court, as opposed to an "Agency" or "authority" within the meaning of the exclusion. The court noted that the director of insurance is granted statutory authority to serve as liquidator and, while serving as liquidator, continues to carry out insurance regulatory and supervisory functions.

The court also rejected the liquidator's argument that the regulatory exclusion conflicted with the statutory

provisions granting the liquidator the right to enforce the rights of an insured, creditor or shareholder and blocked the liquidator's ability to carry out his or her statutory duties. Noting that the liquidator may still have a claim against the personal assets of the directors and officers, the court found no direct conflict between the provisions of the Liquidation Act and the regulatory exclusion. The court also found that no stated public policy addressed regulatory exclusions in Nebraska and that voiding the exclusion would undermine state policy supporting freedom to contract. Accordingly, the court ruled that the regulatory exclusion is not void as against public policy.