

Maurice A. Deane School of Law at Hofstra University

## Scholarship @ Hofstra Law

---

Hofstra Law Faculty Scholarship

---

1992

### Attorneys' Malpractice Policies: Regulatory Exclusions and Public Policy

Susan Saab Fortney

*Maurice A. Deane School of Law at Hofstra University*

Follow this and additional works at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship](https://scholarlycommons.law.hofstra.edu/faculty_scholarship)

---

#### Recommended Citation

Susan Saab Fortney, *Attorneys' Malpractice Policies: Regulatory Exclusions and Public Policy*, 109 *Banking L.J.* 116 (1992)

Available at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/444](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/444)

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact [lawscholarlycommons@hofstra.edu](mailto:lawscholarlycommons@hofstra.edu).

## ATTORNEYS' MALPRACTICE POLICIES: REGULATORY EXCLUSIONS AND PUBLIC POLICY

Susan Saab Fortney\*

*The courts have yet to decide the issue of the enforceability of provisions in legal malpractice insurance policies that specifically exclude from coverage claims made by government regulators such as the FDIC. The question has reached the courts with respect to such exclusionary provisions in directors' and officers' liability insurance policies, and here the courts are split. The author discusses the current case law and the statutory developments.*

The Federal Deposit Insurance Corporation (FDIC) is on a mission. Facing billions of dollars in losses from failed financial institutions, the FDIC has mounted an offensive to recover the losses from officers, directors, attorneys, accountants, and other persons who performed services for the institutions. In this effort, the FDIC has targeted attorneys.<sup>1</sup> As a result, legal malpractice insurers have experienced a virtual explosion of claims.

In response to the avalanche of claims against attorneys, legal malpractice insurers have sought to limit their exposure. These insurers have followed the lead of insurers that issued directors' and officers' liability policies containing exclusionary provisions, commonly referred to as FDIC exclusions or regulatory exclusions. These policy provisions specifically excluded claims made by government regulators such as the

---

\* Of counsel to the firm of Long, Burner, Parks, & Sealy, P.C., Austin, Tex. Currently, she is a J.S.D. candidate at Columbia University School of Law.

<sup>1</sup> See France, "Savings & Loan Lawyers," 77 A.B.A.J. 52, 55 (1991) (referring to 150 lawsuits against former counsel to failed thrifts); Kawasaki, "Liability of Attorneys, Accountants, Appraisers and Other Independent Contractors Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989," 42 Hastings L.J., 249, 267 (1990) (noting that the Bush administration has dictated a "get tough" philosophy on attorneys).

FDIC and the now-defunct Federal Savings and Loan Insurance Corporation (FSLIC).

Despite express exclusionary language in the directors' and officers' liability policies, the FDIC and FSLIC challenged the regulatory exclusions. The regulators claimed that the exclusions were unenforceable because they were contrary to public policy. A number of trial courts have ruled on the validity of regulatory exclusions under directors' and officers' liability policies. Some courts have been persuaded by the FDIC's myriad arguments and have declared that the regulatory exclusions are unenforceable because they contravene public policy. Other courts have held that no public policy abrogates the regulatory exclusions.

To date, there has been no reported decision on regulatory exclusions in legal malpractice policies. Therefore, the only guidance on the enforceability of such exclusions is the case law on regulatory exclusions in directors' and officers' liability policies. After discussing the current case law and statutory developments affecting directors' and officers' liability policies, this article will consider the applicability of public policy arguments to legal malpractice policies. Finally, the article will discuss the consequences of judicial rewriting of the policies to both insured attorneys and their clients.

#### **Case Law on Regulatory Exclusions in Directors' and Officers' Liability Policies**

As noted, there is a split of authority on the issue of enforceability of regulatory exclusions in insurance policies. An analysis of the cases reveals that the two camps have focused on different doctrines and principles of law. On one hand, those court opinions holding that the exclusions are unenforceable have emphasized public policy arguments for empowering the FDIC to recoup losses incurred in connection with failed financial institutions. On the other hand, those court opinions upholding the exclusions emphasize the parties' freedom to contract, finding no public policy that nullifies the regulatory exclusions.

*Cases Invalidating Regulatory Exclusions*

The line of cases that has held that the regulatory exclusions are invalid on public policy grounds began<sup>2</sup> with the opinion in *FDIC v. Oldenburg*.<sup>3</sup> *Oldenburg* arose out of a directors' and officers' liability policy issued by Federal Insurance Company (Federal) to State Savings and Loan Association (State Savings). After State Savings was declared insolvent, the FSLIC, as receiver of State Savings, brought an action against former officers and directors of State Savings. The FSLIC sought a ruling that the directors' and officers' liability policy issued by Federal and State Savings provided coverage for the pending claims against State Savings' former officers and directors. In response, Federal asserted that the claims against State Savings' officers and directors were specifically excluded by Endorsement No. 2 of the policy. Endorsement No. 2 read as follows:

It is understood and agreed that the company shall not be liable to make any payment for loss in connection with any claim made against the directors or officers based upon or attributable to any claim, action or proceeding brought by or on behalf of the Federal Home Loan Bank Board, any other similar organization, or any other national or state bank, regulatory agency, whether such claim, action or proceeding is brought in the name of such regulatory agency or by or on behalf of such regulatory agency in the name of any other entity.<sup>4</sup>

The court was not persuaded by Federal's arguments that the plain contractual language of the policy excluded the FSLIC's claims and that the parties to the contract freely bargained for the coverage provided by the terms of the policy.

---

<sup>2</sup> In an earlier opinion in *American Casualty Co. v. FDIC*, 677 F. Supp. 600 (N.D. Iowa 1987), the court denied summary judgment on the regulatory exclusion because the exclusion was ambiguous. Still, the court implicitly recognized the validity of such exclusion by stating: "If American Casualty had truly intended to exclude coverage for direct actions against the officers and directors by the FDIC, it would have been a simple matter to say so directly, rather than phrasing this exclusion in the cumbersome manner which it has." *Id.* at 604. This indicates that the court may have enforced an unambiguous regulatory exclusion. In this case, the district court decided after trial that the exclusion was not ambiguous but found coverage on other grounds. Later decisions also turned on contract construction, rather than public policy considerations. See, e.g., *American Casualty Co. v. FSLIC*, 704 F. Supp. 898 (E.D. Ark. 1989).

<sup>3</sup> 671 F. Supp. 720 (D. Utah 1987).

<sup>4</sup> *Id.* at 722.

The court rejected these arguments by stating that it would not allow a federally insured institution to bargain away the rights of the FSLIC as receiver of that institution. The following outlines the court's reasoning:

1. Through legislation and administrative rules, the FSLIC, as receiver, succeeded to all rights of the failed institution and was empowered to collect all debts of the institution.
2. Because the institution's claims against the directors would be covered, the FSLIC's claims should be covered.
3. The regulatory exclusions that deprive the FSLIC of a right the institution had are contrary to statutes and regulatory pronouncements and therefore violate public policy.<sup>5</sup>

In reaching its conclusion, the court analogized to a case where an exclusion in an automobile policy was not enforced on the theory that it violated the state's safety responsibility act requiring liability insurance.<sup>6</sup> However, the court did not identify any statute that specifically required directors' and officers' liability insurance. The only statutory provisions the court referred to were those statutes that articulate "a strong policy . . . that the FSLIC as receiver have all the rights and claims that [the insured institution] would have had."<sup>7</sup>

This public policy argument was later adopted in *FSLIC v. Mmahat*.<sup>8</sup> In *Mmahat*, American Casualty Company (American Casualty) moved for summary judgment seeking a dismissal of the FSLIC's claims under the directors' and officers' liability policy issued by American Casualty. American Casualty contended that no coverage was afforded because of the application of either the insured-versus-insured exclusion<sup>9</sup> or the regulatory exclusion in the policy.

<sup>5</sup> *Id.* at 722-723.

<sup>6</sup> *Id.* at 724.

<sup>7</sup> *Id.* at 723.

<sup>8</sup> Civ. A. No. 86-5160 (E.D. La. Mar. 3, 1988) (1988 WESTLAW 19304). This case has been frequently cited by the FDIC.

<sup>9</sup> The court concluded that the insured-versus-insured exclusion, which excluded claims brought against one insured by another insured, was unenforceable. *Id.* at \*1.

The regulatory exclusion before the *Mmahat* court was very similar to the regulatory exclusion in *Oldenburg*. Following *Oldenburg*, the *Mmahat* court found that enforcement of the exclusion would contravene public policy and impair the FSLIC's statutorily imposed duties.<sup>10</sup> Without explanation, the court in *Mmahat* stated that it found the reasoning of the district judge in *Oldenburg* to be persuasive.<sup>11</sup>

In *FSLIC v. Aetna Casualty & Surety Co.*,<sup>12</sup> the court relied on *Oldenburg* for the rule that "[t]he FSLIC as receiver of a failed institution has all the rights and powers of that institution."<sup>13</sup> Applying that rule, the court refused to enforce a termination provision in an extended reporting endorsement to a fidelity bond.<sup>14</sup> Under the terms of the endorsement, the extended reporting period granted to the institution would terminate upon takeover of the institution by a receiver, liquidator, or any state or federal agency. Because the endorsement purported to take away from the receiver a right that the institution would have had had there been no receivership, it was struck down as a violation of public policy.<sup>15</sup>

The public policy argument for invalidating regulatory exclusions was later adopted in *Branning v. CNA Insurance Co.*<sup>16</sup> There, the court concluded that the regulatory exclusion hindered the FSLIC's exercise of its federal powers and therefore was contrary to federal policy.<sup>17</sup> According to the court, Congress in 12 U.S.C. § 1729(d) expressly authorized the FSLIC to collect all obligations of the insured institution.<sup>18</sup>

---

<sup>10</sup> *Id.* at \*2.

<sup>11</sup> *Id.* at \*1. Subsequently in the same case, the district court on June 19, 1988, denied the summary judgment filed by Mt. Hawley Insurance Co., the excess underwriters. The court denied Mt. Hawley's motion for the same reasons set forth with respect to American Casualty's motion.

<sup>12</sup> 701 F. Supp. 1357 (E.D. Tenn. 1988).

<sup>13</sup> *Id.* at 1363.

<sup>14</sup> *Id.*

<sup>15</sup> To this general statement the court adds the following dictum: "Had the agreement provided that neither [the insured] nor the FSLIC could discover losses . . . then it would be valid and enforceable as [the insured] would be bargaining its own rights, and the FSLIC's rights as well." *Id.* This statement implies that the FSLIC could not acquire rights greater than those of the insured.

<sup>16</sup> 721 F. Supp. 1180 (W.D. Wash. 1989).

<sup>17</sup> *Id.* at 1184.

<sup>18</sup> *Id.*

The court cited *Oldenburg* for the proposition that “private parties to an insurance contract may not frustrate the Congressional purpose behind receivership by annulling FSLIC’s federal powers.”<sup>19</sup>

In conclusion, cases that strike down the regulatory exclusions on public policy grounds are emphasizing governmental interests above private parties’ rights to contract. Unfortunately, the arguments do not identify specific legislative intentions. Instead, they focus on the insurance policy as an asset of the failed institution and federal legislation empowering the FSLIC and the FDIC to marshal all assets of failed institutions.

#### *Cases Enforcing Regulatory Exclusions*

The public policy argument was criticized by the court in *Continental Casualty Co. v. Allen*.<sup>20</sup> In *Continental Casualty*, the court noted that in order “[f]or contract provisions to be void for public policy reasons, they may be injurious of [sic] the public good or be subversive to sound morality.”<sup>21</sup> After a lengthy discussion, the court found that the regulatory exclusions did not meet this requirement.<sup>22</sup> In *Continental Casualty*, the court noted that there was no statutory insurance minimum that the exclusion would violate.<sup>23</sup> Therefore, insurance policies providing limited coverage when coverage or the form of coverage is not required by statute do not violate public policy.<sup>24</sup>

The opinion in *Continental Casualty* criticized cases such as *Oldenburg* that relied on public policy arguments having no backing in applicable law.<sup>25</sup> The court pointed out the weak reasoning of these opinions, which based public policy arguments on congressional intent to allow the FSLIC to “marshal and collect” assets of the failed institution.<sup>26</sup> The court recognized that in order to marshal an asset, it must

<sup>19</sup> *Id.*

<sup>20</sup> 710 F. Supp. 1088 (N.D. Tex. 1989).

<sup>21</sup> *Id.* at 1098 (citing *Ritter v. Mutual Life Ins. Co.*, 169 U.S. 139, 154 (1898)).

<sup>22</sup> *Id.* at 1099.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

first exist.<sup>27</sup> Because the institution did not own as an asset a policy without the exclusion, the FDIC could not collect such an asset.<sup>28</sup> The FDIC steps into the shoes of the institution, whatever those shoes may be. On that basis, the *Continental Casualty* court does not believe that the FDIC should be allowed to step into shoes much larger than those worn by the insolvent institution.

Other courts have followed *Continental Casualty* in rejecting the public policy arguments initially made in *Oldenburg*. In *FDIC v. Aetna Casualty & Surety Co.*,<sup>29</sup> the Court of Appeals for the Sixth Circuit held that provisions that terminated coverage under bankers bonds “immediately upon the taking over of an insured by a receiver or other liquidator or by State or Federal officials” were valid, despite their effect of precluding the FDIC from recovering under the bonds as part of its receivership duties of marshaling the assets of the failed bank.<sup>30</sup>

The court in *Aetna* found the reasoning behind the *Oldenburg* line of cases contrary to the U.S. Supreme Court’s established standards regarding public policy justifications for invalidating contracts.<sup>31</sup> The *Aetna* court concluded that there was no clear manifestation of public policy that would support invalidating the terms of the bankers bond.<sup>32</sup> To the contrary, the court stated that the dominant public policy is that the “parties’ freedom of contract must not be disturbed.”<sup>33</sup> In its opinion, the *Aetna* court noted that legislation adopted by Congress in 1989 indirectly supported the validity of the regulatory exclusions. That legislation, included in the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), has been referred to in subsequent cases that have enforced the regulatory exclusions.<sup>34</sup>

<sup>27</sup> *Id.* at 1099–1100.

<sup>28</sup> *Id.* at 1100.

<sup>29</sup> 903 F.2d 1073 (6th Cir. 1990).

<sup>30</sup> *Id.* at 1077.

<sup>31</sup> See *id.* at 1079.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1078.

<sup>34</sup> See, e.g., *American Casualty Co. v. Baker*, 758 F. Supp. 1340 (C.D. Cal. 1991).



Recently, in *American Casualty Co. v. FDIC*,<sup>35</sup> the attorneys for the insurance industry relied on this legislation and argued that Congress, in enacting FIRREA, chose not to declare that the regulatory exclusions were against public policy interests. Evidently, this argument fell on receptive ears. In a unanimous opinion, the Court of Appeals for the Eighth Circuit summarily rejected the FDIC's public policy arguments and affirmed the lower court ruling that the regulatory exclusion was neither ambiguous nor against public policy. In a single paragraph, the court simply stated that it found no error in law or fact in the district court's analysis and conclusions<sup>36</sup> and that no good purpose would be served in repeating the discussion.<sup>37</sup> The appellate court also noted that the district court's analysis and conclusions were in line with the vast majority of the courts that have considered regulatory exclusions.<sup>38</sup>

The Eighth Circuit decision in *American Casualty* coupled with the Ninth Circuit decision in *Aetna* has struck a real blow to the FDIC's public policy arguments. Since the Sixth Circuit opinion in *Aetna*, the FDIC has lost nearly every case involving a regulatory exclusion.<sup>39</sup> The FDIC has reacted to its losses by asking Congress for legislative changes, including the deletion of the proviso in Section 1821(d)(12)(a) of FIRREA which is discussed later in this article.<sup>40</sup> If the FDIC is successful in changing provisions of FIRREA to effectively eliminate regulatory exclusions, industry representatives predict that officers and directors for financial institutions face huge insurance premiums, if they can get coverage at all.<sup>41</sup>

---

<sup>35</sup> 944 F.2d 455 (8th Cir. 1991).

<sup>36</sup> The district court in *American Casualty Co. v. FDIC*, Civ. No. 86-4018, slip. op. at 11-13 (N.D. Iowa 1990), rejected three public policy arguments made by the FDIC.

<sup>37</sup> *American Casualty Co. v. FDIC*, 944 F.2d 455, 460 (8th Cir. 1991).

<sup>38</sup> *Id.*

<sup>39</sup> According to the FDIC's *Report on Directors' and Officers Liability Insurance and Depository Institution Bonds Pursuant to Section 220(b)(3) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, at 15 (1991) (hereinafter *FDIC Report*), the FDIC and FSLIC had initial success in litigation involving the exclusion. As of the date of the *FDIC Report*, the government had lost fourteen of twenty-two cases involving the exclusions. *Id.* The *FDIC Report* was written before the Eighth Circuit opinion in *American Casualty*.

<sup>40</sup> See *FDIC Report*, note 39 *supra*, at 21.

<sup>41</sup> See Rehm, "Plan May Lift Insurance Fees for Officers," *Am. Banker*, Sept. 30, 1991, at 9, col. 2 (quoting James McLaughlin, director of the American Bankers Association).

### Regulatory Exclusions After FIRREA

FIRREA was signed into law by President Bush on August 9, 1989.<sup>42</sup> The legislation overhauled the law affecting financial institutions. In restructuring the regulatory framework for financial institutions, FIRREA created the Resolution Trust Corporation and dissolved both the FSLIC and the Federal Home Loan Bank Board.

FIRREA was enacted after the court's decision in *Continental Casualty*, where the court stated that "policies providing limited insurance, which are not required by statute or mandated as to a form of coverage, are not invalidated on a public policy argument."<sup>43</sup> The legislative history clearly indicates that the congressional legislators were aware of the *Continental Casualty* decision.<sup>44</sup> Still, the FIRREA legislation did not mandate directors' and officers' coverage or expand the government's powers with regard to the directors' and officers' policies.

With regard to the authority to enforce contracts, FIRREA provides as follows:

The conservator or receiver may enforce any contract, other than a directors' or officers' liability insurance contract or a depository institution bond, entered into by the depository institution notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment of a conservator or receiver.<sup>45</sup>

In a report issued with FIRREA, the House Committee on Banking, Finance, and Urban Affairs stated that FIRREA confirmed the historic right of a conservator or receiver to enforce any contract, notwithstanding certain provisions of the contract, except for directors' and officers' liability insurance contracts and financial institution bonds.<sup>46</sup> The House report states that legislation retained the current law for the treat-

---

<sup>42</sup> Pub. L. No. 101-73, 101 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.).

<sup>43</sup> *Continental Casualty Co. v. Allen*, 710 F. Supp. 1088, 1099 (N.D. Tex. 1989).

<sup>44</sup> See 135 Cong. Rec. 510,198 (daily ed. Aug. 4, 1989) (statement of Sen. Garn).

<sup>45</sup> 12 U.S.C. § 1821(e)(12)(A) (1989).

<sup>46</sup> H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1, at 127 (1989).

ment of the provisions in directors' and officers' policies and depository institution bonds.<sup>47</sup>

After reviewing this legislative history, the court in *Gary v. American Casualty Co.*<sup>48</sup> noted that it was clear that Congress intended that the courts determine whether the regulatory exclusions were contrary to public policy. Although Congress discussed invalidating regulatory exclusions, it refused to do so.<sup>49</sup> Therefore, Congress has not indicated any public policy justifying the invalidation of contract provisions in directors' and officers' liability policies. Rather than expanding the powers of the FDIC, Congress chose to specifically exclude depository institution bonds and directors' and officers' liability policies from FIRREA provisions allowing the FDIC to enforce contracts regardless of provisions that are triggered by insolvency or appointment of a conservator or a receiver.<sup>50</sup>

#### Regulatory Exclusions in Legal Malpractice Policies

Despite the split of authority on enforceability of regulatory exclusions or maybe because of it, many insurers are still including regulatory exclusions in legal malpractice policies. Some insurers are using the exclusions nationwide.<sup>51</sup> Other carriers are using exclusions only in Texas, California, and other states experiencing a large number of financial institution failures.<sup>52</sup>

As noted above, there is no reported decision on the enforceability of these regulatory exclusions in legal malpractice policies. Given the large number of policies that include such

---

<sup>47</sup> *Id.*

<sup>48</sup> 753 F. Supp. 1547 (W.D. Okla. 1990) (appeal pending).

<sup>49</sup> *American Casualty Co. v. Baker*, 758 F. Supp. 1340, 1346 (C.D. Cal. 1991).

<sup>50</sup> In *FDIC v. Aetna Casualty & Surety Co.*, 903 F.2d 1073, 1078 (6th Cir. 1990), the court noted that this choice was significant in light of *Sharp v. FSLIC*, 858 F.2d 1042 (5th Cir. 1988). In *Sharp*, the Court of Appeals for the Fifth Circuit found that under the language of the bond form, the bond terminated immediately upon the commencement of the conservatorship. Therefore, the court refused to judicially rewrite the bond. According to the court, if the FSLIC finds the coverage inadequate, it need only require the member institutions to obtain bonds with additional provisions. See *Sharp*, 858 F.2d at 1048.

<sup>51</sup> See Himmelstein, "Insurers Dodge S&L Claims Against Lawyers," *Legal Times*, Apr. 29, 1991, at 1 (referring to a nationwide campaign of malpractice insurance carriers).

<sup>52</sup> See Gifford, "Risky Coverage of S&L Lawyers Spooks Insurers," *Legal Times*, Nov. 18, 1990, at 1 (noting that two of the largest malpractice carriers no longer cover legal work for banks and savings and loan associations in certain states).

exclusions and the volume of FDIC cases against attorneys, the FDIC and the insurers are on a collision course.

A court that is asked to rule on the enforceability of a regulatory exclusion in a legal malpractice policy may consider the existing case law on regulatory exclusions. First, the court may follow the trend of cases beginning with *Continental Casualty* and reject the public policy arguments. Even a court that might be willing to apply the public policy arguments to directors' and officers' liability policies should hold that the public policy arguments made in the *Oldenburg* line of cases have no applicability to legal malpractice policies.

First, the legal malpractice policy is not an asset of the financial institution. This is important in light of the formulation of public policy in *Oldenburg*, where the court refused to enforce the exclusion of public policy grounds because the predecessor institution should not be allowed to bargain away rights of the FSLIC to carry out its statutory functions. In the case of a legal malpractice policy, the predecessor institution is not a party to the policy and therefore has no rights to bargain away.<sup>53</sup> While it is true that a third party may acquire legally enforceable rights under a liability policy of another once the insured's liability to a third party has been established, this rule does not convert the attorneys' policy to an asset of the institution before judgment.<sup>54</sup> Given that legal malpractice policies are not assets of financial institutions, the regulatory exclusions do not frustrate the federal legislation empowering the FDIC to marshal assets of failed institutions. Therefore, a court should hold that the exclusions in legal malpractice policies do not violate any public policy expressed in congressional legislation.

The court may then attempt to determine if regulatory exclusions are contrary to some other public policy. As noted by the U.S. Supreme Court in *Ritter v. Mutual Life Insurance*

---

<sup>53</sup> The FIRREA provisions that give the receiver the authority to enforce contracts do not apply to attorneys' policies because the policies are not contracts with the institution.

<sup>54</sup> With the exception of a few states, such as Louisiana, that have adopted direct action statutes, normally a third party may not sue an insurer until after the third party has obtained a judgment against the insured. See generally A. Windt, *Insurance Claims and Disputes* 357-358 (1982).

*Co.*,<sup>55</sup> in order for contractual provisions to be void for public policy reasons they must be injurious to the public good or subversive of sound morality. There is no indication that regulatory exclusions in legal malpractice policies meet this standard. The most often found violators of public policy are contracts that induce criminal conduct or are contrary to statutory law.<sup>56</sup> With regard to state legislation, no state other than Oregon<sup>57</sup> requires that attorneys maintain professional liability insurance. In fact, the insurance regulators in several states, including Florida, Illinois, New York, Maryland, Ohio, and Pennsylvania, have granted approval of regulatory exclusions in legal malpractice policies.<sup>58</sup> This approval seems to indicate that the arm of government charged with regulating insurance does not believe that the exclusions violate public policy.

In discussing other expressions of public policy, the Texas Commission of Appeals stated the following:

In the situation presented it is difficult to perceive harm to the public in allowing able-minded men, dealing at arms' length, to contract with reference to their own property. . . . An important requirement of policy is "that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice" unless, perchance, contravention of public right or welfare very clear appears.<sup>59</sup>

In the case of an insurance policy between an insurer and an insured attorney, "able-minded men, dealing at arms' length" enter into the contract. Normally, attorneys are sophisticated insureds. Attorneys are in a position to comprehend the terms of their insurance policies and to appreciate the consequences of regulatory exclusions. Therefore, after the insured and insurer have entered into a contract with certain conditions and limitations, the FDIC should not be per-

---

<sup>55</sup> 169 U.S. 139, 154 (1898).

<sup>56</sup> *Continental Casualty Co. v. Allen*, 710 F. Supp. 1088, 1098 (N.D. Tex. 1989).

<sup>57</sup> See Or. Rev. Stat. § 9.080 (1989), which authorized the organization of a professional liability fund. In Oregon, each attorney must contribute to the professional liability fund.

<sup>58</sup> Himmelstein, note 51 *supra*, at 18.

<sup>59</sup> *St. Regis Candles v. Hovas*, 117 Tex. 313, 3 S.W.2d 429, 433-434 (1928).

mitted to change the terms of the contract under the guise of public policy.

It is well established that parties to an insurance contract are entitled to make their own contracts in any legal form they desire, so long as they do not offend some rule of law or contravene public policy.<sup>60</sup> For the foregoing reasons, courts should enforce unambiguous regulatory exclusions that are not inconsistent with public policy clearly expressed in constitutions, statutes, or common law.

### Conclusion

The crisis the government faces with failed financial institutions does not justify disregarding of the terms of a contract freely entered into by sophisticated insureds who understand the limitations in their insurance policies. If the courts ignore the clear intentions of the parties and declare the exclusions unenforceable, the courts will, in effect, be rewriting the contracts.

This judicial rewriting of insurance policies will harm both the insureds and the general public by eliminating the availability of insurance for persons who perform services for financial institutions. If insurers cannot rely on the terms of the policy, they will simply quit writing the insurance.<sup>61</sup> Like the rich gambler who suddenly realizes that everyone is plotting to clean him out, several major malpractice insurers have already pulled out of the market.<sup>62</sup>

The courts must resist the FDIC's attempt to shift its losses to private insurers. To do otherwise ignores the freedom of parties to make contracts for lawful purposes and harms the public by forcing persons who perform work for the financial institutions to "go bare" without insurance.

---

<sup>60</sup> See generally 13 J. Appleman, *Insurance Law and Practice* § 7381, at 1-8 (1976).

<sup>61</sup> See Himelstein, note 51 *supra*, at 19 (quoting Hector DeLeon, former general counsel of the Texas State Board of Insurance, who stated that the best thing for insurers to do when they do not know their ultimate exposure is not to write the insurance).

<sup>62</sup> Gifford, note 52 *supra*, at 1.