

Prior Notice by Bank of Lawsuit Precludes Coverage

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In an unreported decision, the United States District Court for the Western District of Wisconsin, applying Wisconsin law, has held that the prior notice exclusion in a bank's D&O policy precluded coverage for a claim asserted solely against the bank, even though the D&O policy in effect when the bank provided precautionary notice did not provide entity coverage. *Bancinsure, Inc. v. The Park Bank*, No. 03-C-397-C (W.D. Wis. May 13, 2004).

The insurer issued consecutive, one-year, claims-made D&O policies to the bank, effective July 1, 2000 to July 1, 2001 (the 2000 policy) and July 1, 2001 to July 1, 2002 (the 2001 policy). The 2000 policy named as "Insured Persons...all persons who were, now are or shall be the directors and officers of the Company." The 2000 policy did not provide entity coverage. The 2000 policy also provided that if "any Insured Person or the Company" became aware of circumstances that might "give rise to any Claim against any Insured Person for a specific alleged Wrongful Act" during the policy period and provides written notice to the insurer no later than 30 days after the expiration of the policy, the actual claim against the "Insured Person" would be treated as having been made during the policy period.

Originally, the 2001 policy contained the same provisions as the 2000 policy. In September 2001, however, the insurer added an errors and omissions endorsement to the 2001 policy, retroactively effective to July 1, 2001. The endorsement replaced the phrase "Insured Person" with "Insured" in the underlying policy and defined "Insured" to include the bank, its parent company and their "employees acting within the scope of their employment." The 2001 policy also excluded coverage for "Loss in connection with any Claim made against the [Insured]...arising out of...(1) any Wrongful Act or any fact, circumstance or situation that has been the subject of notice under any policy of insurance in effect prior to the Inception Date of this Policy."

In April 2001, another bank alerted the policyholder bank to a possible check kite fraud involving both banks. The policyholder bank provided notice of the possible fraud to the insurer in May 2001. In July 2001, the second bank sued the policyholder bank for conversion of funds and breach of contract, but it did not name any of the bank's directors or officers in the suit. That same month, the bank gave notice of the suit to the second insurer, which denied coverage based on the receipt of notice during the prior policy period. The bank settled the underlying lawsuit in December 2002 and filed a claim with the second insurer under the 2001 policy for approximately \$550,000, representing the amount of the settlement and defense costs.

The court held that the insurer had properly denied coverage because the bank had provided notice of the fraud, which led to the claim against the bank and the eventual settlement in May 2001, prior to the inception of the 2001 policy. The bank argued that because the 2000 policy covered only the bank's directors and officers and did not provide entity coverage, the notice provided by the bank in May 2001 was not notice of a "Claim against any Insured Person," and therefore the prior notice exclusion in the 2001 policy did not apply to bar coverage. The defendant questioned why the bank would have to give notice under "someone else's insurance policy" (*i.e.*, the 2000 policy insuring its directors and officers). The court rejected the bank's argument as "creative" but "not a reasonable interpretation" of the policy. The court noted that the insurer was not arguing that the bank was required to give notice under the 2000 policy, but rather that it had, in fact, given notice under its 2000 policy in a failed "attempt to persuade plaintiff to provide coverage" and now is bound by that notice under the terms and exclusions of the 2001 policy. According to the court, it is "undisputed" that the bank is an "insured" under the 2001 policy and that the policy "excludes claims made against insureds if notice [of the facts or circumstances leading to the claim] has been given previously under any prior policy."

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