

Upon Appointment of FDIC as Receiver, Coverage Under D&O Policy Ceased but Policy Was Not Automatically Terminated

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The United States District Court for the District of Kansas, applying Kansas law, has held that a D&O policy issued to a bank was not automatically canceled or terminated when the FDIC was appointed as the bank's receiver but that coverage under the policy ceased. *Columbian Fin. Corp. v. BancInsure, Inc.*, 2009 WL 4508576 (D. Kan. Nov. 30, 2009). The court concluded that although coverage ceased upon the appointment of the FDIC as receiver, the insureds could report claims at any time prior to the expiration of the policy.

The insurer issued a D&O policy to a company and its subsidiary, a bank, for the policy period of May 11, 2007 to May 11, 2010. The bank ceased active banking activity when the FDIC was appointed as receiver on August 22, 2008. On September 2, 2008, counsel for the FDIC sent the insurer a notice of circumstances that could give rise to potential claims against the bank's former officers and directors. Within 30 days after the bank was placed in receivership, the insurer received additional letters providing notice of potential claims and circumstances. The parent company and an insured individual sought a declaration that claims covered by the D&O policy could be reported to the insurer at any time prior to the expiration of the policy.

The policy contained a Cessation of Business condition that provided that if "the Company shall cease to engage in an active banking business or cease to accept deposits for any reason, coverage shall cease as of the date of the cessation of such business, and . . . the Company shall not be entitled to obtain" an extended reporting period. Under the "Cessation of Business" condition, the appointment of any state or federal banking regulator as receiver constituted the cessation of banking business. The policy defined "Policy Period" to mean either the period from the inception date to the expiration date shown on the declarations or the period from the inception date to the date when the policy was "effectively terminated."

The insurer argued that the appointment of the receiver automatically canceled and effectively terminated the policy. The court noted that the policy provided for two situations in which the "policy may be canceled" and concluded that the use of different terminology in the Cessation of Business condition and with respect to cancellation indicated that the phrase "coverage shall cease" did not mean that the policy was canceled. Furthermore, the court found it significant that the Regulatory Exclusion Endorsement to the policy deleted a "regulatory exclusion" and provided coverage for actions brought by the FDIC as receiver during the policy

period. The court stated that this endorsement "indicate[d] that the parties did not intend for the policy to terminate upon the appointment of a receiver." The court therefore determined that although coverage ceased upon the appointment of the receiver, the policy was not terminated or canceled. Accordingly, the court granted partial summary judgment in favor of the insureds.

The court declined to reach the issues of whether the company was entitled to purchase an extended reporting period and whether future claims were covered under the policy.