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NEWSLETTER

Prior Notice Exclusion Bars Coverage for Actions Arising from Loan Transaction That Gave Rise To Prior Suit

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The United States District Court for the Southern District of Indiana has held that several lawsuits against an insured bank by different claimants, based on different legal theories, were sufficiently connected by the fact that they all arose out of the same loan transaction to trigger the prior notice exclusion in the bank's directors and officers liability policy. *Community Bank v. Progressive Cas. Ins. Co.*, 2010 WL 2985932 (S.D. Ind. July 27, 2010).

In 1998, the bank issued a loan to a real estate firm to purchase and develop a piece of commercial property. The firm subsequently defaulted on the loan, and a number of lawsuits followed, including one filed by a subcontractor on July 13, 1999, alleging that the bank and one of its officers made certain misrepresentations. The bank noticed the action to the insurer under its claims-made policy in effect at the time. The bank also identified the action on its August 27, 1999 renewal application as a fact or circumstance that could reasonably give rise to a claim. Six months later, the guarantors of the loan to the real estate firm filed suit against the bank. Then, in July 2000, the borrower filed suit against the bank as well.

The bank tendered the later actions by the guarantors and the borrower to the insurer under the renewal policy, which was issued to the bank for the period of September 11, 1999 to September 11, 2000. Based on the fact that the bank had noticed the suit by the subcontractor under the earlier policy, the insurer denied coverage under the policy's prior notice exclusion. This provision bars coverage for claims arising out of or in any way involving any wrongful act, fact, circumstance or situation that has been the subject of notice given prior the effective date of the policy under any other insurance policy.

In the coverage litigation that followed, the court first rejected the insured's argument that the insurer could not rely on the exclusion because the insurer did not deliver a copy of the policy to the insured until almost two years after the policy period had ended. The court noted that it was unaware of any case law in Indiana suggesting that the failure to deliver a policy results in the *per se* inability to enforce its exclusionary provisions. The court also determined that, while the insured failed to specify whether it was relying on the doctrine of promissory estoppel or equitable estoppel, neither theory would be successful.

The court next addressed the exclusion itself and concluded that it applied to bar coverage for the actions against the bank by the guarantors and the borrower. According to the court, the dispositive fact was that these later lawsuits and the previous suit by the subcontractor noticed under the earlier policy all arose out of "one loan to one borrower [for] one real estate project" – in other words, "the same course of conduct." The court found that the exclusion did not require "complete commonality" among the actions and, therefore, it did not matter that that actions asserted different legal theories. The court also rejected as immaterial the fact that the later suits did not involve allegations of any misrepresentation by the bank to the subcontractor.