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NEWSLETTER

FDIC Cannot Intervene in Coverage Litigation

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The United States District Court for the Central District of California has determined that the Federal Deposit Insurance Corporation (FDIC) cannot intervene as a matter of right or by permission in coverage litigation between insurers and individual insureds against whom the FDIC was separately pursuing claims for negligence. *XL Spec. Ins. Co. v. Perry (In re IndyMac Bancorp, Inc.)*, No. 11-cv-2078 (C.D. Cal. Nov. 30, 2011). Wiley Rein LLP represents an excess insurer and the primary Side-A insurer in the litigation.

The coverage litigation involves eight insurers and several insured individuals and concerns the availability of coverage for numerous underlying lawsuits and other matters, including litigation brought by the FDIC against some of the insured persons who were directors and officers of a failed banking institution. The FDIC sought to intervene in the coverage action to protect its purported interest in obtaining a declaration that the underlying matters in which it is a claimant are covered under the policies at issue and that other matters–in which it is not a plaintiff–are not covered.

The court considered first whether the FDIC was entitled to intervene as a matter of right. The court indicated that a proposed intervenor must have an “actual interest protected by law[, which is] related to the subject matter of the present suit,” and determined that the FDIC did not have a “significant protected interest” in the coverage litigation. The FDIC's purported interest in recovering in the underlying actions in which it was a plaintiff was not, the court held, a legally protected interest because it had not yet obtained a judgment and might never do so. Even if the FDIC did have a legally protected interest, the court noted, that interest was not related to the coverage litigation. According to the court, the underlying FDIC litigation involved alleged legal wrongdoing by insured defendants in contrast to the coverage litigation, which involved the interpretation of insurance contracts. As a result, the court determined that the underlying claims and the coverage action were not related for purposes of mandatory intervention.

With respect to permissive intervention, the court determined that the FDIC's motion to intervene did not meet the threshold requirement that it present common questions of law and fact to the main action. Moreover, the court expressed concern that the FDIC might not be able to show the necessary independent jurisdictional grounds for its participation in the coverage litigation because it had not obtained a judgment against the insured persons and therefore had no interest to protect. Accordingly, the court noted that “it would appear that the FDIC's claims are not yet ripe for adjudication and that it would not have standing as a permissive intervenor.”