

Insured Versus Insured Exclusion Held Inapplicable to FDIC's Failed Bank Suit

December 2012

A Puerto Rico federal district court has declined to apply a D&O policy's Insured versus Insured exclusion to a suit brought by the Federal Deposit Insurance Corporation (FDIC) against former directors and officers of a failed bank. *W Holding Co., Inc. v. Chartis Ins. Co., P.R.*, No. 3:11-cv-2271, (D.P.R. Oct. 23, 2012).

The FDIC became receiver of a failed Puerto Rico bank in 2010. It filed suit against the bank's former directors and officers. Pursuant to Puerto Rico's direct action statute, the FDIC also sued four insurers that issued D&O policies to the bank's holding company. The insurers moved to dismiss, citing the Insured versus Insured exclusion in the primary D&O policy, which barred coverage for any claim "which is brought by, on behalf of or in the right of, an Organization or any Insured Person other than an Employee of an Organization, in any respect and whether or not collusive."

The court denied the motion. The court declared the exclusion to be ambiguous as applied to a suit by a regulatory agency. The court acknowledged that the policy language at issue specified that the exclusion applied to claims "whether or not collusive" but nevertheless stated that the "obvious intent" of the exclusion was to protect carriers from collusive suits. It rejected the notion that the suit by the FDIC was a collusive suit. The court also noted that the FDIC's complaint alleged that it was suing on behalf of "depositors, account holders, and a depleted insurance fund." The court stated that the FDIC's regulatory role sufficiently distinguished it from "those whom the parties intended to prevent from bringing claims under the Exclusion."