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NEWSLETTER

Court Finds Ambiguity Applying Insured v. Insured Exclusion to FDIC Lawsuit

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The United States District Court for the Northern District of Georgia has denied in part a motion for summary judgment by the directors and officers liability insurer of a failed bank seeking a declaration that an "insured v. insured" exclusion barred coverage for a claim by the Federal Deposit Insurance Corporation (FDIC). *Progressive Cas. Ins. Co. v. Fed. Deposit Ins. Corp.*, No. 1:12-cv-1103 (N.D. Ga. Jan. 4, 2013). The court also found ambiguity in a "loan loss carve-out" from the definition of "loss," but ruled in the insurer's favor that no coverage was available to the extent certain wrongful acts occurred outside the policy period.

The FDIC, as receiver for the failed bank, brought a lawsuit against several former directors, officers and employees of the bank. The insurer contended that no coverage was available for this lawsuit because the policy barred coverage for claims "by, on behalf of, or at the behest of the Company," and the FDIC "steps into the shoes of" the failed bank. The court determined that the exclusion was ambiguous because it was "unclear whether the FDIC-R's claims are 'by' or 'on behalf of' the failed bank. Furthermore, it [was] unclear what exactly is encompassed by the phrase 'steps into the shoes.' . . . The FDIC-R is tasked . . . with bringing claims to recover losses suffered by the federal Deposit Insurance Fund and a bank's depositors, creditors, and shareholders. The FDIC-R has multiple roles." Accordingly, the court denied the insurer's motion and permitted the FDIC to take discovery concerning the drafting history and marketing of the policy.

The court also found ambiguity in connection with a "loan loss carve-out" from the policy's definition of "loss." The definition of "loss" expressly did not include "any unpaid, unrecoverable or outstanding loan, lease or extension of credit to any customer or any forgiveness of debt." The carve-out, determined the court, did not clearly exempt tortious conduct, which was the basis for the FDIC's claims. Accordingly, the court denied summary judgment for the insurer on this basis as well.

The insurer also contended that coverage was precluded for certain allegations in the FDIC's lawsuit because the alleged wrongful acts occurred after the relevant policy period. The insurer argued that the policy affords no coverage for such claims unless notice of the circumstances from which such claims arose was provided during the policy period. Although an FDIC demand letter was sent during the policy's "discovery period," that period only permitted the insured to provide notice of claims resulting from wrongful acts occurring before the cancellation or nonrenewal of the policy. The court agreed with the insurer, granting summary judgment that no coverage existed to the extent the relevant wrongful acts occurred after the effective date of the nonrenewal of the policy.