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NEWSLETTER

Insured v. Insured Exclusion Bars Coverage for Claim by FDIC as Receiver

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An exclusion from a failed bank's D&O liability policy for any claim brought by the insured bank—or any receiver of the bank—barred coverage for a claim by the Federal Deposit Insurance Corporation (FDIC), as receiver of the bank, according to a summary judgment ruling by the United States District Court for the Eastern District of California. *Hawker v. BancInsure, Inc.*, 2014 WL 1366201 (E.D. Cal. Apr. 7, 2014).

The FDIC sued the bank's former officers for alleged negligence and breach of fiduciary duty. The insurer denied coverage for the FDIC lawsuit under the policy's insured v. insured exclusion, which barred coverage for any claim "by or on behalf of, or at the behest of, any other insured person, the company, or any successor, trustee, assignee or receiver of the company."

The FDIC made numerous arguments that this exclusion did not apply to its lawsuit. The FDIC first argued that "receiver" must refer to a court-appointed receiver because some dictionary definitions of the term reference appointment by courts. The district court rejected that argument, finding that the Black's Law Dictionary definition—which does not limit the term "receiver" to those appointed by courts—is representative of the "ordinary and popular" meaning of the term. The court concluded that the FDIC meets the definition of "receiver" as used in the exclusion.

The FDIC also contended that the fact that the insurer offered a separate regulatory exclusion that specifically barred claims by the FDIC in any capacity meant that the insured v. insured exclusion should not apply to the FDIC, lest the regulatory exclusion be rendered meaningless. The court rejected this argument as well, finding that any overlap between the exclusions did not negate the reach of the insured v. insured exclusion to claims by the FDIC as a receiver where the broader regulatory exclusion would also exclude claims by the FDIC as a regulator.

The FDIC further asserted that, based on the purpose of the insured v. insured exclusion to prevent collusive lawsuits, and the fact that the FDIC's claims clearly are not collusive, the application of the exclusion defied "reasonable expectations." The court rejected this argument, noting that it is flawed because it would apply to any receiver in any context and therefore cannot be conclusive if the term "receiver" is to be given meaning within the exclusion, as it must under California law. The court observed in addition that claims by the FDIC against insureds who are also creditors of the failed bank may well be collusive because "the directors and officers benefit by having their uninsured investment and loans paid from the insurance proceeds." Finally, the court examined proffered extrinsic evidence concerning the alleged intent of the parties during the underwriting process for the policy, and concluded that the emails and deposition testimony did not render the exclusion reasonably susceptible to the FDIC's interpretation. Because the FDIC acted as a receiver within the meaning of the insured v. insured exclusion, its claim against the former bank officers was excluded from coverage.