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ALERT

No Coverage for Breach of Contract Claims

February 14, 2013

A federal district court, applying Florida law, has held that a loan company was not entitled to coverage under an errors and omissions policy for amounts that it paid to settle breach of contract claims by two banks. *MarineMax, Inc. v. National Union Fire Ins. Co.*, 2013 WL 425832 (M.D. Fla. Feb. 4, 2013). The court also held that the loan company was entitled to coverage for a settlement with a third bank, which had alleged negligent misrepresentations in the performance of professional services in addition to breach of contract.

The insured loan company sold loan packages to three banks based on contractual agreements in which the company made representations and warranties about the loans. When some of the loans failed to perform, each bank asserted a claim against the loan company. The company settled the first bank's written demand by agreeing to repurchase two non-performing loans from the bank. The company resolved the second bank's arbitration proceeding for breach of contract by agreeing to a settlement payment. The loan company resolved the third bank's lawsuit by a settlement payment. Although the insurer denied coverage for the claims asserted by the first two banks, it agreed to defend the company in the third bank's suit, which alleged both breach of contract and negligence based on alleged misrepresentations the company made in selling the loan package. The insurer also agreed to contribute half of the cost of the settlement with the third bank but denied coverage for the amounts that the company paid the other two banks. After resolving its disputes with the banks, the loan company filed suit against the insurer to recover the amounts that it paid the banks.

On cross-motions for summary judgment, the court held that the loan company was not entitled to coverage for its agreement to repurchase loans from the first bank because the amounts repaid to

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that bank did not constitute "damages," defined by the policy as "any amount that you shall be legally required to pay because of judgments, arbitration awards or the like rendered against you, or for settlements negotiated by us with your written consent." The court reasoned that the loan company's repurchase agreement was a voluntary payment because the insurer did not consent to the settlement.

The court then considered the insurer's argument that the arbitration proceeding commenced by the second bank and the lawsuit filed by the third bank did not allege any "wrongful acts" because the loan company's purported misrepresentations were made in its contracts with the banks. In rejecting this argument, the court ruled that the banks' allegations that the company had made misrepresentations in the contracts were sufficient to satisfy the policy's definition of "wrongful acts," which included "misstatement[s]" and "misleading statement[s]." The court then considered whether coverage for the arbitration proceeding and the lawsuit was precluded by the policy's contractual liability exclusion, which barred coverage for claims "arising out of liability you assume under any contract or agreement, including but not limited to, any contract price, cost guarantee or cost estimate being exceeded; however, this exclusion does not apply to liability you would have in the absence of such contract or agreement." Declining to accept the loan company's argument that the exclusion only applied to tort liability assumed in contracts, the court applied the plain language of the exclusion to bar coverage for the arbitration proceeding. The court then determined that the exclusion's exception for liability in the absence of a contract applied to the lawsuit because the third bank had asserted a separate cause of action for negligence in the performance of professional services. The court therefore held that the loan company was not entitled to coverage for the payments to the first two banks but was entitled to coverage for the full amount of its settlement with the third bank.

The opinion is available here.