

**ALERT**

# “Based Upon, Arising From, or In Consequence Of” Language in Exclusion Requires Causal Connection, Not Proximate Causation

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The United States District Court for the District of New Mexico has held that a “Lending Services” exclusion in a D&O policy barred coverage for a claim alleging that a policyholder wrongfully recorded and refused to release certain security interests. *W. Heritage Bank v. Fed. Ins. Co.*, 2013 WL 1491895 (D.N.M. Mar. 21, 2013). In so ruling, the court held that an injury is “based upon, arises from, or is in consequence of” certain conduct if there is a causal connection between the two, rejecting an insured’s argument that proximate causation is required.

The policyholder, a bank, made several loans to its customer so that the customer could purchase a franchise and open a restaurant. The customer entered into a lease with a property owner and made renovations to the property, and the bank secured its loans with liens on the restaurant equipment, the franchise, and the lease. The customer subsequently defaulted on its bank loans, franchise agreement and lease, and the property owner terminated the lease and identified another company to take over the franchise and operate the restaurant. That company eventually shut down its operation of the restaurant, however, when the bank refused to release its liens.

The property owner filed suit against the bank and its officers, seeking a declaratory judgment that the liens were fraudulent, and asserting various state law claims. Those claims were premised on allegations that the bank and its officers improperly placed

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fraudulent liens on the owner's property and that they refused to release those liens unless they were paid a certain sum of money. The bank tendered the suit to its D&O insurer, which determined that its policy did not afford coverage.

In a coverage action that followed, the insurer argued that there was no coverage for the property owner's claims because the policy excluded claims "based upon, arising from, or in consequence of the [insured's] performing or failure to perform . . . Lending Services." The bank took the position that the exclusion did not apply because the underlying suit involved damages caused by the bank's intentional failure to remove the liens, which would not constitute "Lending Services," and not from its recording of them, which would.

The court rejected the bank's argument that "the alleged intentional tort . . . of refusing to release the [l]iens [was] an independent intervening cause," concluding instead that words such as "arising out of" were "ordinarily understood to mean 'originating from,' 'having its origin in,' 'growing out of' or 'flowing from.'" The court reasoned that the policy language required that there be "some causal connection" between the Lending Services and the injuries suffered, but "not . . . proximate cause in the legal sense." The court found that there was "clearly" a causal connection between the bank's Lending Services and the property owner's alleged damages from the bank's failure to release the liens. Accordingly, the court concluded that the Lending Services exclusion barred coverage for the property owner's claims.

The opinion is available [here](#).