

**BankBCLP**

## **D&O CARRIER SEEKS DENIAL OF COVERAGE AGAINST FORMER DIRECTORS OF FAILED BANK**

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On March 30, 2012, Progressive Casualty Insurance Company filed an action naming as defendants the FDIC as Receiver of Omni National Bank, as well as the former officers and directors of Omni whom the FDIC had previously sued. The Complaint asserts a claim for declaratory judgment that Progressive is not obligated to cover any of the claims asserted by the FDIC against the former directors and officers in the Omni litigation. This action is significant in that it raises a number of coverage issues which former directors and officers of failed banks may see raised by their own D&O insurance carriers, and the presence or absence of D&O coverage is a critical factor considered by the FDIC in determining whether to bring an action seeking any kind of recovery.

Progressive had underwritten a director and officer liability policy for the directors and officers of Omni with a total policy limit of \$10 million. The policy did not contain any exclusion which would directly exclude coverage for any action brought by a governmental or regulatory agency such as the FDIC (a so called "regulatory exclusion"). Nonetheless, apparently after having received notice of the claim by the FDIC, Progressive denied coverage on a number of separate bases, which now form the basis of the declaratory judgment lawsuit.

First, Progressive alleged that coverage for the former directors and officers of Omni was barred by the insured v. insured exclusion contained in the policy. An insured v. insured exclusion is a common feature of a directors and officers liability policy, and essentially provides that any claim brought by, on behalf of, or at the behest of any insured company or insured person under the policy against insured persons under that same policy are not covered. Progressive alleges that, because the FDIC steps into the shoes and succeeds to all the rights and privileges of the Bank, and brought the action against the directors and officers in its capacity as Receiver for the Bank, the insured v. insured exclusion is triggered and therefore no coverage is available. Whether a standard insured v. insured exclusion in fact bars coverage for an action by the FDIC against former officers and directors is an important question, and is certainly debatable.

Next, Progressive alleges that, because unpaid unrecoverable loan losses are carved out from the definition of "loss" under the policy, there is no coverage for the losses alleged in the FDIC's

complaint against the former Omni directors and officers. Progressive alleges that the FDIC's complaint is specifically based on \$24.5 million in losses that the bank suffered on over 200 loans.

The complaint concludes with various allegations that certain claims contained in the FDIC's complaint are not covered by virtue of having been made outside the policy period or the extended discovery period or because certain claims are based on alleged wrongful acts that took place after the expiration of the policy. As to one particular defendant who had previously pleaded guilty to a criminal violation, Progressive alleges that no coverage exists based on an exclusion for loss arising out of fraud and/or acts in violation of the criminal laws.

It will be interesting to see what the Courts do with these kinds of coverage positions taken by director and officer liability carriers. Given that the existence of insurance coverage for former directors and officers is such a central component of the FDIC's decision making process in determining whether it is cost effective to bring claims, this is an issue that is worth watching.

## MEET THE TEAM



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