

Carve-Outs to Definition of “Professional Services” Operate as Exceptions to Professional Services Exclusion

April 2014

Applying New Mexico law, the United States Court of Appeals for the Tenth Circuit has held that enumerated carve-outs to a D&O policy's definition of “professional services” extended coverage to the enumerated carve-outs, even if they were arguably excluded by other policy provisions. *Western Heritage Bank v. Fed. Ins. Co.*, 2014 WL 903469 (10th Cir. March 10, 2014).

A bank that had issued a loan to a borrower for improvements on a property foreclosed on the loan and repossessed the borrower's personal property upon the borrower's default. The bank also recorded a lien on the leasehold interest of another company on the property to secure the loan. When the bank refused to release the lien, the company sued the bank, some of its officers, and its attorneys. The bank tendered the claim to its professional liability insurer for a defense under a D&O liability policy. The insurer denied coverage, arguing that the policy excluded coverage for loss on account of any claim based upon or arising from the performance of professional services or lending services. The bank then sued the insurer, and the district court entered summary judgment in favor of the insurer, holding that the exclusion for lending services barred coverage.

On appeal, the court evaluated the policy's exclusion for professional services and lending services. The policy's definition of “professional services” expressly carved out (1) legal services, (2) services performed by an entity which the insured had acquired ownership or control of as security for a loan (*i.e.*, post-control actions), and (3) lending services. Although the policy defined “lending services” broadly enough to potentially encompass both legal services and post-control actions, the court rejected this reading as rendering the first two carve-outs to the definition of professional services as mere surplusage. The court also rejected the insurer's argument that the carve-outs to the definition of professional services should only be read to narrow the definition of that term rather than to create exceptions to the professional services exclusion, finding that anything that falls outside the ambit of the carve out language that would otherwise be covered falls within the policy's coverage. Accordingly, the court concluded that legal services and post-control actions were exceptions to the professional services exclusion under the language of the policy.

Nonetheless, the court ultimately held in favor of the insurer, concluding that the bank failed to establish that it met either the legal services or the post-control actions exception. The court found that the bank failed to present any evidence that the allegations in the underlying action arose out of the bank's performance of legal services, noting that the recording of liens and subsequent refusal to release them would not inherently require a license to practice law and the failure of the insureds to provide any other factual support for that argument. The court also held that the post-control exception did not apply to the bank's conduct in foreclosing on the loan equipment or repossessing personal property, reasoning that the post-control exception applies to the conduct of entities acquired by the bank, not to the conduct of the bank itself. As such, the court concluded that the insurer had no duty to defend or indemnify the bank.