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ALERT

Policies' Interrelated Claims, Prior Notice and Prior Litigation Provisions Bar Coverage for Multiple Lawsuits Arising Out of Bank's Collapse

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In a case in which Wiley Rein represented the primary Side A insurer and an excess insurer, the United States District Court for the Central District of California has granted summary judgment in favor of Side A and traditional directors and officers liability insurers, holding that a number of lawsuits involving the former directors and officers of a failed bank holding company and its bank subsidiary were deemed made in the first of two claims-made policy periods and otherwise excluded from coverage under the second insurance tower. *XL Specialty Insurance Company v. Perry*, No. 11-cv-2078 (C.D. Cal. June 27, 2012). A link to the opinion can be found here.

During the first claims-made policy period, securities litigation was filed against the insured entity making allegations concerning its underwriting and securitization of allegedly risky loans. During the second policy period, the bank subsidiary of the insured was seized and the entity entered bankruptcy. A wave of lawsuits followed, including additional shareholder securities litigation and lawsuits by holders of mortgage backed securities affiliated with the insured, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and the bankruptcy trustee of the insured's estate.

The insurers contended that coverage for the various litigation was available under only the first of the successive policy periods. Under the policies at issue, claims involving or arising out of "interrelated wrongful acts" were deemed a single claim first made at the time of the initial claim. Moreover, the second year policies contained prior

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notice exclusions for claims based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any fact, circumstance, or situation that had been the subject of prior notice, as well as specific litigation exclusions for claims based upon, arising out of, resulting from, in consequence of, or in any way involving the facts, circumstances, situations, transactions or events or series of facts, circumstances, situations, transactions or events alleged in or underlying the securities litigation made in the prior policy year.

Applying California law, the court rejected the insureds' contention that the policies' definitions of "interrelated wrongful acts" were ambiguous. "Interrelated wrongful acts" was defined in one set of policies as "wrongful acts which have as a common nexus any fact, circumstance, situation, event, transaction or series of facts, circumstances, situations, events or transactions" and in the other policies as "any wrongful act based on arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any of the same or related, or series of related, facts, circumstances, situations, transactions, or events." The court further determined that, under the policy language, "it is not necessary for alleged wrongs to be temporally identical. " The court concluded that these definitions were unambiguous and describe "a broad range of relationships between the original claim and other lawsuits that will be deemed as part of that same claim and made at the time of the first claim." The similarly broad prior notice and specific litigation exclusions were also held to be unambiguous.

The court concluded that each of the later-filed claims had facts, circumstances, situations, events or transactions in common with or directly resulted from the earlier-filed securities litigation involving the insured entity's alleged issuance and securitization of high-risk loans. Accordingly, the court concluded that there was no possibility of coverage under the second set of policies for any of the later-filed claims and granted the insurers' summary judgment motions in full.