

ALERT

No Coverage for FDIC Suit for Erroneous Appraisal Performed Before Prior Acts Date

February 17, 2012

Applying California law, a federal district court has held that an insurer had no duty to indemnify a real estate appraiser who allegedly made negligent misrepresentations in an appraisal conducted before the applicable policy's prior acts date. *FDIC v. Gen. Star Nat'l Ins. Co.*, 2012 WL 398352 (C.D. Cal. Feb. 7, 2012). Although the appraiser had revised the appraisal after the prior acts date in response to inquiries from a bank, the court determined that the subsequent conduct was interrelated with the excluded conduct. Moreover, the court held that the insurer would have been entitled to summary judgment in any event because California law prohibits insuring against negligent misrepresentation.

On October 3, 2006, the policyholder real estate appraiser prepared an appraisal report that valued a California property at \$890,000. In response to a bank's request for additional information, on December 4, 2006, the appraiser prepared a revised version of the appraisal that also had an effective date of October 3, 2006. The bank subsequently loaned \$890,000 secured by the property. After the FDIC became receiver of the bank, it filed suit against the appraiser alleging negligent misrepresentation. The policyholder tendered the suit to her E&O insurer, which denied coverage because the policy had a prior acts date of November 20, 2006. The FDIC subsequently obtained a default judgment of over \$500,000 against the appraiser and filed suit against the insurer seeking indemnification and bad faith damages.

The policy's insuring agreement provided coverage in connection with acts happening "during the Policy Period; or prior to the Policy Period provided that: such act, error, omission or Personal Injury happened on or after the Prior Acts Date" of November 20, 2006. The

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Policy also provided that all “Claims alleging interrelated acts, errors or omissions or Personal Injuries regardless of the number of Claims, Insureds, or claimants are considered to be one claim. All such Claims are considered first made at the time the first Claim was first made. Furthermore, an interrelated act, error or omission is deemed to have occurred at the time the first interrelated act, error, or omission occurred.” The policy did not otherwise define “interrelated.”

In connection with the carrier’s summary judgment motion, the court held that the misrepresentations upon which the judgment obtained by the FDIC was based were all made in the original appraisal that took place before the prior acts date. Thus, the wrongful conduct alleged was not covered by the policy. The court further indicated that, even if some portion of the conduct alleged in the underlying case occurred after the prior acts date, such conduct was interrelated with the work performed before the prior acts date. In doing so, the court dismissed the FDIC’s argument that the policy’s use of “interrelated acts” was automatically ambiguous because the policy did not define that term, and noted that the court could use the plain, ordinary, and customary definition of the term.

Because the insurer was entitled to summary judgment on the coverage issues, the court also granted it summary judgment on the bad faith claims. The court specifically noted that the insurer would not be liable for bad faith even if coverage existed because the insurer had a good faith coverage position. Finally, the court held that, because California law and precedent prohibit indemnification for intentionally harmful conduct such as fraud or misrepresentation, the insurer could not indemnify the FDIC for the underlying judgment in any event, as negligent misrepresentation was “a species of fraud.”