

ALERT

6th Circuit Affirms No Coverage Where Insured Concealed Claim and Underlying Facts Before Giving Untimely Notice of Claim

July 10, 2018

In a case that was briefed and argued for the primary carrier by Wiley Rein at the trial court level and on appeal, the U.S. Court of Appeals for the Sixth Circuit unanimously affirmed summary judgment on behalf of the insurers where the insured bank concealed key facts concerning a government investigation until the eve of settlement, holding that the insured failed to provide timely notice of a Claim or adequate notice of a potential Claim. *First Horizon Nat'l Corp. v. Houston Cas. Co.*, No. 17-5767/5844 (6th Cir. July 10, 2018).

The insured bank was the subject of a False Claims Act (FCA) investigation by U.S. Department of Justice (DOJ) and the U.S. Department of Housing and Urban Development (HUD), which alleged that the bank had submitted false claims for FHA mortgage insurance. The government's investigation began in 2012, and in May 2013, representatives from the government met with the insured in person and presented a 35-page presentation outlining the insured's violations of the FCA, including that 67.1% of the loans for which it sought insurance contained serious, undisclosed deficiencies, and articulating "theoretical damages and penalties" upward of \$1.19 billion. DOJ and the insured entered into a tolling agreement in which DOJ agreed not to file "a civil action against [the insured] under the False Claims Act" while the parties engaged in settlement discussions. Then, in April 2014, DOJ made a \$610 million settlement demand by telephone, which it confirmed in a lengthy email that explained the bases for liability and damages and repeatedly referred to DOJ's "settlement offer." Shortly thereafter, DOJ stated that it could not "push back the date by which we agree to file suit

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beyond June.”

Read the full summary here.