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McKool Smith Team Notches $33M Win in Dispute Over Legal Costs

The judge found exclusions claimed by several insurers did not preclude them from covering defense and indemnity coverage claims against Cushman & Wakefield, the world's largest privately held real estate services firm.

Photo: J. Albert Diaz/ALM

BY GREG LAND

An Illinois judge has sided with global commercial real estate services giant Cushman & Wakefield in a dispute with its insurers over more than $33 million in legal fees it racked up fighting lawsuits stemming from appraisals performed for developers prior to the 2008 recession.

Ruling on summary judgment, U.S. District Judge Joan Lefkow of the Northern District of Illinois said that Illinois National Insurance, ACE American Insurance, Liberty Mutual Insurance and RLI Insurance were obligated to provide tiered levels of professional liability coverage to Cushman under their contracts.

Lefkow ordered Cushman to reimburse Illinois National for about $3 million it has already paid to defend and indemnify Cushman, but the ACE policy appears to cover those costs as well.

Cushman is represented by a team of McKool Smith lawyers including principals Robin Cohen, Natasha Romagnoli and Michelle Migdon and associate Avery Williams, who were not at liberty to comment.

The insurers are represented by well over a dozen lawyers from Kaufman Dolowich & Voluck; Pretzel & Stouffer; Wilson Elser Moskowitz Edelman & Dicker; and Walker Wilcox Matousek, and from New York's London Fischer and New Jersey's Bressler, Amery & Ross.

There was no immediate response to inquiries from each insurer's lead attorney.

As detailed in court filings, Credit Suisse AG retained Cushman to conduct appraisals for loans to developers of master-planned communities between 2004 and 2007. Credit Suisse underwrote the loans based on the appraisals, which used a "total net value" methodology, defined as "the sum of the market value of the bulk lots of the entire planned community, as if all of the bulk lots were complete (in terms of backbone and infrastructure) and available for sale to merchant builders, as of the date of the appraisal."

Many of the loans defaulted between 2008 and 2010, resulting in litigation asserting that the TNV value resulted in higher valuations than the customary "market value" method, allowing Credit Suisse to "allegedly earn fees by originating and servicing large syndicated loans using the [developments] as collateral," the order said.

Four lawsuits, including a putative class action, were filed against Cushman.

The company had five policies in place for the relevant 2009-2010 year: A primary policy with another carrier for $2 million, then a first-level excess policy carried by Illinois National for $23 million; secondary excess coverage with ACE for sums exceeding $25 million; and third-level coverage with Liberty and RLI of $7 million each for sums exceeding $35 million.

The insurers argued, among other things, that their policies did not cover investment advisory activities or the "misleading" TNV appraisals, and Illinois National and ACE sought reimbursement for $26 million and $7 million, respectively, that they paid to defend the claims.

In her March 20 order, Lefkow wrote that while Cushman's appraisers may have had concerns, "this does not mean they knew issuing TNV appraisals was inherently misleading, nor that a reasonable person with knowledge of the facts surrounding these appraisals might expect such activity to be the basis of a claim."

She also said that Illinois National was due a refund of about $3 million, roughly the remaining amount of coverage from the ACE policy.

Lefkow's ruling left alive five other relatively minor claims, which she urged the parties to settle.

Of the four underlying lawsuits against Cushman, two have settled and one was dismissed. Cushman won summary judgment on the fourth, which was appealed and is now pending before the U.S. Court of Appeals for the Ninth Circuit.

***Greg Land** covers topics including verdicts and settlements and insurance-related litigation for the Daily Report in Atlanta.*