

Cushman Beats Insurers' Bid To Bar Appraisal Suit Coverage

By **Jeff Sistrunk**

Law360 (April 23, 2018, 5:23 PM EDT) -- Cushman & Wakefield Inc.'s insurers cannot lean on a pair of policy exclusions to deny coverage for multiple lawsuits against the company over pre-2008 real estate appraisals, a New York federal judge held Friday, while also finding that all the underlying actions are related and fall under the same policy period.

In an order deciding a flurry of summary judgment motions, U.S. District Judge Joan H. Lefkow ruled that C&W is entitled to coverage under excess policies provided by AIG subsidiary Illinois National Insurance Co. and other carriers. The judge shot down Illinois National's bid to nix coverage based on two exclusions, one for claims involving investment advice and the other for claims stemming from any wrongful acts C&W knew about before the policy inception.

Judge Lefkow also concluded that four separate matters pertaining to the appraisals — three suits and one presuit demand — are related for coverage purposes and fall under C&W's policies for the period spanning 2009 to 2010, during which the earliest of the actions was filed.

"The claims are unmistakably based on much more than a 'tenuous ... factual overlap,'" Judge Lefkow wrote.

C&W provided real estate appraisals to Credit Suisse AG between 2004 and 2007 for loans made to developers of large, master-planned residential communities, or MPCs, many of which went into default during the 2008 to 2010 economic crisis. In the aftermath, C&W was hit with a slew of claims alleging it intentionally overvalued the MPCs using a faulty "total net value" method so Credit Suisse could generate fees.

Those claims included a putative class action in Idaho federal court dubbed "Gibson" in Judge Lefkow's order, a Colorado federal court suit known as "Blixseth," a third-party bankruptcy court complaint called "Rhodes," and a presuit demand by a hedge fund. According to the order, C&W defeated both the Gibson and Blixseth cases, although an appeal in Gibson is currently pending in the Ninth Circuit. Meanwhile, the company agreed to settle the presuit demand, which the order referred to as "Highland," for \$12 million and the Rhodes complaint for \$362,500, the decision says.

From 2009 through 2013, C&W held multi-tiered professional liability insurance programs. For the 2009-2010 policy year, the company had \$2 million in primary insurance with Nottingham Indemnity Co., \$23 million in first-layer excess coverage from Illinois National, \$10 million in second-layer excess coverage

from Ace American Insurance Co. — now part of Chubb Ltd. — and \$15 million in third-layer excess coverage from Liberty Mutual Insurance Co. and RLI Insurance Co., according to court documents.

As of last year, Illinois National and Ace had shelled out a combined \$33 million in defense and settlement payments on C&W's behalf in connection with the appraisal cases, court papers indicate.

However, disputes arose between C&W and its insurers about the availability and extent of coverage, and the real estate services firm filed the instant suit in November 2014. Judge Lefkow's Friday decision touched on a series of summary judgment motions filed by the parties last summer.

In its motion, Illinois National sought a ruling that none of the four underlying claims is covered by its policy on account of prior knowledge and investment adviser exclusions, and also requested an order directing C&W to reimburse it for all the payments it has made to date.

Illinois National asserted that the term "investment" in the investment adviser exclusion, formally known as Endorsement 5, can be read to apply to real estate appraisals. C&W countered that the exclusion only applies to securities-related activities typically undertaken by investment advisers.

Judge Lefkow found that, because C&W set forth a reasonable interpretation of the exclusionary language, Endorsement 5 doesn't preclude coverage.

Illinois National also argued that the prior knowledge exclusion applies, because C&W appraisers were aware before the 2009-2010 policies were issued that the total net value appraisal method produced misleading results. But Judge Lefkow said the insurer hadn't presented any "persuasive evidence" to back up that assertion.

"True, appraisers may have had concerns, but this does not mean they knew issuing [total net value] 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," the judge wrote.

Judge Lefkow also ruled the Blixseth and Rhodes actions and the Highland demand relate to the earlier Gibson suit, such that all four claims fall under the 2009-2010 insurance program. All four claims contain "overlapping factual allegations and arise from strikingly similar circumstances," the judge said. As a result, C&W can pursue coverage under each layer of the 2009-2010 program in succession, according to the order.

Based on her conclusions, Judge Lefkow held that neither Illinois National nor Ace may seek reimbursement from C&W for defense and settlement payments they have already made. But Illinois National will be entitled to reimbursement for any sums paid over its \$23 million limit, the judge said.

The district judge also dismissed two of C&W's breach-of-contract claims against Illinois National and its bad faith claim against that insurer, noting a lack of evidence that Illinois National demonstrated "gross disregard" of its policy obligations.

Counsel for C&W declined to comment, while attorneys for the insurance companies did not immediately respond to requests for comment.

C&W is represented by Robin Cohen, Natasha Romagnoli and Avery Williams of McKool Smith PC and John H. Mathias Jr. and Jennifer S. Senior of Jenner & Block LLP.

Illinois National is represented by David T. Brown and Andrew S. Johnson of Kaufman Dolowich Voluck LLP and Robert Novack and J. Emma Mintz of Bressler Amery & Ross PC.

Liberty is represented by Robert Marc Chemers, Donald J. O'Meara Jr. and William W. Elinski of Pretzel & Stouffer, Chartered.

Ace is represented by Christopher A. Wadley of Walker Wilcox Matousek LLP and Daniel W. London of London Fischer LLP.

RLI is represented by Michael John Duffy and Ashley L. Conaghan of Wilson Elser Moskowitz Edelman & Dicker LLP.

The case is Cushman & Wakefield Inc. v. Illinois National Insurance Co. et al., case number 1:14-cv-08725, in the U.S. District Court for the Northern District of Illinois.

--Editing by Nicole Bleier.