

Suits Alleging Appraisal-Related Errors Triggered Professional Liability Coverage

CHICAGO — An Illinois federal judge on April 20 found that the world's largest privately held commercial real estate services firm can access more than \$48 million in professional liability coverage for underlying defense and settlement costs arising from lawsuits alleging appraisal-related errors (Cushman & Wakefield Inc. v. Illinois National Insurance Company, et al., No. 14-8725, N.D. Ill., 2018 U.S. Dist. LEXIS 67523).

(Opinion and order in Section D. Document #13-180503-028Z.)

Professional Liability

Cushman & Wakefield Inc. sued its real estate professional liability insurers Illinois National Insurance Co., ACE American Insurance Co., Liberty Mutual Insurance Co. and RLI Insurance Co. in the U.S. District Court for the Northern District of Illinois, seeking a declaration as to coverage for underlying lawsuits.

Credit Suisse AG entities retained Cushman subsidiaries to conduct real estate appraisals related to loans made to developers of large, master-planned residential communities (MPCs).

After loans defaulted, certain property owners, shareholders and developers of the MPC brought or threatened four lawsuits alleging that Cushman committed appraisal-related errors when it used a new total net value (TNV) appraisal method for real estate appraisals.

In the present lawsuit, Cushman also sued Illinois National and ACE for breach of contract and breach of the implied covenant of good faith and fair dealing. Illinois National counterclaimed for declaratory relief and recoupment, and ACE counterclaimed for recoupment. The insureds moved for summary judgment, and Cushman moved for partial summary judgment.

Judge Joan H. Lefkow first noted that Cushman is a corporation organized under the laws of New York and has its principal place of business in New York. She said the policies were all addressed and delivered to Cushman's New York headquarters and the 2009-2010 and 2010-2011 policies were negotiated by Cushman's insurance broker out of New York offices.

“The policies cover nationwide risks and thus given the aforementioned facts, New York bears a strong rational relationship to the general contract. The court will therefore apply New York law.”

Prior Knowledge Exclusion

The judge found that Illinois National has failed to demonstrate that the prior knowledge exclusion precludes coverage for the underlying claims.

“Illinois National argues that Cushman appraisers knew as far back as 2006 that issuing TNV appraisals was inherently misleading and might result in claims of professional malpractice or misfeasance, but it submits no persuasive evidence to substantiate its assertion. . . . Illinois National also contends that Cushman appraisers began taking issue with conducting TNV appraisals as far back as 2006, pointing to an affidavit by [appraiser Michael] Miller. . . . True, appraisers may have had concerns, but 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.”

The judge added that Miller's concerns were assuaged after speaking to Credit Suisse and that there was no indication that Cushman was violating any requirements under the Uniform Standards of Professional Appraisal Practice (USPAP).

“Indeed, ‘mere knowledge of “some consequences” of an act is inconsequential, which, standing alone, would not provide a reasonable basis [for] the insured to believe that it had committed a wrongful act that foreseeably will result in a claim.’ . . . Under these facts, the Prior Knowledge Exclusion does not bar coverage for the Underlying Claims.”

The judge further found that coverage is not precluded by Endorsement 5, which bars coverage for “any Claim alleging, arising out of, based upon, resulting from, directly or indirectly, or in any way involving . . . (a) the exercise of any authority or discretionary control by an Insured with respect to any client’s funds or accounts; (b) any actual or alleged commingling of funds or monies; (c) an Insured selecting an investment manager, investment advisory or custodial firm; (d) any Insured advising as to, promising or guaranteeing the future value of any investment or any rate of return or interest; or (e) the failure of any investment to perform as expected or desired.”

Reimbursement

The judge determined that Illinois National is entitled to reimbursement of the amounts it paid in excess of its \$23 million limit for the 2009-2010 policy year.

“ACE, Liberty and RLI must pay, to the extent the ACE, Liberty, and RLI 2009-2010 Policies are triggered, all amounts incurred in connection with each Underlying Claim that are in excess of the 2009-2010 Illinois National Policy (as to ACE) and the 2009-2010 ACE Policy (as to Liberty and RLI), up to their respective Policies' limits.”

The judge denied Illinois National and ACE's motions for summary judgment on their respective recoupment counterclaims and granted Cushman's motion as to these counterclaims.

Counsel

Robin L. Cohen, Natasha Romagnoli and Michelle R. Migdon of McKool Smith in New York and Avery Williams of McKool Smith in Dallas represent Cushman.

David Thomas Brown and Andrew Shilling Johnson of Kaufman Dolowich & Voluck in Chicago, Douglas K. Eisenstein and J. Emma Mintz of Bressler Amery & Ross in New York and Kenneth J. Cesta and Robert Novack of Bressler, Amery & Ross in Florham Park, N.J., represent Illinois National.

Daniel Wagner London, Melissa Lynn Swindel, David Bradley Franklin and Perry Ian Kreidman of London Fischer in New York and Christopher J. Shannon and Christopher A. Wadley of Walker Wilcox Matousek in Chicago represent Ace.

Robert Marc Chemers, Donald J. O'Meara Jr., William W. Elinski and Paula Kirschnick Villela of Pretzel & Stouffer in Chicago represent Liberty Mutual. Michael John Duffy and Ashley L. Conaghan of Wilson, Elser, Moskowitz, Edelman & Dicker in Chicago represent RLI.