

Thursday, November 7, 2013

Navigators Insurance Company Sues Appraiser to Deny Coverage Under "Regulatory Claims"/FDIC Exclusion

By Peter C

Update: Navigators has sued three more appraisers to deny coverage under the same "regulatory claims" exclusion discussed in the post below. The more recent lawsuits are discussed in this later [post](#).

Yesterday, appraiser E&O provider Navigators Insurance Company filed a lawsuit in Florida against one of its own insured appraisers. In its complaint, Navigators seeks to enforce a "regulatory claims" exclusion in the E&O policy purchased by the appraiser. That appraiser is currently being sued by the FDIC in a separate lawsuit scheduled for trial next month. If Navigators prevails in its legal action against the appraiser, the appraiser will not have coverage under her E&O policy for any damages for which she is found liable to the FDIC at the upcoming trial and will also receive no further payment of defense costs.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NAVIGATORS INSURANCE COMPANY)
Plaintiff,)
v.) Case No. _____
[REDACTED], an individual d/b/a [REDACTED])
APPRAISAL SERVICES; the FEDERAL)
DEPOSIT INSURANCE CORPORATION,)
as receiver for COLONIAL BANK,)
Defendants.)

**PLAINTIFF NAVIGATORS INSURANCE COMPANY'S
COMPLAINT FOR DECLARATORY JUDGMENT**

The two cases provide an important look at current FDIC lawsuits against appraisers and at a significant hole in some E&O policies marketed to appraisers by some insurers.

The FDIC's Underlying Lawsuit Against the Appraiser. In February 2007, the defendant appraiser allegedly appraised a condominium unit in Holmes Beach, Florida for \$950,000. The appraisal was for a \$570,000 refinance loan arranged by defunct mortgage lender Taylor, Bean & Whitaker (TBW). The funds for the loan came from a wholesale line of credit provided by Colonial Bank. TBW allegedly assigned the mortgage to Colonial Bank upon origination. Colonial Bank failed in 2009, and the FDIC is now serving as its receiver. As a receiver, the FDIC has the right and ability to pursue losses it contends resulted from the negligence or other alleged wrongdoing of professionals or service providers to the failed lender, including appraisers.

The borrower ultimately defaulted on the loan, and the FDIC has alleged that the loan is greatly undersecured. It alleges that the defendant appraiser prepared a negligent appraisal report which inflated the value. The FDIC sued her for professional negligence and negligent misrepresentation in a lawsuit filed in August 2012. The FDIC seeks monetary damages against the appraiser equal to the loss on the loan, plus accrued interest and other charges. The FDIC's lawsuit against the appraiser is scheduled for trial next month, December 2013.

Navigators' Lawsuit Against the Appraiser. In what is referred to as a coverage action in legal circles, Navigators filed its own lawsuit against the appraiser on November 6, 2013. The lawsuit relates to insurance coverage for the FDIC's lawsuit against the appraiser under Navigators' E&O policy. Because the FDIC is an affected party, Navigators' lawsuit also names the FDIC as a defendant.

In this separate lawsuit, Navigators contends that it has no duty under its E&O policy to defend the appraiser and has no duty to pay any damages for which the appraiser may be found liable to the FDIC. Instead, based on a "regulatory claims" sublimit and exclusion in its policy, Navigators contends that it only has responsibility to the appraiser to pay for her defense expenses against the FDIC up to \$100,000. According to Navigators, it has already spent \$100,000 for the appraiser's defense and thus has no further responsibility to the appraiser in connection with her defense or for any damages awarded to the FDIC in the trial next month.

Navigators' lawsuit seeks an order from the court confirming these legal contentions.

If Navigators prevails, the appraiser would then have personal responsibility for any further costs of defending herself against the FDIC's lawsuit and also would have full personal liability for any damages awarded against her at trial or in settlement. Unfortunately for the appraiser, Navigators' filing of the lawsuit also means that she must now defend two lawsuits: the FDIC's professional negligence case against her and Navigators' action seeking to deny coverage for that case. This puts the appraiser in a very difficult position.

Here are Navigators' summary allegations in its own complaint filed in the U.S. District Court for the Middle District of Florida in Tampa:

NAVIGATORS INSURANCE COMPANY
THIS IS BOTH A CLAIMS MADE AND REPORTED INSURANCE POLICY.
THIS POLICY APPLIES TO THOSE CLAIMS THAT ARE FIRST MADE AGAINST THE INSURED AND REPORTED IN WRITING TO THE COMPANY DURING THE POLICY PERIOD.
PLEASE READ THIS POLICY CAREFULLY.
REAL ESTATE APPRAISERS ERRORS AND OMISSIONS INSURANCE POLICY
DECLARATIONS

POLICY NUMBER: FH11RAL002607V RENEWAL OF: _____

1. NAMED INSURED: [REDACTED]

2. ADDRESS: [REDACTED]

3. POLICY PERIOD: FROM: 06/24/2011 TO: 06/24/2012
12:01 A.M. Standard Time at the address of the Named Insured as stated in Number 2 above.

4. LIMITS OF LIABILITY:
A. \$ 500,000 Damages Limit of Liability – Each Claim
B. \$ 500,000 Claim Expenses Limit of Liability – Each Claim
C. \$ 1,000,000 Damages Limit of Liability – Policy Aggregate
D. \$ 1,000,000 Claim Expenses Limit of Liability – Policy Aggregate

5. DEDUCTIBLE (Inclusive of claim expenses): A. \$ 500 – Each Claim
B. \$ 1,000 – Aggregate

6. PREMIUM: \$ 807.00 Additional 1.3% FL Hurricane Fund Surcharge \$10.00

7. RETROACTIVE DATE: 06/24/2004


8. FORMS ATTACHED: NAV RAL NIC 19 (02/11)
NAV RAL 008 (02 11) NAV RAL 003 (02 11) NAV RAL 002 (02 11)

PROGRAM ADMINISTRATOR: Robert H. Landy Insurance Agency Inc.
75 Second Ave Suite 410 Needham, MA 02494-2876

By Acceptance of this policy the Insured agrees that the statements in the Declarations and the Application and any attachments hereto are the Insured's agreements and representations and that this policy embodies all agreements existing between the Insured and the Company or any of its representatives relating to this insurance.

IN WITNESS WHEREOF, we have caused this policy to be signed by our President and Secretary.

[Signature: Emily Miner] [Signature: Stanley A. Goloraki]
[Emily Miner] Secretary [Stanley A. Goloraki] President

NAV RAL DEC (02 11) Page 1 of 1 

Navigators/Landy Policy at Issue in Lawsuit

3. In particular, Navigators seeks a declaratory judgment that the Policy does not afford indemnity coverage for a claim asserted by Defendant the Federal Deposit Insurance Corporation (the "FDIC"), as receiver for Colonial Bank the (the "FDIC-R"), against [REDACTED] (the "Underlying FDIC-R Claim"), by virtue of a Policy exclusion barring coverage for Regulatory Claims, i.e., claims based on or arising out of any claim made by, or on behalf of, the FDIC or any similar regulatory agency.

4. Navigators also seeks a determination that it has no duty to defend [REDACTED] in connection with the Underlying FDIC-R Claim, but is instead obligated only to pay claim expenses incurred by [REDACTED] in defense of the Underlying FDIC-R Claim up to the applicable \$100,000 aggregate sublimit of liability for Regulatory Claims.

WHEREFORE, Navigators respectfully requests that this Court:

- A. Enter judgment declaring that, for the reasons stated in Count I, the Policy does not provide indemnity coverage for the Underlying FDIC-R Claim pursuant to Section IV., as amended by the Regulatory Claims Endorsement;
- B. Enter judgment declaring that, for the reasons stated in Count II and pursuant to Sections II and IV of the Policy, as amended by the Regulatory Claims Endorsement, Navigators has no duty to defend Pearl in connection with the Underlying FDIC-R Claim or to pay claim expenses incurred in connection with the Underlying FDIC-R Claim beyond the \$100,000 Regulatory Claims Sublimit;
- C. Award Navigators its fees and costs incurred herein; and

Navigators' full complaint and a copy of the E&O policy at issue in its complaint are available [here](#).

The FDIC or "Regulatory Claims" Exclusion. The "regulatory claims" exclusion referred to in Navigators' lawsuit

against the appraiser is applied as an endorsement to many appraiser E&O policies currently issued by Navigators in states where appraisers are at higher risk for being sued by the FDIC -- as this time: Arizona, California, Florida, Georgia, Illinois, Michigan, Nevada, and Washington. Appraisers often don't realize they have a regulatory claims exclusion until after they have purchased their policy or, worse, until they are threatened with a claim. The intended effect of the endorsement is to exclude coverage for damages in any claim by the FDIC or by any similar federal or state regulatory agency and to cap the attorneys' fees available to defend such a claim. To be blunt, the exclusion saves the insurer from the risk of the worst lawsuits currently being litigated against both residential and commercial appraisers. (The FDIC itself has warned banks about new exclusions being found in D&O policies for bank officers and directors and warned about the personal liability that may result. A post about the FDIC's Financial Institution Letter is [here](#).)

This is the actual exclusion language in the appraiser's E&O policy relied on by Navigators in its lawsuit:

REGULATORY CLAIMS SUBLIMIT - CLAIM EXPENSES ENDORSEMENT

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

REAL ESTATE APPRAISERS ERRORS AND OMISSIONS INSURANCE POLICY

In consideration of the premium charged, it is agreed that the following is added to Section IV. EXCLUSIONS of the policy:

Q. Based on or arising out of any claim made by, or on behalf of, the Federal Deposit Insurance Corporation or any similar federal or state regulatory agency (a "Regulatory Claim").

It is further agreed that the following is added to Section II. LIMITS OF LIABILITY AND DEDUCTIBLE of the policy:

K. Regulatory Claims Sublimit

Notwithstanding Exclusion Q, the Company will pay on behalf of the Named Insured, claim expenses incurred by the Named Insured in defense of a Regulatory Claim otherwise covered under this policy, subject to an aggregate maximum sublimit of liability of \$100,000 for all such Regulatory Claims (the "Regulatory Claims Sublimit". The Regulatory Claims Sublimit shall be part of, and not in addition to, the amount shown in Item 4D. in the Declarations as the "Claim expenses Limit of Liability - Policy Aggregate."

All other provisions of this policy remain unchanged.

Navigators/Landy FDIC-Regulatory Exclusion and Sublimit

There are similar FDIC-related exclusions in some appraiser E&O policies from General Star (depending on the date of the appraiser's coverage), Star Insurance Company, Five Star/Lloyd's and CNA, as explained in this prior [post](#). **However, not all policies for appraisers have FDIC and regulatory claims exclusions.** Even in high risk states, coverage without such exclusions is available in LIA's [appraiser E&O](#) program and in competitive programs from Intercorp and FREA.

Peter Christensen is an attorney who advises professionals and businesses about legal and regulatory issues concerning valuation and insurance. He also serves as general counsel to **LIA Administrators & Insurance Services**. If you need assistance with legal or insurance matters similar to those discussed in this article, Peter can be reached at peter@liability.com.