Pratt's Journal of Bankruptcy Law

LEXISNEXIS® A.S. PRATT®

FEBRUARY-MARCH 2024

LexisNexis

Pratt's Journal of Bankruptcy Law

VOLUME 20	NUMBER 2	February-March 2024

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call or email:

Ryan D. Kearns, J.D., at 513.257.9021
Email: .... ryan.kearns@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . (800) 833-9844
Outside the United States and Canada, please call . . . . (518) 487-3385
Fax Number . . . . (800) 828-8341
Customer Service Website . . . . http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call

Your account manager or . . . . (800) 223-1940
Outside the United States and Canada, please call . . . . (937) 247-0293

Library of Congress Card Number: 80-68780

ISBN: 978-0-7698-7846-1 (print)
ISBN: 978-0-7698-7988-8 (eBook)
ISSN: 1931-6992

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S JOURNAL OF BANKRUPTCY LAW [page number] ([year])

Example: Patrick E. Mears, *The Winds of Change Intensify over Europe: Recent European Union Actions Firmly Embrace the "Rescue and Recovery" Culture for Business Recovery*, 10 PRATT'S JOURNAL OF BANKRUPTCY LAW 349 (2014)

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW BENDER

(2024–Pub.4789)

Editor-in-Chief, Editor & Board of Editors

POSTMASTER: Send address changes to *Pratt's Journal of Bankruptcy Law*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Bank Failure Highlights Related Claim Issues, State Law Considerations, in Directors and Officers Insurance Claims

By Geoffrey B. Fehling and Carleton Goss**

In this article, the authors review a recent federal court decision involving insurance coverage for claims stemming from the collapse of First NBC Bank.

A Louisiana federal judge recently granted the motion for partial summary judgment filed by the Federal Deposit Insurance Corporation (FDIC) in a directors and officers (D&O) liability insurance coverage dispute involving "related" claims arising from the collapse of First NBC Bank. In addition to being a win for policyholders facing similar disputes involving related claims, the decision shows that related-claim issues depend heavily on both the specific policy language purchased and governing law. Here, the policyholder's victory turned largely on Louisiana law and the interpretation of the specific causation language used in the related claims and prior notice provisions. Shortly after the court's decision, the parties settled the dispute and dismissed the case.

BACKGROUND

The recent decision stems from the largest bank failure in Louisiana history. In 2017, First NBC Bank failed. The bank's failure triggered a series of legal actions, including a criminal action against the bank's former president and chief executive officer (CEO) that resulted in a 14-year prison sentence.[1]

At the time of its collapse, First NBC Bank had D&O insurance policies. This dispute pertained to the 2017 policies in place at the time the bank failed. The bank sought coverage for breach of fiduciary duty and gross negligence claims against executives in approving certain loans. The insurer denied coverage, arguing that the claims against executives were not "first made" during the policy period because the new claims related back to multiple claims and notices made or provided during the 2016 policy period. Coverage litigation ensued, and the FDIC, which had been appointed as receiver, and the 2017 insurers cross-moved for partial summary judgment.

---

* The authors, partners in Hunton Andrews Kurth, may be contacted at gfehling@huntonak.com and cgoss@huntonak.com, respectively.

[1] https://www.justice.gov/usao-edla/pr/former-bank-president-ashton-ryan-sentenced-14-years-prison-fraud-ended-first-nbc-bank.

THE PRIOR MATTERS AND KEY POLICY PROVISIONS

According to the insurers, the claims against the executives were not covered under the 2017 policies because they were related to prior claims reported under earlier policies. Specifically, the insurers pointed to the following matters:

- An action by the Georgia insurance commissioner against First NBC and its CEO alleging that the bank was using straw entities to prop up an insurance company.
- Notice by a bank director of a potential claim identifying twelve borrowing relationships that could give rise to a lawsuit based on similarities to claims asserted in the Georgia action.
- A shareholder action against a bank holding company and its CEO and chief financial officer alleging securities violations by falsely portraying the company's finances.
- A shareholder derivative action against the directors and officers of the same bank holding company alleging that the defendants breached their fiduciary duties by misrepresenting the bank's financial situation.
- A prior joint examination by the FDIC (in its corporate capacity) and the Louisiana Office of Financial Institutions (LOFI) identifying problems with the bank's lending practices and non-compliance with laws and regulations and resulting in a consent order.

In support of their denial, the insurers relied on the policies' "Interrelationship of Claims" (IOC) provision and prior notice exclusion. The IOC provision stated that all claims "alleging, arising out of, based upon or attributable to the same facts, circumstances, situations, transactions or events" are considered a single claim first made at the time the earliest such claim was made. Because the 2017 policies were "claims-made" policies that provided insurance coverage only for claims made against insureds during the policy period, any claims that related back to claims first made under prior policy periods would not be covered.

The prior notice exclusion similarly barred coverage for claims arising out of the same facts that had been reported under a prior policy. The insurers argued that the prior notices of related claims barred coverage under the 2017 policies. Both provisions incorporated the same, broad "arising out of" causation language and involved analysis of the relationship between the current claim and prior claims.

THE DECISION

Following Louisiana law, the court began its analysis with the text of the policies. The parties agreed that the critical language in both provisions was "arising out of, based upon, or attributable to." The court acknowledged that this language "dictates how connected a claim must be to a previous claim in order to be excludable under these provisions." Unsurprisingly, the insurers urged the court to construe the language broadly – requiring only a "mere connection" with a prior claim. The court rejected that argument. Relying on the plain language and caselaw, it held that a "stronger relationship" was required. In reaching that conclusion, the court pointed out that the Louisiana Supreme Court defined "arising out of" to indicate a "but for" causal relationship without requiring a showing of direct or proximate causation.

Applying binding Louisiana law requiring the insurer to show a causal relationship, the court analyzed whether the FDIC's present claims arose out of prior claims. Ultimately, it determined that there was no indication that the present claims, which involved allegations of securities laws and breaches of fiduciary duties, were attributable to the same circumstances as prior claims. For instance, the court noted that the only similarity between the prior Georgia litigation and the present claims was that they involved the same bank, which did not meet the standard to establish relatedness. The director's notice of problematic borrowing relationships concerned only notice of potential claims, which cannot trigger either the prior notice exclusion or IOC provision.

The court further distinguished the two shareholder actions because they broadly related to financial misrepresentations and did not concern approval of specific loans like those at issue in the present claims. As a result, the actions did not amount to prior notice of the specific lending relationships at issue or show that those actions were interrelated with the specific lending relationships. The joint FDIC-LOFI matter did not support the insurers' denial because the consent order did not mention specific loan approvals. The fact that a matter had to do with lending was not by itself determinative.

Because none of the claims in the present dispute arise out of, were based upon, or were attributable to the matters identified in prior claims, the IOC provision and prior notice exclusion were not implicated. Thus, the Court granted the FDIC's partial summary judgment motion and rejected the insurers attempt to limit coverage.

CONCLUSION

This decision is notable for a few reasons.

First, the decision is significant because it underscores that related-claims analysis is highly fact-specific and turns on many factors, including the specific policy language, underlying allegations giving rise to the claims and losses, and applicable state law. Given all of these variables, there are often arguments both for and against relatedness, especially if a policy provision is written as broadly as those included in First NBC Bank's D&O policies. Policy forms vary widely and are often subject to negotiation, including with respect to exclusionary language that could support insurer defenses based on prior notices or claims.

Second, it highlights the importance of governing state law, which also varies significantly and can be dispositive on critical issues, like the proper interpretation of "arising out of" causation language. Policies may include choice-of-law or similar venue provisions that can impact this issue. Here, the decision was based on the interpretation of causation language under Louisiana law. Had Louisiana law supported a broader reading of those provisions like what was advocated for by the insurers, the court may have ruled that the claims were related and that there was no coverage.

Third, it is a reminder for banks to have a formal process for regularly reviewing their insurance coverages. The scope of such review should cover not only the amount and scope of coverage provided by each individual policy but also how policies fit together and operate within the overall insurance program, which can minimize coverage gaps and help avoid the risk of surprise denials should a claim arise. It is particularly important for banks that are in troubled condition, or that anticipate litigation, to (i) closely review the parameters of their insurance policies, and (ii) confer with counsel prior to filing a claim or responding to information requests from insurance companies.

Finally, the decision is a good reminder for policyholders to consider the effect of related-claim provisions in handling notices, claims, renewals, and other insurance decisions. Related-claim issues can arise from not only prior litigation, but also regulatory investigations, enforcement actions, consent orders, or notices of potential claims. Working with experienced brokers, coverage counsel, and other professionals can help policyholders understand the scope of related-claim provisions and how they work, which can help minimize any surprises should a claim arise. Further, understanding the effect of related-claim provisions can help with litigation strategy. Here, a month after the court's pro-policyholder decision on the related-claim provisions, the parties settled and the case was dismissed.