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FDIC's \$176M Westernbank D&O Suit Survives Dismissal Bid

By **Megan Stride**

Law360, Chicago (October 24, 2012, 4:07 PM ET) -- A Puerto Rico federal judge refused Tuesday to toss the Federal Deposit Insurance Corp.'s claims seeking \$176 million from directors and officers of Westernbank Puerto Rico and demanding enforcement of their D&O insurance policies, finding the regulator alleged enough details for its gross negligence claims to proceed.

U.S. District Judge Gustavo A. Gelpí also rejected a group of insurers' arguments that the FDIC cannot try to force them to provide liability coverage, rejecting the group's argument that a so-called insured vs. insured policy exclusion barred the FDIC's claims against them because the regulator is now Westernbank's receiver.

The directors and officers initially launched the suit with W Holding Co., Westernbank's former parent company, against Chartis Insurance Co. of Puerto Rico, seeking a declaration that the insurer had to cover them for claims they filed after the FDIC took over as Westernbank's receiver in April 2010.

The FDIC intervened in the suit and is seeking recovery of \$176 million in damages from the former Westernbank directors and officers in addition to a court order enforcing contracts for liability coverage between the directors and officers and Chartis, as well as excess liability policies with XL Specialty Insurance Co., Liberty Mutual Insurance Co. and Ace Insurance Co.

The FDIC specifically accuses the directors and officers and their various partnerships of greenlighting 21 grossly negligent real estate, construction and asset-based loans and transactions between January 2004 and November 2009.

The officers allegedly approved ineligible capital and funded loans despite borrower defaults, among other misdeeds, while the directors allegedly failed to act on auditor warnings of problems in the bank's commercial lending.

On Tuesday, Judge Gelpí axed a handful of motions lodged by the directors and officers and their partnerships to dismiss the FDIC's claims.

The FDIC stated sufficient facts in its complaint to allege a plausible claim for gross negligence, satisfying the relevant pleading standards, the judge concluded, finding "overwhelmingly evident" similarities between the FDIC's allegations against the Westernbank directors and officers and those it brought in similar cases in Illinois, North Carolina and Georgia courts that survived dismissal motions.

The directors and officers had argued that vagueness in the FDIC's complaint prevents individual directors and officers from understanding for precisely which actions the FDIC is alleging they are accountable, but Judge Gelpí shot down that stance on Tuesday.

"Here ... the FDIC explicitly chronicles which director or officer approved which purportedly

grossly negligent loan, when the approval occurred, whether the loan constituted an initial loan, additional credit, extension of construction loan, or post-approval administration and funding," the judge wrote, adding that the FDIC also discusses in "extensive detail" the alleged pitfalls in the directors and officers' approval of the loans.

Judge Gelpí also rejected the bid by Chartis, Ace, XL Specialty and Liberty to dismiss the FDIC's claims against them for enforcement of the directors and officers' policies as well as Chartis' motion to toss the directors and officers' similar enforcement claims against it.

The insurers had argued that the FDIC, since it stands in the shoes of Westernbank, should be barred from bringing the suit under a policy exclusion that blocks coverage for claims brought by one insured against another.

But Judge Gelpí wrote Tuesday that the exclusion is intended to protect insurance companies from collusive suits among insured parties and that the FDIC would not reap the benefits enjoyed by those kinds of actors.

"The FDIC's role as a regulator sufficiently distinguishes it from those whom the parties intended to prevent from bringing claims under the exclusion," the order said.

The judge also noted the FDIC had sued on behalf of depositors, account holders and a depleted insurance fund, as opposed to Westernbank shareholder W Holding.

Andres Rivero of Rivero Mestre LLP, who represents some of the directors and officers, told Law360 on Wednesday that his team is reviewing the order on the FDIC's claim and considering an appeal but that his clients are also "heartened" by the court's ruling on the exclusion.

Attorneys for the other parties did not immediately respond to requests for comment.

The FDIC is represented by Liskow & Lewis PLC and Toro Colon Mullet Rivera & Sifre PSC.

Chartis is represented by Saldaña Carvajal & Vélez-Rivé PSC and Wilson Elser Moskowitz Edelman & Dicker LLP. XL Specialty is represented by Vincente & Cuebas and Wiley Rein LLP. Liberty is represented by Pietrantonio Méndez & Alvarez LLC and Boies Schiller & Flexner LLP. ACE is represented by Colón & Colón PSC and Bailey Cavalieri LLC.

The directors and officers are represented by Rivero Mestre LLP, Coto & Associates, Alston & Bird LLP, Enrique Peral Law Offices PSC and Nigaglioni Law Offices PSC, among others.

The case is W Holding Co. Inc. et al. v. Chartis Insurance Co.-Puerto Rico, case number 3:11-cv-02271, in the U.S. District Court for the District of Puerto Rico.

--Editing by Richard McVay.

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