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AIG Can't Skirt Legal Fees In \$176M Westernbank FDIC Suit

By Sean McLernon

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Law360, New York (March 20, 2013, 7:53 PM ET) -- The First Circuit on Wednesday shot down AIG Insurance Co.'s attempt to escape attorneys' fees and costs incurred by the directors and officers of Westernbank Puerto Rico in a \$176 million coverage suit after the Federal Deposit Insurance Corp. became the bank's receiver in April 2010.

In a three-sentence ruling, a three-judge panel said that AIG failed to establish the First Circuit's jurisdiction over the order finding that the insurer acted obstinately by refusing to advance the legal expenses under their director and officer insurance policies.

Westernbank's former parent company and co-plaintiff W Holding Co. had argued that the order could not be appealed because it is an interlocutory order that is not final. The order merely states that the directors and officers were entitled to the legal fees and costs from AIG, allowing the directors and officers to submit a specific amount of fees, the company said in its motion to dismiss.

Andres Rivero of Rivero Mestre LLP, who represents the plaintiffs, told Law360 that he was pleased to see the First Circuit affirm the district court's ruling.

"It's really important to our clients because it will be an expensive litigation and we needed to have a decision that the insurance would cover the defense," Rivero said. "It was particularly important because the insured versus insured question had not been decided during this crisis."

The directors and officers and W Holding first sued AIG in October 2011, demanding a declaration that the insurer had to cover them for claims they filed after the FDIC took over as Westernbank's receiver almost three years ago.

The FDIC intervened in the suit, seeking recovery from the former Westernbank directors and officers of \$176 million in alleged damages as well as a court order enforcing insurance policies between the directors and officers and AIG. The regulator also sought to enforce excess liability policies with XL Specialty Insurance Co., Liberty Mutual Insurance Co. and Ace Insurance Co.

The FDIC alleges that the directors and officers, and their various partnerships, approved 21 grossly negligent real estate, construction and asset-based loans and transactions between January 2004 and November 2009.

The directors and officers moved for sanctions against AIG in August, arguing that the insurer was violating the terms of its policy by refusing to advance legal costs. AIG had denied coverage under the policy's "insured vs. insured" exclusion, claiming that because FDIC was Westernbank's receiver, it was bringing its action on behalf of Westernbank.

U.S. District Judge Gustavo A. Gelpi granted the sanctions motion, finding that AIG acted

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obstinately by denying that a remote possibility of coverage exists in the case.

“The court’s denial of the D&Os and insurers’ motions to dismiss discusses the various reasons previous courts have or have not applied the insured vs. insured exclusion to the FDIC,” the judge said in his October decision. “As a matter of law, more than a ‘remote possibility’ exists that the exclusion does not apply to the FDIC, and that coverage may therefore apply, as well.”

Counsel for AIG was not immediately available for comment Wednesday.

Judges Sandra Lynch, Jeffrey Howard and Ojetta Rogeriee Thompson sat on the panel for the First Circuit.

W Holding and the directors and officers are represented by Andres Rivero, Alan H. Rolnick, Charles E. Whorton and M. Paula Aguila of Rivero Mestre LLP.

AIG is represented by James K. Thurston and Melissa A. Murphy-Petros of Wilson Elser Moskowitz Edelman & Dicker LLP and Fernando Sabater-Clavell and Luis N. Saldana of Saldana Carvajal & Velez-Rive PSC.

The case is W Holding Co. Inc. et al. v. AIG Insurance Co., case number 12-2508, in the U.S. Court of Appeals for the First Circuit.

--Additional reporting by Megan Stride. Editing by Andrew Park.

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