

National Union Prevails on \$40 Million Coblentz Enforcement Action in D&O Case

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On October 20, the U.S. District Court for the Middle District of Florida granted summary judgment to National Union Fire Insurance Company of Pittsburgh, Pa., in *BondSafeguard v. National Union*, 6:13-cv-561. The court held that the plaintiffs' \$40 million negligent misrepresentation claim was excluded under National Union's directors and officers (D&O) policy's unambiguous contract liability exclusion. Plaintiffs were sureties for a bankrupt land development company insured under National Union's D&O Policy. Plaintiffs issued the insured bonds guaranteeing the performance of various development agreements around the Southeast. Upon the insured's default under these contracts, plaintiffs sued the insured's chairman for alleged negligent misrepresentations that allegedly induced the bonds' issuance. The chairman and his family and plaintiffs entered into a *Coblentz* agreement, under which the chairman assigned his claim against National Union for its denial of coverage. The court held that National Union's contract liability exclusion was "unambiguously broad and preclude[d] coverage for the purported tort claims that depend on 'the existence of actual or alleged contractual liability' of an insured 'under any express contract or agreement.'" Record evidence established that plaintiffs' negligent misrepresentation claim depended on (and was not merely incidental to) the chairman's and the insured's contractual liability under the indemnity agreement, the bonds, and various development agreements. Florida's concurrent cause doctrine also did not apply because the insured risk was "related and dependent" on an excluded risk, and did not pose a risk distinct from the excluded risk. Although the court did not reach the issue of whether the *Coblentz* agreement was reasonable and not entered in good faith, it noted "the plethora of evidence indicating that enforcement of the *Coblentz* agreement in this case would be contrary to Florida law." The court explained that objective and subjective factors are considered to evaluate reasonableness of the settlement, and that reasonableness is ordinarily established through the use of expert testimony. The court noted that expert testimony that merely states that the underlying claim is only "legally possible" provides scant support for proving the settlement of that claim was reasonable. As to bad faith, the court found that "[o]n this record, the conclusion that the *Coblentz*

agreement was reached by collusion or an absence of effort to minimize liability is compelling." The court's ruling provides persuasive language for applying contract liability exclusions under D&O policies to alleged business torts that are related to or dependent on the existence of contractual liability. It also provides an analysis of how to evaluate *Coblentz* agreements for reasonableness and bad faith in the business context.

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