Cahill Prevails in Multi-Decade Class Action Dispute on Behalf of Swiss Re

Date: 10/25/24

After more than 23 years in litigation, the United States District Court for the Southern District of New York ruled on summary judgment that Swiss Re and other insurers did not provide coverage for $330 million of liability based on the fee exclusion in their policies, mostly turning on a single word -- “the” – in the insurance policy.

Cahill partner Thorn Rosenthal served as lead counsel to Swiss Re in the briefing and argument of the fee exclusion issue.

Class action plaintiffs argued that under the Home Ownership and Equity Protection Act (HOEPA) the insured, ResCap, a GM subsidiary, was liable in respect of certain improper and excessive fees charged by originating banks as respects tens of thousands of loans it purchased from the originating banks. After buying the loans from the originating banks, ResCap serviced them briefly before securitizing and selling them. Plaintiffs claimed in excess of two billion dollars.

Over the course of two decades of litigation, GM and ResCap filed for bankruptcy. Eventually, the claims against ResCap were resolved for approximately $330 million, consisting of a relatively small payment of cash and allowed claims in bankruptcy against ResCap in excess of $300 million. The ResCap Liquidating Trust and the class action plaintiffs became assignees of ResCap’s insurance rights, and, in 2015, filed an adversary proceeding in the bankruptcy court in the Southern District of New York against the “tower” of GM’s insurers seeking coverage. Swiss Re, as one of the insurers within the “tower,” hired Thorn to join the case in 2015. If the plaintiffs were successful in their adversary proceeding, Swiss Re would have been held liable for $100 million in claims above the first $100 million (aka the $100-200M corridor).

Thorn advanced the argument that certain fee exclusions applied, and, therefore, Swiss Re could not be held liable for the $100 million in claims. He based his fee exclusion argument on a clause in the insurance policy known as the “deemer” clause, which, he argued, defined the fee exclusions as applying to fees charged by third parties (i.e., the originating banks) for whom ResCap as the “assured” is legally responsible under HOEPA.

Plaintiffs argued that the deemer clause did not apply based on the use of the definite article “the” in the fee exclusions modifying “assured.”

The bankruptcy judge in 2019 denied the summary judgment motion made by Thorn on behalf of Swiss Re and the other insurers based on the deemer clause, finding that the use of the definite article “the” limited the fee exclusion to fees paid directly to ResCap.

Discovery commenced and proceeded over the next three years. The bankruptcy court then adjudicated eleven other motions for summary judgment. In all, the bankruptcy court issued over 200 pages of opinions on summary judgment motions.

Thorn and the other insurers then took the matter to the district court. Thorn briefed the fee exclusion motions, and, in all, the parties filed over 800 pages of briefing on objections to the bankruptcy court’s rulings.

On October 11, 2024, the district court reversed the bankruptcy court as respects the fee exclusions based on Thorn’s deemer clause arguments. As a result, Swiss Re was found not to be liable for the $100 million insurance pay-out, while the other insurance companies also avoided their pay-outs for liability to the class plaintiffs.

Attorney

- Thorn Rosenthal