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RELATED CLAIMS FIRST MADE PRIOR TO D&O POLICY PERIOD PRECLUDES COVERAGE, FLORIDA DISTRICT COURT HOLDS

Walker Wilcox recently obtained summary judgment on behalf of RSUI Indemnity Company when a Florida federal judge held it had no duty to cover an underlying $40 million consent judgment arising from claims of real estate fraud because every underlying claim asserted against the insured shares the same factual basis as a 2008 counterclaim that was "first made" before the policy's inception. *RSUI Indemnity Co. v. Attorney's Title Insurance Fund Inc.*, No. 13-670, M.D. Fla.

Attorneys' Title Insurance Fund Inc. and Florida Title Co. (collectively, ATIF) sued Section 10 Joint Venture LLP, Sky Property Venture LLC and CAS Group Inc., seeking to recover $3 million that they paid for an allegedly fraudulently sold property. The underlying lawsuit alleged claims for equitable lien/constructive trust, injunctive relief and unjust enrichment. Section 10 counterclaimed for slander of title, wrongful lis pendens, declaratory judgment, tortious interference and wrongful injunction.

ATIF sought coverage for the counterclaims from its commercial general liability insurers and RSUI, its directors and officers liability insurer. Eventually ATIF's unjust enrichment count was the only remaining claim, and Section 10 filed a claim for malicious prosecution against ATIF. The parties in the underlying dispute reached a settlement that resulted in a $40 million judgment against ATIF. Section 10 agreed to enforce the judgment only against ATIF's insurers pursuant to *Coblentz v. Am. Sur. Co. of New York*, 416 F.2d 1059 (5th Cir. 1969).

ATIF's liability insurer filed suit in the U.S. District Court for the Middle District of Florida, seeking a declaration as to coverage and RSUI intervened. RSUI moved for summary judgment, arguing that there is no coverage because Section 10's claim is a single claim that predates any RSUI policy. The District Court agreed stating:

> Contrary to Section 10's position, the policies' language is clear and unambiguous. For a claim to qualify for coverage, it must be first made during the respective policy period and it must not be factually or otherwise related to a previous claim. If it is factually or otherwise related to a previous claim, and that claim was first made before the respective policy periods, there is no coverage available. That is what occurred here. Every claim asserted against ATIF in the underlying state court litigation shares the same factual basis as the 2008 Counterclaim, which was 'first made' before the respective policy periods began. As such, there is no coverage afforded under the policies for these claims.

The judge added that the "Prior and Pending Litigation Exclusion, even in its modified form, is in harmony with this construction" rejecting Section 10's argument that there was conflict between the Related Claims

Condition and the Prior and Pending Litigation Exclusion.

RSUI was represented by the Walker Wilcox team of Bill Bila, Robert P. Conlon and Cassandra L. Jones.