

Northern District of Illinois Rules I v. I Exclusion Bars Claim

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The United States District Court for the Northern District of Illinois, applying Illinois law, has held that an insured's claim for coverage in connection with a securities class action lawsuit is barred by the I v. I exclusion in a D&O policy because the insured provided information to the securities class plaintiffs that allowed them to reach a "more advantageous settlement" with the insured defendants. *Denari v. Genesis Ins. Co., et al.* (N.D. Ill. Dec. 12, 2003). In addition, the court accorded preclusive effect to a prior determination in a related action that fees incurred by the plaintiff in objecting to the underlying securities settlement or seeking coverage did not constitute "Cost of Defense" as defined by the operative policy because they were incurred in connection with the plaintiff's affirmative claims.

The policyholder company procured D&O coverage from two insurers. The policy issued by the first insurer contained an I v. I exclusion which, among other things, excluded coverage for all claims "brought by or at the behest of, or with the assistance or active participation of" any insured under the policy. A second insurer had an I v. I exclusion in its policy; however, the policy lacked the "assistance or active participation" language of the first insurer's policy.

The company and several directors and officers were named in a securities lawsuit. One of the defendant officers provided information to the underlying plaintiffs. Once a proposed settlement was reached, the same officer hired counsel to attempt to derail the settlement. Those efforts failed, and the settlement was ultimately approved. The objecting officer then brought suit against the company's two D&O insurers seeking recovery for fees incurred in objecting to the settlement as well as fees for his coverage action. The officer also asserted that he was entitled to extra-contractual damages under Illinois law because the insurers had refused to pay the costs incurred in objecting to the settlement. Both insurers argued that their policies' I v. I exclusions barred coverage because the officer had actively assisted the underlying securities plaintiffs.

After determining that the officer had failed to rebut the insurers' showing that he had provided affirmative assistance to the plaintiffs, the court granted summary judgment to the first insurer with respect to all fees incurred after the date the officer first provided assistance to the plaintiffs based on the plain language of the I vs. I exclusion. The court denied summary judgment to the second insurer, however, reasoning that its policy lacked the "assistance or active participation" language of the first insurer's policy.

The court also determined that the officer's efforts to derail the settlement or to seek coverage under the D&O policies were not covered under either policy. With respect to the first insurer, the court accorded preclusive effect to a ruling made in connection with the securities litigation that specifically determined that the officer's efforts to obtain coverage or to oppose the settlement were incurred in connection with "asserting [the plaintiff's] own affirmative claims or positions" and thus did not constitute "Cost of Defense" as defined by the policy. Although the prior ruling did not involve the second insurer, the court found the underlying logic of the prior ruling persuasive, and determined that the officer's claim for the same fees under the policy was likewise without merit, as they were not costs incurred in "defending or investigating claims," and thus were not defense costs as defined by the policy.

Finally, the court determined that the claims by the officer for extra-contractual damages and civil conspiracy failed as a matter of law. According to the court, under Illinois law, extra-contractual damages must be supported by "vexatious and unreasonable" conduct, which is not present where an insurer asserts a legitimate policy defense or there is otherwise a bona fide coverage dispute. Accordingly, as the insurers' coverage defenses were meritorious, the court denied recovery under the statute. Similarly, because the first insurer acted lawfully in accordance with its policy's plain language, the court held that the officer could not show the requisite "unlawful purpose" to support his civil conspiracy claim under Illinois law.

Wiley Rein & Fielding LLP represented the first insurer in connection with this matter.

For more information, please contact us at 202.719.7130.