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NEWSLETTER

Eighth Circuit: No Coverage under D&O Policy for Claim Arising from Contract

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The United States Court of Appeals for the Eighth Circuit, applying Missouri law, has held that a D&O policy exclusion for claims arising from a contract barred coverage for a lawsuit involving an insured's performance as a subcontractor, regardless of whether the underlying counts sounded directly in contract. *Spirtas Co. v. Federal Ins. Co.*, 2008 WL 850230 (8th Cir. Apr. 1, 2008). The court held that the term "arising from" is synonymous with "arising out of" and should be construed broadly so that the exclusion applies to bar coverage for all counts flowing from or having their origins in a breach of contract.

A general contractor sued the insured after a dispute arose concerning the insured's performance of a subcontract. The general contractor's complaint contained counts for breach of contract, express or implied trust, conversion and unjust enrichment. The general contractor also sought declaratory relief seeking a stay of a state court action the insured had initiated. The insured sought coverage under D&O policies that contained an exclusion for claims "based upon, arising from, or in consequence of any actual or alleged liability . . . under any written or oral contract or agreement, provided that this Exclusion . . . shall not apply to the extent that an Insured Organization would have been liable in the absence of the contract or agreement."

The court explained that "'arising from' is construed broadly such that an exclusion precluding insurance coverage for claims arising from a contract not only applies to claims sounding directly in contract but also to claims sounding in tort as long as they flowed from or had their origins in the breach of the contract." The court held that the exclusion barred coverage because all of the counts against the insured "arose from the contractual relationship between the parties and flowed from [the insured's] alleged breach of the subcontract, and thus the D&O policies' contract exclusions applied notwithstanding the fact some of [the general contractor's] counts sounded in tort rather than in contract."

The insured, citing *Fidelity & Casualty Co. of New York v. Wrather*, 652 S.W.2d 245 (Mo. Ct. App. 1983), argued that the phrase "arising from" is more narrow than the term "arising out of" and should instead be interpreted as "resulting from." The phrase "resulting from," the insured contended, requires a close causal connection between the contract and the claims against the insured. The court rejected this argument, pointing out that the *Wrather* court, which actually analyzed the term "arising out of," not "arising from," declined to decide whether "arising out of" is synonymous with "resulting from."

The court surveyed case law from other jurisdictions and determined that "in the insurance context courts appear to be unanimous in interpreting the phrase 'arising out of' synonymously with the term 'arising from.'" The court concluded that "Missouri courts . . . would follow the majority rule and interpret the phrase 'arising from' broadly, similar to the broad interpretation given to the phrase 'arising out of.'"