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NEWSLETTER

Letter Demanding that Board Remedy Corporate Waste Constitutes "Demand for Monetary Damages"

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In an unreported decision, a New Jersey trial court has held that a shareholder's letter to a company, alleging corporate waste and demanding that the board "recover excessive compensation" and void a trust, constituted a "claim" under a D&O policy where that term was defined to include "a written demand for monetary damages." *Ames Rubber Corp. v. Fed. Ins. Co.*, No. SSX-L-253-02 (N.J. Super. Ct., Law Div. June 20, 2003).

The insurer issued a claims-made D&O policy in 1999 to two companies controlled by three families. The policy defined "claim" to include "a written demand for monetary damages." The policy also contained an I v. I exclusion that applied to claims "brought by or on behalf of any or all members" of the controlling families. The same insurer provided coverage in subsequent years, although the policy issued in later years did not contain an I v. I exclusion. The policy issued in 2002 contained language stating that "Related Claims will be treated as a single claim made when the earliest of such Related Claims is first made."

In 1999, one of the family members wrote a letter to counsel for the companies alleging instances of misconduct and self-dealing by the directors and officers of the company. The letter stated that the author "expected" the board of directors of the company to take necessary steps "to recover the excessive compensation paid to" one of the officers and to void funds placed in a "Rabbi Trust," which had been created to fund retirement obligations of certain officers of the company. Subsequently, in 2002, members of one of the families filed suit against the companies, enumerating the same allegations contained in the 1999 letter. The insurer denied coverage, contending that the suit was a "related claim" to the 1999 letter and therefore coverage was barred under the I v. I exclusion in the 1999 policy. The policyholders argued that the 1999 letter did not constitute a claim because there was no "written demand for monetary damages." Coverage litigation ensued.

The trial court ruled in favor of the insurer, holding that the 1999 letter constituted a "written demand for monetary damages." It reasoned that the New Jersey Supreme Court has held that the term "damages" should be "accorded its plain, non-technical meaning." *See Morton Int'l v. General Acc. Ins.*, 134 N.J. 1, 25 (1993). The court noted that, under this standard, "damages" encompasses both legal and equitable relief

since the "average businessman" would not differentiate between the two types of relief. Accordingly, the court concluded that the 1999 letter demanded monetary damages since the letter stated that the author "expected" the companies to take certain actions in response to the "business torts" of misconduct and self-dealing set forth in the letter. Because the lawsuit was deemed to constitute part of the same "Claim" as the 1999 letter and thus fell within the 1999 policy, the I v. I exclusion barred coverage.

For more information, please contact us at 202.719.7130.