

# Case or Controversy Exists When Insurer Sues Directors Indemnified by Policyholder Company

---

October 2003

A federal district court in Kansas denied a motion to dismiss filed by the directors and officers of a company who were insured under a D&O policy issued to the company and were named, along with the company, as defendants in a lawsuit by the insurer concerning coverage for the settlement of an underlying securities lawsuit. *Executive Risk Indem. Inc. v. Sprint Corp. et al.*, 2003 WL 22149637 (D. Kan. Sept. 9, 2003). The court rejected the argument by the directors and officers that there was no case or controversy since the company was indemnifying them.

The insurer issued a D&O policy to the company. Subject to all of its terms and conditions, the policy provided coverage for the directors and officers to the extent they were not indemnified by the company and coverage to the company to the extent that it indemnified the directors and officers. The policy also contained a presumptive indemnification clause stating that the certificate of incorporation, by-laws and all other relevant documentation "will be deemed to have been adopted or amended to provide indemnification to the fullest extent permitted by the law."

Securities litigation was filed against the company and the litigation ultimately settled for \$50 million. During the settlement negotiations, the directors and officers were represented by their own counsel. After the settlement was reached, the company, which had agreed to indemnify the directors and officers for the settlement, and the insurer could not agree on the extent of coverage for the underlying litigation, although the insurer advanced a portion of the settlement amount under the terms of an interim funding agreement. The insurer filed suit against both the company and the directors and officers. The directors and officers sought to dismiss the lawsuit on the grounds that there was no case or controversy because any obligation they would have in connection with the settlement would be paid by the company.

The district court denied the motion to dismiss, explaining that "[r]egarding the [presumptive indemnification] clause, whatever effect it might have on the parties' respective burdens and benefits as a matter of insurance law, this Court's jurisdiction is based on actual fact, not on what parties have 'deemed' to exist." The court noted that the fact that the company was "deemed" to have indemnified the directors and officers did not guarantee that it had done so and that the words "to the fullest extent provided by law" created uncertainty

about the extent of indemnification. Accordingly, since the parties had not agreed on the resolution of the coverage dispute and "indemnification is not assured, the Individual Defendants remain interested parties with whom [the insurer] has an actual case or controversy." The court also noted that directors and officers had been "insured as directors and officers, separately from [the company]; they were named as defendants in the underlying litigation, separately from [the company]"; and they were represented by separate counsel in the underlying litigation.

For more information, please contact us at 202.719.7130.