

Eighth Circuit Holds That D&O Policy Provides Coverage for Claims Against Directors Based on Both Conduct and Status as Directors

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The United States Court of Appeals for the Eighth Circuit, applying Arkansas law, has held that coverage under a D&O policy is not limited to claims based solely on directors' status as a director. *McAninch v. Wintermute*, 2007 WL 655454 (8th Cir. Mar. 6, 2007).

The insurer issued a D&O policy to a bank for the policy period of October 7, 2000 to October 7, 2001. On September 7, 2001, the bank was closed, and the FDIC was appointed receiver of its assets. On September 26, 2001, an attorney representing one of the bank's directors notified the insurer that the FDIC might assert claims against the bank's directors and officers. In 2003, two directors were charged in a federal indictment. One director was subsequently convicted on two counts and acquitted of four counts. (The second director died prior to trial, and the indictment against him was dismissed.) In the coverage dispute that followed, the surviving director and the deceased director's estate sought a declaratory judgment of coverage under the D&O policy and reimbursement for the defense costs for those criminal charges that had been successfully defended.

The Eighth Circuit rejected the insurer's argument that the underlying action was not based on the insured's capacity as a director, as the director had been indicted for criminal offenses that were beyond the scope of his position. According to the appellate court, this approach would mean that the insureds would be covered only if they were "caught up in litigation merely as a result of [their] status as a director" and not where they actually committed or were alleged to have committed wrongful acts. The court held that this approach ignored the plain language of the policy, which defined "wrongful act" as "any actual or alleged error or misstatement, misleading statement, act of omission, breach of duty, breach of fiduciary duty, or any other act." The court reasoned that the "actual or alleged" language would have no meaning if coverage were afforded only for claims based solely on a director's status rather than based on his conduct. Instead, the court stated that the policy should be read to provide coverage "for claims based on conduct and claims based on status." Therefore, the insurer could not deny coverage on the basis that the indictment alleged misconduct.

The court then rejected the insurer's argument that there was no coverage when the director acted in multiple capacities, rather than solely as director. The insurer contended that because the indictment covered the director's activities not only as a director, but also as a bank owner and prior to becoming a director, the actions were not alleged against him solely in his capacity as a director. Without citing specific authority, the court held that an insurer must show how a director's dual status facilitated the alleged misconduct before denying coverage. Otherwise, the court concluded, the insurer could "deny coverage based on factors unrelated to the risk underwritten."