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# Former Officer and Director Is an "Individual Insured" for Purpose of Applying Insured v. Insured Exclusion

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The United States District Court for the District of New Jersey has held that the plain language of an "insured v. insured" exclusion precludes coverage for claims in a derivative action brought against the policyholder with the support of a past president and former board member of the policyholder who falls within the policy's definition of an "Individual Insured." *Foodtown, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2008 WL 3887617 (D.N.J. Aug. 20, 2008).

The court began its analysis by determining that the rule of *contra proferentum* did not apply to the interpretation of the insurance contract because Foodtown, a closely held cooperative with member stores in two states and Puerto Rico, was a sophisticated commercial entity. Finding no ambiguity in the terms of the policy, the court addressed the coverage claims looking only to the plain and ordinary meaning of the policy language.

Foodtown argued that the "insured v. insured" exclusion should not apply to this claim under the rule propounded by the Third Circuit in *Township of Center v. First Mercury Syndicate*, 117 F.3d 115, 118 (3d Cir. 1997), in which the court held the relevant status of an individual insured for a "claims made" policy is his status at the time the claim is made.

The court declined to follow *Township of Center* for two reasons. First, the court noted that *Township of Center* had been decided under Pennsylvania law, and no New Jersey court had ever followed or even cited the decision in the more than ten years since it was decided. Second, while the definition of "Individual Insured" in *Township of Center* specifically referenced "acting within the scope of their official duties," the Foodtown policy's plain language defined an "Individual Insured" to include (in relevant part) "a past, present or future duly elected or appointed director [or] officer." The language of the policy trumped any other consideration or rule.