

Insurer's Duty to Defend Individual Terminates If No Longer Sued in Capacity as Director or Officer

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The United States District Court for the Central District of California, applying California law, has held that an insurer's duty to defend an individual insured expires where the amended underlying complaint no longer names the individual in his capacity as an officer or director of the insured entity. *Goerner v. Axis Reinsurance Co.*, 2009 WL 463979 (C.D. Cal. Feb. 23, 2009).

The underlying plaintiff alleged that the insured entity and its president/CEO in his capacity as such, along with two other non-insured companies, were involved with a potential merger with the underlying plaintiff's company. The complaint asserted that the defendants made fraudulent misrepresentations, breached written and oral contracts, and misappropriated trade secrets, among other causes of actions. The insurance policy provided that the insurer would pay "all loss on behalf of any Insured arising from any D&O Claim for a Wrongful Act [by any insured in their capacity as such]," and therefore the insurer provided a defense to the insured individual as an officer, subject to a reservation of rights. However, after a settlement between the insured entity and the underlying plaintiff, the second amended complaint did not name the insured entity and named the relevant individual only as an agent of the other non-insured defendants, and not in his capacity as an officer or director of the insured entity. The insurer subsequently withdrew its defense of the individual on that basis. The individual filed an action asserting that the insurer still owed him a duty to defend.

The federal trial court stated that as the insurer "only agreed to defend D&O Claims against [the insured's] Officers or Directors 'in their capacity as such,' . . . [the operative complaint] must have sought to impose liability on [the individual] in his capacity as [the insured's] Director or Officer in order for such a claim to have triggered a defense obligation under the policy's basic coverage grant." The court held that the fact that the second amended complaint "no longer attempted to impose liability on [the insured individual] in his capacity as an Officer or Director" of the insured entity "eliminated a potential for coverage and terminated [the insurer's] obligation to defend [the insured individual] against [the second amended complaint] under the terms of the [insurer's] policy. [The insurer] correctly concluded that [the individual] no longer qualified as an insured person under its policy and appropriately withdrew from its defense of [the insured individual]."

In addition, the court rejected the individual's contention that extrinsic facts known to the insurer required the insurer to "infer" that he "was really acting in his [insured entity] capacity." The court stated that "resolution of the crucial coverage question depends on the capacity in which [the underlying plaintiff] sued [the individual] in the [second amended complaint], and not on [the individuals'] unsupported suppositions."