

Court Holds that Criminal Indictment Does Not Constitute a "Claim for Loss" Under a D&O Policy

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Applying Missouri law, a federal district court has held that a criminal indictment does not constitute a "claim for loss" under a D&O policy. *Wintermute v. Kansas Bankers Surety Co.*, No. 03-03285-CV-S-REL (W.D. Mo. July 2, 2009). In the alternative, the court held that personal profit and dishonesty exclusions bar coverage for a claim where the complaint centers on allegations of fraud.

The insured, a former director of a national bank, brought a suit for declaratory judgment and breach of contract against her insurer, arguing that the insurer wrongfully refused to defend her against a criminal indictment under a D&O policy. The indictment alleged in part that the insured had "intended to injure" the bank "by embezzling, abstracting, purloining and misapplying monies, funds, and credits belonging to the bank." Ultimately, the insured was convicted of two counts of conspiracy to file a false statement and filing a false statement, and acquitted on the remaining four charges, including bank fraud. She sought coverage under the D&O policy only for the costs incurred in defending these latter charges.

The court granted summary judgment for the insurer. First, the court held that coverage was unavailable because a "claim for loss" was not made against the insured, as required by the policy. The policy defined "loss" as the amount that must be paid "for a claim or claims made" against the director, officer, or employee. The court agreed with the insured that the attorney's fees incurred in defending the criminal charges against her constituted "the amount that must be paid." According to the court, the question then became whether those fees had to be paid "for a claim or claims made" against the insured. The court found that no "claim" was made against the insured because "[t]he plain, ordinary and popular meaning of the word 'claim' does not include a criminal indictment." Further, the court found that "even the count charging criminal forfeiture [did] not constitute a 'claim for loss' which would trigger coverage under the D&O Policy" because forfeiture would "surrender funds to the public fisc rather than restoring those funds to the victims."

In the alternative, the court held that, even had a "claim for loss" triggered coverage under the policy, the policy's personal profit and dishonesty exclusions would bar coverage for the claim. The personal profit exclusion precluded coverage for loss "based upon or attributable to the Directors or Officers or employees gaining in fact any personal profit or advantage to which they were not legally entitled." The court rejected

the insured's argument that, although the indictment alleged personal profit or advantage, these allegations were irrelevant because she was acquitted of the related charges. "Because the allegations and not the outcome of the underlying lawsuit [] govern the duty to defend," the court found that the personal profit exclusion applied.

The court also found that the policy's dishonesty exclusion, which excluded loss "brought about or contributed to by the dishonesty of the Directors," would preclude coverage for the claim. According to the court, the plain and ordinary meaning of "dishonesty" includes fraud, of which the indictment accused the insured. Again, "because the allegations in the criminal indictment trigger the duty to defend, not the outcome," the court concluded that the dishonesty exclusion barred coverage under the policy.